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Articles

Notes

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ARTICLES

NOTES

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.[1] In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three or four issues per year. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

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The Honorable William O. Douglas, former Justice of the Supreme Court of the United States; **W. Page Keeton**, former dean of the University of Texas School of Law; **Thomas Buergenthal**, former president of the Inter-American Court of Human Rights; **Charles Alan Wright**, former professor at the University of Texas School of Law, co-author of the leading treatise *Federal Practice and Procedure*, and former president of the American Law Institute; **Louis Henkin**, former president of the American Society of International Law, chief reporter of the Restatement of Foreign Relations Law of the

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).

United States, and former editor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, member of the Constitutional Court of South Africa and former chief prosecutor of the United Nations International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **the Honorable Dalia Dorner**, Associate Justice of the Supreme Court of Israel.

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The *Journal* hosts an annual symposium offering in-depth treatment of a topic of international legal concern. The purpose of these symposia is to promote the awareness of important developments in the formation of international law and to forge closer ties among scholars, practitioners, students, and members of the global legal community. We welcome your interest in these events. For more information regarding our annual symposium, please contact our Symposium Coordinator at tilj@law.utexas.edu or visit www.tilj.org/symposium.

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The *Exodus* Encounter: Towards a Foundational Theory of Human Rights

ITAMAR MANN*

Abstract

Contemporary human rights scholarship largely adopts one of two brands of positivism. In the transnational governance tradition, human rights are understood to be constituted by treaties and cooperative transnational arrangements. In the sovereignty tradition, human rights are thought of as heightened values of particular polities. Through a reading of yet-unstudied materials regarding the 1947 Exodus *ship that left Europe for colonial Palestine, this Article proposes a different theory of human rights law. The "law of encounter" is a non-positive source of law that bars particular behaviors that may kill or risk human life, regardless of their membership in particular polities. When powerful authorities recognize such limitations on their behavior, certain opportunities for human rights remedies arise when powerless parties address those authorities. As long as human rights are respected, these opportunities become avenues for participatory political discourse beyond both domestic and transnational legal institutions. They thus constitute an international* grundnorm.

SUMMARY

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* National Security Law Fellow, Georgetown Law Center, J.S.D. Candidate, Yale Law School. I am indebted to Rabia Belt, Kiel Brennan-Marquiz, Owen Fiss, Gregory Klass, Dan-Avi Landau, Kenneth Mann, Sherally Munshi, Oded Na'aman, Moria Paz, Shira Shmuely, Julia Tomasetti, Patrick Weil, and Robin West for comments on drafts of this Article. I also benefited enormously from comments provided by the participants of workshops at Yale Law School, Georgetown Law Center, and Harvard University where I presented drafts at various stages. Samuel Moyn was particularly helpful in his provocative response to my presentation at Harvard. Paul Kahn offered insightful and penetrating remarks in conversations about several drafts, which proved entirely indispensable.

INTRODUCTION

"For the lawyer," wrote Paul Weis in a 1954 article titled *The International Protection of Refugees*, "the status of a person who is deprived of national protection is 'anomalous.' A stateless person—and this applies equally to refugees—has been compared to a vessel on the open sea, not sailing under any flag."[1] By invoking this image, the legal advisor to the newly established United Nations High Commissioner for Refugees (UNHCR) posed a seemingly technical dilemma.[2] "The lawyer" is unsure what law applies to such persons. She may consult her books, but what she will find is a missing page.[3]

Weis's answer to the flagless vessel dilemma was his life's work. A major participant in framing the 1951 Refugee Convention, he directed the UNHCR's legal division until his retirement in 1967.[4] The treaty, alongside other international legal instruments, sought to fill a gap in international law and grant a remedy to those who lost their ties to community and citizenship.[5] Responding to events from the interwar period and during World War II, the UNHCR attempted to solve the problem of refugees through intergovernmental cooperation.[6] The countries that in the postwar period came to be called the Western bloc[7] would secure the human rights of refugees

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1. Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 193 (1954); *see also* Erwin Loewenfeld, Status of Stateless Persons, Papers Read Before the Society in the Year 1941 (May 21, 1941), *in* 27 TRANSACTIONS GROTIUS SOC'Y 59, 59 (1941) (analogizing the status of a stateless individual to that of a flagless, and thus unprotected, vessel).

2. *See, e.g.*, Weis, *supra* note 1, at 202 ("While in common law countries the personal status of an individual is governed by the law of his country of domicile, the countries of Europe and several countries of Latin America apply the law of the country of nationality. In both cases difficult questions of conflict of laws may arise for refugees; it may be doubtful whether a refugee has acquired a domicile of choice; the nationality of refugees is often difficult to determine, and the status of stateless refugees gives rise to difficulties in countries which apply the law of the country of nationality and which lack provisions covering the status of stateless persons.").

3. Jurisdiction over boats has been compared to "personal" jurisdiction over an individual's body. Edwin D. Dickinson, *Jurisdiction at the Maritime Frontier*, 40 HARV. L. REV. 1, 1 n.2 (1926) (citing Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923)). This traditional emphasis on personal jurisdiction foreshadows the way in which the "law of encounter" is triggered by bodily presence.

4. U.N. High Commissioner for Refugees, *Foreword* to the Refugee Convention, 1951: *The Travaux Preparatoires* Analysed with a Commentary by Dr. Paul Weis, 4, (1990), http://www.unhcr.org/4ca34be29.html. Upon awarding Weis the Nansen Award, the United Nations High Commission on Refugees (UNHCR) described him as "a survivor of the Nazi concentration camps . . . [who] escaped from Dachau and found asylum in Britain. As UNHCR's first Protection Director, he was called the 'founding father of protection.' The Vienna-born Weis was a strong advocate for refugees and worked constantly to remind the world of its responsibility towards them." *1991 Libertina Appolus Amathila/Paul Weis*, UNHCR: THE UN REFUGEE AGENCY, http://www.unhcr.org/4ad5dd0610.html (last visited Nov. 13, 2014).

5. Convention Relating to the Status of Refugees, *opened for signature*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

6. *Id.* pmbl.

7. *See* U.N. HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION, at 18–19 (Jan. 1, 2000), *available at* [hereinafter STATE OF THE

and stateless people through coordinated foreign policies.[8] Underlying these efforts was a theory of human rights, still very influential today: Human rights are constituted and enforced by transnational governance.[9]

When, on July 11, 1947, about 4,500 displaced Jews left Sète for Palestine on a boat that came to be known as the *Exodus*, they literally enacted the "flagless vessel" analogy.[10] Originally called the *President Warfield*, the steamer was formerly operated by the Baltimore Steam Packet Company and ran between Baltimore, Maryland, and Norfolk, Virginia. During World War II it was used by the British Navy and sent to Europe.[11] There, the Haganah, a Jewish paramilitary group that sought to establish an independent Jewish state in Palestine, purchased the boat.[12] The passengers of the *President Warfield* organized a ceremony during which the ship was renamed *Exodus*.[13] A blue and white flag with a Star of David was hoisted.[14] This flag signaled particular political aspirations, and later became the Israeli flag.[15] From the point of view of international law, however, it was no flag at all.[16]

WORLD'S REFUGEES], *available at* http://www.unhcr.org/3ebf9ba80.html (describing the Cold War conditions leading to the division between Western bloc, which included the United States and Western Europe, and the Eastern bloc, which included Communist countries).

8. On human rights as foreign policy see ALISON BRYSK, GLOBAL GOOD SAMARITANS: HUMAN RIGHTS AS FOREIGN POLICY 4–5 (2009) ("As such principled states build global governance, they reshape the meaning of sovereignty to implant a slowly emerging legitimacy norm—universal human rights."). *See also* STATE OF THE WORLD'S REFUGEES, *supra* note 7, at 16 ("Western bloc countries insisted that individuals should be free to decide whether or not to return . . . .").

9. *See, e.g.*, Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT'L J. REFUGEE L. 238, 246–54 (2002) (explaining the UNHCR's influence on the refugee situation). The word "transnational" is used here somewhat anachronistically to indicate that its contemporary use fruitfully described the period this essay considers as well. The word is credited to Philip Jessup, who in his 1955 Storrs Lectures at Yale Law School defined "transnational law" as "all law which regulates actions or events that transcend national frontiers." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956). The analytic bit of the term is the way in which it demands collapsing the distinction of public and private law, as well as public legal entities. *Id.* The contemporary use, generated primarily by Harold Koh, celebrated public-private participation to solve "transnational" problems. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 182–84 (1996). *See generally* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

10. RUTH GRUBER, *EXODUS* 1947: THE SHIP THAT LAUNCHED A NATION 72–74 (2007). On the importance of analogy in legal argument, see PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 51 (1999) [hereinafter KAHN, CULTURAL STUDY OF LAW].

11. GRUBER, *supra* note 10, 72-74.

12. *Id.*

13. Arieh J. Kochavi, *Britain and the Illegal Immigration to Palestine from France Following World War II*, 6 HOLOCAUST & GENOCIDE STUD. 383, 388 (1991). Some wanted to call it "Jewish Resistance," to signal the close conceptual ties between their action and the idea of establishing what came to be known as a "Jewish state." YORAM KANIUK, COMMANDER OF THE *EXODUS* 87, 89 (Seymour Simckes trans., 1999) [hereinafter KANIUK, COMMANDER OF THE *EXODUS*]. This name was rejected in favor of the more abstract and possibly more universal name. *Id.* at 89–98.

14. DAVID C. HOLLY, EXODUS 1947 at 225 (1995).

15. Douglas Martin, *Yossi Harel, Who, Defying British, Brought Jews to Palestine, Is Dead at 90*, N.Y. TIMES, May 1, 2008, www.nytimes.com/2008/05/01/world/middleeast/01harel.html?_r=0. Though only one of several boats of Jews that aimed to reach Palestine clandestinely, the *Exodus* came to be the most famous of them all. *See, e.g.*, GRUBER, *supra* note 10, at 143. The Hollywood epic *Exodus* starring Paul Newman established the boat's iconic status. EXODUS (Alpha and Carlyle Productions 1960).

16. *See* Robert C. F. Reuland, Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1198–99 (1989) (suggesting that a ship without the flag of a recognized state is a stateless ship and citing a

A few days later, the British Navy intercepted the ship, bound to enter Palestine illegally.[17] As a British judge hearing a case regarding the *Exodus* later explained, "[t]he question of the immigration of Jews into Palestine has for many years been the subject of acute controversy, and His Majesty's Government and the Government of Palestine have found it necessary to impose certain restrictions on immigration."[18] Many of the Jews, he exclaimed, "strenuously objected" to those restrictions, "and it has become the common practice for the champions of unrestricted immigration to organise parties of Jews from Europe and to send them to enter Palestine, if they can, in defiance of the regulations restricting immigration."[19] Violence erupted during the interception, and two of the *Exodus*'s passengers, one of them a 16-year-old boy, were killed.[20] The passengers were deported from Palestine on three prison ships.[21] When the deportees refused to debark in France,[22] the ships proceeded towards their final destination, Hamburg.[23] Again they did not step off the ship and were hosed and tear-gassed into compliance.[24]

By rendering the flagless vessel hypothetical a reality, the passengers brought to light the question of what law applies to those who are not protected by positive law. The answer they gave to the flagless vessel dilemma was a far cry from Weis's efforts to form effective transnational governance.[25] Their answer relied on the actions of the passengers and on the actions (and inactions) of the authorities that confronted them.[26] The *Exodus* represents an alternative to the developing patchwork of networked transnational governance that fashioned human rights to advance state interests by disseminating minimal relief.

The *Exodus* story is often told within a teleological narrative leading from bondage to sovereignty. In this story, those who had no place in an international legal order organized themselves around sovereignty in a nation-state and brought about their own deliverance by an act of founding.[27] From now on, Israeli law would protect

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British case from 1949 dealing with another ship sailing for Mandatory Palestine that flew the Jewish national, but then-stateless, flag).

17. GRUBER, *supra* note 10, at 45–46.

18. R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) at 551 (Eng.).

19. *Id.*

20. GRUBER, *supra* note 10, at 58–59. While Zionists thought of the journey as one of national liberation, British sources described it as criminal. *See Sec'y of State for Foreign Affairs*, 2 All E.R. at 551 (calling the persons aboard the *Exodus* "illegal immigrants"). The British Foreign Office even declared that Zionists abducted two hundred Jewish children from Hungary and sent them out to sea. *Zionist Abduction of Jews Alleged*, N.Y. TIMES, Sept. 6, 1947, at 5.

21. GRUBER, *supra* note 10, at 132.

22. HOLLY, *supra* note 14, at 260–61.

23. Edward A. Morrow, *Token Fight Waged as Jews of Exodus Begin Debarkation*, N.Y.TIMES, Sept. 9, 1947, at 1 ("After a two-hour token struggle against British military police, 1,406 Jews turned back from Palestine debarked this morning on German soil.").

24. *Id.* at 3

25. *See generally* Weis, *supra* note 1.

26. *See, e.g.*, GRUBER, *supra* note 10 (relaying the author's eyewitness account of the *Exodus* event); HOLLY, *supra* note 14 (providing a biographical account of the *Exodus* event). Unauthorized Jewish migrants leaving Europe for Palestine are still thought of as a symbol of Israel's independence. Driving out of Tel-Aviv to the north, one can see one of the smaller boats, beached as a monument on a sandstone mound overlooking the highway.

27. As the Israeli justice Moshe Landau put in his judgment in the Adolf Eichmann case, the State of Israel delivered Jewish victims of the Holocaust from "object" to "subject." Covey Oliver, *Judicial Decisions*, 56 AM. J. INT'L L. 805, 834 (1962); *see also* Itamar Mann, *The Dual Foundation of Universal Jurisdiction*, 1 TRANSNAT'L LEGAL THEORY 485, 504 (2010) (discussing how scholars have recognized that

the Jewish refugees by granting them the rights of citizenship within a political community.[28] Though this story doubtlessly captures significant aspects of the *Exodus*'s journey, it conceals the most important lesson in legal theory that the affair encapsulates.

Transnational governance and sovereignty remain the two paradigms that dominate contemporary understandings of human rights.[29] However, a closer look at the relevant history reveals that the *Exodus* affair is not reducible to a positivist picture according to which rights are protected by sovereignty or by transnational governance. Both of these paradigms failed to secure human rights and proved to reproduce state violence and violations of rights.[30] Both models occlude the legal theory grounding human rights as a law of encounter.[31] This Article argues for a theory of human rights as a "law of encounter," which is absolutely irreducible to transnational governance or sovereignty. According to this theory, the source of human rights law is the *bare life* of humans when they make demands in the name of their own humanity and the decisions of the authorities that respond.[32] The rights of encounter are the building blocks of the most cogent theory of human rights we may adopt today. As such, the rights of encounter may provide a foundation of international law more generally.

Before explaining this foundational theory of human rights as a law of encounter, this Article will explore the constitutive characteristics of rights as protected by transnational governance and sovereignty. Part I highlights the possibilities and the limitations of conceptualizing human rights as rules of transnational governance. It discusses the plight of refugees since the interwar period

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the court in the Adolf Eichmann case "[wrote] history from object to subject" and that "the state [was] both the agent of salvation and its final proof" (internal quotation marks omitted)).

28. *See* Rivka W. Bar-Yosef, *Children of Two Cultures: Immigrant Children from Ethiopia in Israel*, 32 J. COMP. FAM. STUD. 231, 232 (2001) (describing the Law of Return).

29. *See* Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 268–70 (2011) (addressing "the Modern State Conception," which emphasizes sovereignty while downplaying treaty law). Rights originating in human nature are still discussed in contemporary legal scholarship yet largely retain a religious overlay which makes them unavailable for those who do not have the appropriate religious convictions. *See generally* ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 13 (2011) (arguing for the "revitalization of secular, natural law jurisprudence").

30. This idea has been introduced into political thought by the momentous and much celebrated work of Emmanuel Levinas, both in his two main philosophical works, *Totality and Infinity* and *Otherwise Than Being*, and in several modest but indicative essays he wrote about human rights, or, the "rights of man." *See generally* EMMANUEL LEVINAS, ALTERITY AND TRANSCENDENCE (Michael B. Smith trans., 1999) [hereinafter LEVINAS, ALTERITY AND TRANSCENDENCE]; EMMANUEL LEVINAS, OTHERWISE THAN BEING OR BEYOND ESSENCE (Alphonso Lingis trans., 1991); EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY (Alphonso Lingis trans., 1969) [hereinafter LEVINAS, TOTALITY AND INFINITY].

31. *See* LEVINAS, ALTERITY AND TRANSCENDENCE, *supra* note 30, at 127–30 (discussing the responsibility of human rights as discoverable via a presentation of the other).

32. The term "bare life" was introduced by philosopher Hannah Arendt, whose work is discussed *infra*, and has proven extremely influential in contemporary political theory, especially in the continental tradition. *See generally* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1973) [hereinafter ARENDT, THE ORIGINS OF TOTALITARIANISM]; GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Giulio Einaudi ed., Daniel Heller-Roazen trans., 1998) [hereinafter AGAMBEN, HOMO SACER]; Jacques Rancière, *Who Is the Subject of the Rights of Man?*, 103 S. ATLANTIC Q. 297, 298–305 (2004) (discussing Arendt's and Agamben's *bare life* theories).

through the framing of the 1951 Refugee Convention. In this period the transnational governance of human rights emerged. This enterprise not only protected rights but also wielded violence. Against this backdrop, the *Exodus* passengers attempted to enforce their own human rights. Part II demonstrates the possibilities and shortcomings that follow from understanding human rights as constituted by sovereignty. In this model, the human rights of some are inextricably tied with violence against others. Both paradigms therefore fail to suggest a compelling theory of human rights.

Part III is the heart of the Article's argument. It rereads the *Exodus* case study against the grain. A close reading of *R. v. Secretary of State for Foreign Affairs*, [1947] 2 All E.R. 550 (A.C.) (Eng.), the short and yet unstudied judgment in a *habeas* petition submitted by the *Exodus* passengers to a British court, establishes the principal tenets of the law of encounter.[33] According to this theory, human rights do not stem from international treaty, agreement, or cooperation, nor do they stem from the will of any particular people. Rather, they stem from an encounter between parties with radically asymmetric power. The relatively powerless party makes a claim upon the powerful party, and the powerful party finds itself bound by a norm that commands it, first and foremost, not to kill the powerless party.[34]

Part IV responds to conceptual objections, according to which the rights of encounter can ultimately be reduced to an effect of transnational governance or of sovereignty. Part V shifts to a methodological discussion, situating the argument within a contemporary debate on the role of history in human rights scholarship. Professor Phillip Alston recently intervened in this debate, discussing the work of Professors Jenny Martinez and Samuel Moyn.[35] Contrary to important studies by Martinez and Moyn,[36] the case study of the *Exodus* and its historical context do not offer a lesson about when "human rights" began. Contrary to Alston,[37] this case study doesn't use history to demonstrate the multiple meanings or cultural richness of human rights. History is offered as a powerful method for legal theorists approaching

33. *See Sec'y of State for Foreign Affairs*, 2 All E.R. at 552 (involving petitioner's assertion of a right to be free of false imprisonment regardless of jurisdiction).

34. This reliance on the command against killing admittedly makes the theory of human rights proposed *infra* quite a minimalist grounding for human rights. It follows that the label is only appropriate for protections against those policies that a political actor upholds as absolutely unacceptable for herself and for others to engage in. Much of what we talk about today as "human rights"—including freedom of speech, the rights to education, healthcare, and more—cannot be conceived of as absolute prohibitions against state actors. These are entitlements the scope of which must be established through political deliberation between citizens. Thus, they are civil rights, or citizen's rights, rather than human rights. Human rights are those rights that impose on states and individuals alike certain duties towards all humans the world over. These duties kick in upon an encounter with people who invoke them and thus depend on action. In such instances, human rights law is experienced as an "ethics of conviction": "Here I stand, I can do no other." MAX WEBER, THE VOCATION LECTURES 92 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004) (quoting Martin Luther at the Diet of Worms in 1521); *see also* Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY: AN INT'L J. HUM. RTS., HUMANITARIANISM, & DEV. 47, 55 (2010) [hereinafter Koskenniemi, *Human Rights Mainstreaming*] (arguing that human rights debates are essentially political debates demanding what Weber called an "ethics of responsibility").

35. *See* Phillip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043 (2013) (reviewing JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012) [hereinafter MARTINEZ, SLAVE TRADE AND ORIGINS] and discussing SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010)).

36. *See generally* MARTINEZ, SLAVE TRADE AND ORIGINS, *supra* note 35; MOYN, *supra* note 35.

37. *See generally* Alston, *supra* note 35.

a fundamental question of international law: What are human rights? The answer the Article provides is still unrecognized in contemporary scholarship.[38]

I. THE RIGHTS OF TRANSNATIONAL GOVERNANCE

The dilemma of the flagless vessel was not merely a technical one. For Weis, as for others in his time, refugees and stateless people presented a pressing moral and political concern.[39] The two groups exposed a lacuna in international law that had to be filled with new international legal instruments.[40] As a participant both in the framing of the Convention and in the international organization mandated to implement it, Weis was particularly sensitive to the practical problems of implementation.[41] This sensitivity is characteristic of a much broader orientation toward international law, in which human rights became an issue of transnational governance managed by a network of international organizations.[42]

The legal lacuna that refugees and stateless people represented appeared in an unprecedented way during the interwar period.[43] World War I and the disintegration of the Ottoman and Austro-Hungarian Empires triggered tides of refugees.[44] Among the displaced were Russians who fled during the 1917 Revolution or who were forced to leave their homes during the war.[45] People from Poland, Germany, modern Armenia, Greece, Turkey, and Hungary were also affected—more than one million of each group.[46] This mass displacement caused a humanitarian crisis. One journalist depicted the refugees from Belgium as a procession of humans alongside animals, all of which were in need of food.[47] He reports even more striking events from Eastern

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38. This explains why some positivists are so dismissive of extant theories of human rights law. Joseph Raz, for example, argues that legal theorists working in human rights have not been able to go beyond rehashing principles of liberal political theory and simply pretending they represent extant law. Joseph Raz, *Human Rights Without Foundations*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 321, 322 (Samantha Besson & John Tasioulas eds., 2010) (opining that human rights rhetoric is "rife with hollow hypocrisy"). On the poverty of normative inquiry in contemporary legal theory, see generally WEST, *supra* note 29.

39. GERALD DANIEL COHEN, IN WAR'S WAKE: EUROPE'S DISPLACED PERSONS IN THE POSTWAR ORDER 35–57 (2012).

40. *Id.* at 57; *see also* Weis, *supra* note 1, at 208–18 (discussing the evolution of state practice by reference to international instruments defining certain aspects of the status of refugees).

41. Weis, *supra* note 1, at 211–20 (discussing the work of the agencies created to handle refugees separately from migrants and the international protection afforded to refugees withheld from nationals abroad).

42. This understanding of human rights is familiar to us today. It associates human rights with disaggregated cooperation across borders, often times through private-public partnerships. This orientation was represented by the work of Harold Koh during the 1990s. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399 (1999) [hereinafter Koh, *How Is International Human Rights Law Enforced?*]. On the disaggregation of sovereignty, see generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

43. ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 267.

44. NEVZAT SOGUK, STATES AND STRANGERS: REFUGEES AND DISPLACEMENTS OF STATECRAFT 57 (David Campbell & Michael J. Shapiro eds., 1999).

45. *Id.* at 58.

46. *Id.*

47. *See* ARTHUR RUHL, ANTWERP TO GALLIPOLI: A YEAR OF WAR ON MANY FRONTS—AND BEHIND THEM 44, 65–66 (1916), *available at* http://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t79s2899w;view=1up;seq=11 (detailing the desperate efforts of displaced, hungry Belgian refugees in the wake of World War I).

Europe, where the displaced were compared to a swarm of locusts, consuming produce and vegetation as they moved.[48] This European emergency endured, in differing intensities, until the end of World War II. It was generative of a body of international law: treaties and arrangements for refugee protection of varying degrees of formality.[49]

The transformation of the refugee problem into one of transnational governance started as early as the 1920s "in several institutions, most of which were organs of the League of Nations or [its] satellite organizations. The first . . . was the High Commissioner of Refugees, established as part of the League of Nations. The High Commissioner was not regulated by rules that could . . . be applied universally . . . The League's mandate was . . . applied discriminately to certain groups – ostensibly according to the intensity of the catastrophe [each group] suffered."[50] Russian expatriates were the first to be declared refugees in 1922 after having been displaced by the Revolution of 1917.[51] They received Nansen Passports, named after Fridtjof Nansen, the League of Nations High Commissioner of Refugees.[52] In 1933, this arrangement was broadened to include Armenian, Assyrian, Chaldean, and Turkish refugees, based on either *de jure* or *de facto* statelessness.[53] During the 1930s and 1940s, definitions identifying a particular group for relief were reapplied when people lost their citizenships or fled from different regions, including from the Nazi regime in Germany.[54] International organizations determined refugee status for these large groups collectively and largely on an *ad-hoc* basis—without reference to individual asylum seekers.[55] Relevant groups were placed under the direct authority of an international organization, which would supposedly replace a state.[56]

The deficiencies in this patchwork system were rampant. Gaps consistently reemerged between *de jure* recognition of a person as a refugee and *de facto*

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48. ARTHUR RUHL, WHITE NIGHTS AND OTHER RUSSIAN IMPRESSIONS 210 (1917), *available at* http://babel.hathitrust.org/cgi/pt?id=nyp.33433081555769;view=1up;seq=13).

49. *See* Itamar Mann, *Refugees*, 2e MAFTE'AKH 81, 92 (2011) [hereinafter Mann, *Refugees*]. The other extremely generative bodies of international law at the time were the minorities treaties. *See generally* Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1793 (1993) (discussing the implications of the minorities treaties emerging from the Paris Peace Conference to European nationalism); *see also* David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV. 597, 599–602 (1997) (describing the Paris Peace conference and the development of minority treaties in detail).

50. Mann, *Refugees*, *supra* note 49, at 87.

51. *See* Weis, *supra* note 1, at 206 (stating that Russian refugees who left Russia after the Revolution of 1917 received Nansen passports and benefitted from the first international agreement for the protection of refugees, the Arrangement of July 5, 1922).

52. *Id.*; Isabel Kapriellian-Churchill, *Rejecting "Misfits": Canada and the Nansen Passport*, 28 INT'L MIGRATION REV. 281, 281–82 (1994).

53. *See* Louise W. Holborn, *The Legal Status of Political Refugees, 1920–1938*, 32 AM. J. INT'L L. 680, 680–81 n.3, 690 (1938) (defining "refugee" as applied by the Convention of 1933 and detailing the nationalities of the refugees who received legal status following the Convention of 1933).

54. James Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 376–77, 380 (1984) [hereinafter Hathaway, *The Evolution of Refugee Status in International Law*].

55. *Id.* at 380.

56. *Id.* At work was an underlying principle of complementarity: The international organization steps in to grant a remedy where a sovereign state has failed. *See id.* at 363–65 (discussing how international organizations stepped in to classify and aid refugees). This complementarity can be compared with the idea of complementarity in international criminal law, in which an international body is expected to replace a state that has not fulfilled its most fundamental obligations. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 127 (2007).

statelessness. In her descriptions of the interwar period, philosopher Hannah Arendt stresses the refugees' awful circumstances: Shunted away from any political community, many of the refugees and stateless people were reduced to mere survival, or to *bare life*. As Arendt explains, when some people prefer to commit petty crimes in order to benefit from the food and shelter provided in detention, the idea of "human rights" loses its meaning.[57]

Perhaps most notorious of the failures of transnational governance at the time was the Évian Conference, which President Franklin D. Roosevelt convened at Évian-les-Bains, France, in July 1938.[58] The conference brought together thirty-two countries and thirty-nine private organizations.[59] The Jews of Austria and Germany were hopeful, believing that this international conference would provide them access to a safe haven.[60] Adolf Hitler famously responded to the news of the conference by saying that he would help the Jews leave.[61] But both the United States and the United Kingdom refused to take in substantial numbers of Jews.[62] Most of the countries at the conference followed suit. Jews were subjected to "The Final Solution."[63]

Thus, a rhetorical commitment to rescue met with a political reality in which no actor would agree to pay the price of rescue. Later critics accused the transnational powers of the time, and especially the United States and the United Kingdom, of responsibility for what had transpired.[64] Democrat Senator Claiborne Pell, while Chairman of the U.S. Committee on Foreign Relations, wrote a dramatic forward for the provocatively-titled *The Holocaust Conspiracy: An International Crime of*

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57. *See* ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 284 ("The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights."); s*ee also* Hathaway, *The Evolution of Refugee Status in International Law, supra* note 54, at 357–80 (analyzing *de jure* and *de facto* statuses of refugees from the end of World War I until after World War II).

58. RONNIE S. LANDAU, THE NAZI HOLOCAUST 137 (1994). This contemporary vocabulary of transnational governance aims to indicate that the underlying features were in many respects similar to other processes that were later celebrated, in the post-Cold War moment.

59. Ervin Birnbaum, *Evian: The Most Fateful Conference in All Times of Jewish History*, CRETHIPLETHI, Sept. 21, 2013, http://www.crethiplethi.com/evian-the-most-fateful-conference-of-all-times-in-jewish-history/the-holocaust/2013/; *see also* Hathaway, *The Evolution of Refugee Status in International Law, supra* note 54, at 370–74, 376–79 (discussing the involvement of intergovernmental organizations in creating policies regarding refugees during World War II); *cf.* Koh, *How Is International Human Rights Law Enforced?, supra* note 42, at 1408 ("In this post-war order, an international regime developed in which governmental and inter-governmental organizations began to put pressure on each other—always at a horizontal, intergovernmental level—to comply with human rights, invoking such universal treaty norms as the international covenants on civil and political and economic, social and cultural rights.").

60. WILLIAM R. PERL, THE HOLOCAUST CONSPIRACY: AN INTERNATIONAL POLICY OF GENOCIDE 37–38 (1989).

61. LANDAU, *supra* note 58, at 137. As Hitler said at the time of the conference, "I can only hope and expect that the other world, which has such deep sympathy for these criminals [Jews], will at least be generous enough to convert this sympathy into practical aid. We, on our part, are ready to put all these criminals at the disposal of these countries, for all I care, even on luxury ships."). *Id.*

62. *Id.* at 136–39.

63. *Id.* ("[T]he Evian conference may have justified and reinforced Nazi anti-Jewish ideology and helped move it on toward its monstrous climax . . . the 'Final Solution'.").

64. Claiborne Pell, *Foreword* to PERL, *supra* note 60, at 7 (commenting on the failure of the United States and other Allied powers to prevent the killing of millions of Jews by Nazi soldiers).

Genocide.[65] "In my view, just about every Jew who was killed could have been saved if the governments of the Allied powers had provided timely refuge to European Jews who live in countries coming under the control of Hitler's forces."[66] In this major iteration, the transnational governance of human rights seemed to be but a wishful thought. When it came to non-citizens, states would not realize this thought with a sufficient allocation of resources. Would things be fundamentally different in the post-war period?

On December 14, 1950, the UNHCR was established.[67] The purpose of this new institution was initially defined as providing individual assistance to refugees based on uniform criteria.[68] The UNHCR's mandate was defined as temporary—for three years.[69] Six months later, in July 1951, the Refugee Convention was signed, and yet another definition of the term "refugee" was included in it.[70] This formal definition would later come to be understood as globally applicable.[71] Its principal part appears in Article 1(2) of the Convention, according to which the term "refugee" would apply to any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[72]

The most important right provided by the convention is *non-refoulement*—the right not to be returned to the state from which the refugee came.[73] Famine, disease, natural disasters, and wars were all excluded as bases for refugee claims in the

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65. *Id.*

66. *Id.* Perl was the lawyer who prosecuted members of the *Waffen SS* for the murder of American prisoners of war at Malmedy, Belgium, in December 1944, in what is known as the Malmedy Massacre. Richard Goldstein, *William R. Perl Is Dead at 92; Built Sealift Rescue of Jews*, N.Y. TIMES, Dec. 29, 1998, http://www.nytimes.com/1998/12/29/us/william-r-perl-is-dead-at-92-built-sealift-rescue-of-jews.html. Perl later became the leader of the Washington branch of the far-right movement called the Jewish Defense League. *Id.* In 2001, the FBI designated the League as a terrorist organization. *Jewish Defense League*, SOUTHERN POVERTY LAW CENTER, http:/www.splcenter.org/get-informed/intelligence-files/groups/jewish-defense-league (last visited Nov. 16, 2014).

67. SOGUK, *supra* note 44, at 165–66.

68. *Id.*

69. *Id.*

70. *See* Refugee Convention, *supra* note 5, art. 1 (defining the term "refugee").

71. In his much-discussed *Homo Sacer*, Giorgio Agamben makes the argument that during the twentieth century, states of emergency have had the tendency to persist and transform into the norm. AGAMBEN, HOMO SACER, *supra* note 32, at 39–42. In the later *State of Exception*, he makes the same argument with regard to the legal norm in the post 9/11 United States, and especially the Patriot Act. GIORGIO AGAMBEN, STATE OF EXCEPTION 3–9 (Kevin Attell trans., 2005). Most readers of Agamben therefore tend to emphasize the ways in which states of exception render rights violations intractable. The emphasis here is different, reflecting the entrenchment of an emergency legal mechanism that aimed (successfully or not) to alleviate rights abuses.

72. Refugee Convention, *supra* note 5, art. 1.

73. UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, para. 6 (Jan. 26, 2007), http://www.refworld.org/pdfid/45fl7a1a4.pdf.

convention.[74] The reasons for choosing the five bases for refugee claims—religion, ethnicity, nationality, political opinion, or particular social group—were directly based on the events of the time: from the persecution of Russians and Armenians and of the opposition in Spain, and especially of Jews and other groups in Nazi Germany, to the persecution of the opposition to the new communist regimes in Eastern Europe.[75] The categories of ethnicity, religion, and nationality were all fashioned around the "archetypal" example of the persecution of Jews by the Nazis.[76] Developing Cold War tensions influenced the fifth category, political opinion.[77] Some celebrated the codification of a right to asylum as the culmination of a gradual process of individualization and universalization of human rights.[78] But the idea that transnational governance provided enforceable human rights for the "flagless vessels"—those who were deprived of rights within particular political communities—remained questionable.

Cambridge University Law Professor Hersch Lauterpacht thought the starkest failure of the Universal Declaration of Human Rights of 1948 (UDHR or the Declaration) was its attempt to provide refugees and stateless people with remedies.[79] Contrary to the rhetoric of some international lawyers who began discussing the status of individuals under international law, the crux of Lauterpacht's argument is that *individuals* are not the objects of international law at all.[80] International law was and remained the law between states.[81] For him, the UDHR was misleading in pretending

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74. *See, e.g.*, UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para. 39, U.N. Doc. HRC/IP/4/Eng./REV.1(Dec. 2011), http://www.refworld.org /docid/4f33c8d92.html (noting that famine and disaster are ruled out as part of the definition of "well-founded fear of persecution").

75. Hathaway, *The Evolution of Refugee Status in International Law*, *supra* note 54, at 348–52, 360, 362–63, 377, 380; *see also* Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 734–35, 808–09 (1998) (discussing the various interpretations of the word "refugee," including the process of crafting the definition); Christina Boswell, *European Values and the Asylum Crisis*, 76 INT'L AFFAIRS 537, 539–40, 545, 547 (2000) (describing the negative rights approach used by Western governments with regard to individual refugee determinations).

76. Steinbock, *supra* note 75, at 766.

77. The Soviet government criticized the protections for political dissenters and declared them part of a Western conspiracy designed to provide incentives for treason. James Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 145 (1990). The Soviets therefore boycotted the Convention negotiations. *Id.* The countries that partook in the formulation of the convention were Belgium, Brazil, Canada, China, Denmark, France, Great Britain, Israel, Sweden, Turkey, the United States, and Venezuela. *Id.* at 146 n.105. For background on the development of a political East-West rift on international refugee law, see Georg Schwarzenberger, The Impact of the East-West Rift on International Law, Transactions for 1950 (Dec. 6, 1950), *in* 36 TRANSACTIONS GROTIUS SOC'Y 229, 243 (1950).

78. *See, e.g.*, MANUEL R. GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 161 (1956) ("[I]t is no exaggeration to contend that asylum can be described as a right infused with the practical fulfillment of a humanitarian task.").

79. Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354, 373 (1948).

80. *See id.* at 372–73 (discussing the lack of individual rights in the Universal Declaration of Human Rights (UDHR or the Declaration), which operated in contrast to its governing principles and, further, the limits of the moral force of the Declaration).

81. *See id.* at 373 ("Undoubtedly, the grant to individuals of the right of asylum would have meant an innovation in international law . . . .").

otherwise.[82] Such a shift would require changes in the fundamental privileges afforded by international law to sovereignty, and no such changes had yet occurred.[83] Thus, *sovereignty* remained the exclusive source of rights, properly defined. The UDHR, Lauterpacht pointed out, was perhaps universal but lacked binding force.[84] As such, the UDHR embodied the false promises often associated with international law more generally.[85] This became blatantly clear in UDHR's provisions about refugees and the stateless:

> [F]ew persons—and perhaps few lawyers—reading Article 14 of the Declaration relating to asylum will appreciate the fact that there was no intention to assume even a moral obligation to grant asylum .... That article provides, in its first paragraph, that 'everyone has the right to seek and enjoy in other countries asylum from persecution'. The Committee rejected the proposal that there shall be a right to be granted asylum. According to the article as adopted there is a right 'to seek' asylum, without any assurance that the seeking will be successful. It is perhaps a matter for regret that in a Declaration purporting to be an instrument of moral authority an ambiguous play of words, in a matter of this description, should have been attempted. Clearly, no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it. The right 'to enjoy asylum' was interpreted by the British delegation, which introduced the amendment containing these words, 'as the right of every state to offer refuge and to resist all demands for extradition'. But this, with regard to political offences and persecution generally, is the right which every state indisputably possesses under international law.[86]

In other words, the UDHR declares that it gives people something they already have, which happens to be nothing at all. The paragraph is "couched in language which is calculated to mislead and which is vividly reminiscent of international instruments in which an ingenious and deceptive form of words serves the purpose of concealing the determination of states to retain full freedom of action."[87] Lauterpacht reiterated the same critique in similarly caustic terms for the UDHR provision on statelessness.[88] Unlike other theorists—notably his contemporary Carl Schmitt in

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82. *Id.*

83. *See id.* at 372 ("There is nothing in the Declaration ... which includes—or implies—any legal limitation upon the freedom of states. It leaves that freedom unimpaired.").

84. *See id.* at 375–77 (detailing how, despite any arguable authority that the Declaration may possess, it lacks legal authority to compel change).

85. This false promise was famously explained by Martti Koskenniemi in his *From Apology to Utopia.* The discipline of international law, argues Koskenniemi, vacillates between justifying extant state powers with no position from which to judge them and judging from the point of view of cosmopolitan justice without any ability to back that judgment with political power. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989) [hereinafter KOSKENNIEMI, APOLOGY TO UTOPIA].

86. Lauterpacht, *supra* note 79, at 373.

87. *Id.*

88. *See id.* at 374 ("The same purely nominal—and, in effect, deceptive—solution was adopted in the matter of nationality. After stating, in the first part of Article 15, that 'everyone has the right to a nationality', the Declaration proceeds to lay down that 'no one shall be arbitrarily deprived of his nationality.' The natural implication of the principle that everyone is entitled to a nationality would be the prohibition of deprivation—whether arbitrary or otherwise—of nationality in a way resulting in statelessness. None of the states which in the period between the two world wars resorted to deprivation of nationality *en masse* for political or racial reasons would have admitted that such

Germany and Hans Morgenthau later in the United States[89]—Lauterpacht rejected the idea that international law would merely be the expression of power in positive terms.[90]

Weis's *The International Protection of Refugees*, the essay that invoked the analogy of the "flagless vessel," was a direct response to Lauterpacht's essay on the UDHR.[91] The legal advisor to the newly established UNHCR sought to challenge Lauterpacht's central point, that individuals were not objects of international law.[92] In doing so, he further exposes the underlying premises of human rights as transnational governance. Just as Lauterpacht took refugees and the stateless as the paradigmatic example demonstrating that individuals had no rights independent of sovereignty Weis returns to refugees to show that they did.[93] But Weis believed the UDHR was the wrong instrument to examine. Since the emergence of refugee protection in 1921 with the Nansen initiatives, he explained, international organizations demonstrated that the rights of individuals were recognized by international law in the absence of other standards.[94] The landmark shift in recognizing the status of the individual under international law, he explained, was the Refugee Convention and the establishment of the UNHCR.[95]

Lauterpacht and Weis were not thinking about the same thing when they talked about "law." For Lauterpacht the possibility of enforcement was a necessary condition for a rule to be held "legal."[96] Weis thought that international law can still be called "law" without meeting this test: "Universality and enforcement are two moot points of international law," he casually admitted.[97] "Although the international agencies created for the protection of refugees have no means of enforcement at their disposal, their establishment marks a new method of international supervision of the rights and interests of individuals."[98] Human rights in the transnational governance "method" figure as a turn to the individual, decoupled from enforcement.[99] In its practical implementation, says Weis, the Convention requires the cooperation of particular state authorities—which at best can progress incrementally.[100]

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measures were arbitrary. They were, in their view, dictated by the highest necessities of the state. In a pronouncement claiming primarily moral authority there should have been no room for the institution of statelessness, which is a stigma upon international law and a challenge to human dignity in an international legal system in which nationality is the main link between the individual and international law.").

89. Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 17–18 (Michael Byers ed., 2001) [hereinafter Koskenniemi, *Image of Law in International Relations*].

90. *See generally* Lauterpacht, *supra* note 79.

91. Weis, *supra* note 1, at 193

92. *Id.*

93. *See generally id.* (discussing the rights of refugees in international instruments).

94. *Id.* at 208–10

95. *Id.* at 194–95.

96. Lauterpacht, *supra* note 79, at 361–62.

97. Weis, *supra* note 1, at 195.

98. *Id.*

99. *Id.*

100. *Id.* at 194, 220–21.

While not providing reliable legal remedies for human rights claims, the incrementalism of transnational governance may still seem compelling. It represents a legal version of an enlightened hope for moral progress.[101] But in practice, this incrementalism meant that transnational governance wielded violence against some of the most brutalized populations.[102] This is best illustrated by the Allied forces' treatment of the many displaced persons (DPs) during and after the Second World War. The Allies cooperated immediately after the Second World War in order to find solutions for the countless DPs.[103] This massive operation involved the military management of camps.[104] In the context of this management, disagreements about the legal foundations of the protection of the war's victims grew between the Allies.[105] Because there was no underlying agreement between the victorious Allies on what "human rights" entailed, transnational governance simply could not respond to the urgency of the problems some people suffered. In this environment, humanitarian relief came dangerously close to Nazi policies.[106]

British authorities felt that creating camps specifically for Jews would amount to inappropriate racial segregation: "[I]t is undesirable to accept the Nazi theory that the Jews are a separate race. Jews, in common with all other religious sects, should be treated according to their nationality, rather than as a race or a religious sect."[107] It is too easy to respond that this position was disingenuous. According to such a response, rather than protecting victims of World War II from racism, it was motivated by the complicated relationship the British Empire had with the developing Jewish national movement.[108] Such dismissal would, however, make the mistake of

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101. *See, e.g.*, Lauterpacht, *supra* note 79, at 370–71 (suggesting that despite not being a legal instrument, the UDHR represents a significant landmark representing the moral force of the rights contained therein).

102. *See* Weis, *supra* note 1, at 204–05 (discussing the treatment of refugees of enemy nationality by Allied countries including the use of exceptional measures such as the sequestration of property).

103. *See* Liisa H. Malkki, *Refugees and Exile: From "Refugee Studies" to the National Order of Things*, 24 ANN. REV. ANTHROPOLOGY 495, 499 (1995) (discussing the Allied military's development of plans to confront the refugee crisis, including plans for administering the refugees).

104. *See id.* at 499–500 (indicating that refugees in Europe "were classified as a military problem" and discussing the military model used to administer them during and after World War II).

105. *See* AVIVA HALAMISH, THE *EXODUS* AFFAIR: HOLOCAUST SURVIVORS AND THE STRUGGLE FOR PALESTINE 1–3 (Ora Cummngs trans., 1998) [hereinafter HALAMISH, THE *EXODUS* AFFAIR] (indicating that the American government established camps specifically for Jewish refugees whereas the British government placed them in camps with other refugees because it did not recognize them as having a distinct nationality and wanted to avoid racial distinctions).

106. Indeed, some of the most well-intentioned transnational governance proposals were marred by racism. One author grounded his suggestion to relocate Displaced Persons (DPs) to "the tropics," in a quasi-Darwinian idea that certain peoples are more adaptive to warm weather. "Let us begin by defining the terms 'white,' 'settlement' and 'tropics' from the viewpoint of refugee and other white colonization. All the European refugees will be white in the popular sense, but there may be many ethnic (popularly 'racial') differences .... We have no scientific information as to the reasons, but they probably lie in the climatic experience of peoples who live in the warm climates of Southern Europe, and in the fact that ethnic groups such as [the Portuguese, Spanish, and Italians] possess an historic mixture of Moorish or other 'colored' bloods. The Jews appear to do fairly well in the moderate tropics, such as Curaçao in the Dutch West Indies; and this matter should be investigated more closely, for the Jews are the chief people likely to figure in refugee emigration." A. Grenfell Price, *Refugee Settlement in the Tropics*, 8 FOREIGN AFF. 659, 660 (1940).

107. HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at 1–2.

108. *See* Kochavi, *supra* note 13, at 383 ("Following World War II, Britain invested considerable effort in preventing illegal sailings of Jewish immigrants from various ports in Europe to Palestine .... The unauthorized sailings constituted one of the most effective means in the Zionists' struggle against Britain's policy toward Palestine in general and its immigration restrictions in particular.").

assuming that politics, even if it did inform British views on the DPs, was independent of genuine normative convictions regarding the entitlements of human beings. The view that all those in need should be treated equally, regardless of distinctions of race or religion, is more familiar to human rights advocates today, than the view the United States advanced.[109]

On September 29, 1945, Harry Truman sent to Dwight Eisenhower, then his Chief of Staff, a report that reflected just how deep the differences of fundamental normative convictions within transnational networks were.[110] The report, authored by American lawyer Earl Harrison, representative to the Intergovernmental Commission on Refugees (and Dean of the University of Pennsylvania Law School), was the fruit of a "[m]ission to Europe to inquire into the conditions and needs of those among the displaced persons in the liberated countries of Western Europe and in the [Supreme Headquarters Allied Expeditionary Force] area of Germany—with particular reference to the Jewish refugees—who may possibly be stateless or non-repatriable."[111] From a contemporary perspective, this document reads like a prototypical human rights report, one that might be authored by a government, an international organization, or even an NGO like Human Rights Watch or Amnesty International.[112] Like the contemporary genre of human rights reporting, it seamlessly weaves together law, fact, and policy. Like that genre, it relies heavily on interviews, focusing on issues like detention conditions, nutrition, and accommodation.[113] Substantively, however, its recommendations seem to be taken from a universe far removed.

Harrison responded to the British emphasis on color blindness and the resulting treatment of the Jews according to their differing nationalities: "While admittedly it is not normally desirable to set aside particular racial or religious groups from their nationality categories," he wrote, "the plain truth is that this was done for so long by

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109. *See* Seyla Benhabib, *Another Universalism: On the Unity and Diversity of Human Rights*, 81 PROC. & ADDRESSES AM. PHIL. ASS'N 7, 12 (2007) (defining universalism as the principal that human beings are entitled to equal moral respect regardless of their race or religion).

110. Letter to General Eisenhower Concerning Conditions Facing Displaced Persons in Germany, PUB. PAPERS (Sep. 29, 1945), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=12334 [hereinafter Letter to General Eisenhower].

111. EARL G. HARRISON, REPORT OF EARL G. HARRISON (1945), *available at* http://www.ushmm.org/exhibition/displaced-persons/resourc1.htm (Dec. 22, 2013) [hereinafter HARRISON REPORT].

112. *Compare* HUMAN RIGHTS WATCH, "CONTAINMENT PLAN": BULGARIA'S PUSHBACKS AND DETENTION OF SYRIAN AND OTHER ASYLUM SEEKERS AND MIGRANTS 7 (2014), *available at* http://www.hrw.org/sites/default/files/reports/bulgaria0414_ForUpload_0_0.pdf (documenting the Bulgarian border police's use of excessive force against and summary expulsion of asylum seekers and migrants and recommending that the Bulgarian government end summary expulsions, stop the use of excessive force, and improve the treatment of detained asylum seekers and migrants), *with* HARRISON REPORT, *supra* note 11 (describing living conditions and the needs of DPs in Germany and Austria after World War II with particular focus on Jewish refugees and recommending policy changes aimed at improving the treatment of DPs).

113. *See generally* HARRISON REPORT, *supra* note 111 (describing the situation of DPs in Germany and Austria immediately following World War II, with a particular focus on Jewish refugees, including their health, clothing, food, and housing situations and indicating that their overall wellbeing and morale were low).

the Nazis that a group has been created which has special needs."[114] Jews, he thought, should be treated as Jews.[115]

"In this connection, I wish to emphasize that it is not a case of singling out a particular group for special privileges. It is a matter of raising to a more normal level the position of a group which has been depressed to the lowest depths conceivable by years of organized and inhuman oppression."[116]

Like the British position, this opinion too can easily be reduced to power. One might say that the position was already formulated with view to American interests in supporting Zionist national aspirations.[117] But that determination too may have been informed by the normative convictions that someone like Harrison could express in his report.[118] The two positions point to two distinct potentials that human rights had in the twentieth century—one focusing on the defense of individuals and the other focusing on the defense of groups.[119] And the distinct policies entailed in terms of the administration of the DPs reflect how these potentials were not only different, but also contradictory.[120]

More important than these philosophical considerations, however, Harrison emphasized conditions on the ground, which indicated the depth of the failure of transnational networks to protect refugees and stateless people.[121] Three months after the war was over, "many Jewish [DPs] and other possibly non-repatriables" were living behind barbed wires in some of the camps where the Nazis had interned them.[122] Their sanitary conditions were deplorable and they lived "in complete idleness, with no opportunity, except surreptitiously, to communicate with the outside world,

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114. *Id.* § II.

115. *Id.* The question about the role of the Jews as a group in meting out justice remained alive at least until the Eichmann trial, as reflected in Arendt's *Eichmann in Jerusalem*. Compare the British position expressed here with that of the Israeli prosecution, as described in her book. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 6 (2006) (describing Israeli Attorney General Gideon Housner's focus on crimes committed against Jews during his prosecution of Adolf Eichmann, indicating that Housner's intent was not to make ethnic distinctions but to concentrate the trial on Eichmann's goal of destroying the Jewish population, and contrasting Housner's approach to the focus on crimes committed against persons of various nations during the Nuremberg Trials).

116. HARRISON REPORT, *supra* note 111, § IV(4).

117. *See* Michael Ottolenghi, *Harry Truman's Recognition of Israel*, 47 HIST. J. 963, 970 (2004) (noting that political considerations informed President Truman's post-World War II decisions concerning Palestine, including his support for Jewish immigration into Palestine and his recognition of Israel).

118. The report interestingly foreshadows the incredibly influential "antisubordination" approaches to equality in the United States. *See generally* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

119. The competing traditions are concisely and usefully drawn out in Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L. J. 397, 397–401 (1991) [hereinafter Koskennieme, *The Future of Statehood*] (describing individual human rights and the need to evaluate group rights—such as self-determination—selectively based on the types of "communal life" advanced by nationalist groups).

120. It is significant that both opposing positions in this quasi-legal sides in a legal dispute frame their ideas on the same backdrop of distinguishing themselves from Nazi policies. *See* KAHN, CULTURAL STUDY OF LAW, *supra* note 10, at 115 (arguing that "[t]o investigate the history of belief in the rule of law, we need to focus on what unites the opposing sides in a legal dispute").

121. *See generally* HARRISON REPORT, *supra* note 111, § I(1) (discussing the unsanitary living conditions and needs of the liberated victims of Nazi persecution).

122. *Id.* § I(1).

waiting, hoping for some word of encouragement and action in their behalf."[123] Harrison documented the lack of medical supplies, as well as "pathetic malnutrition cases both among the hospitalized and in general population of the camps." [124] The daily caloric intake per person was determined at 2,000 calories, which "included 1,250 calories of a black, wet and extremely unappetizing bread."[125] Many still wore their concentration camp garb, "a rather hideous striped pajama," while others had to wear S.S. uniforms.[126] As Harrison adds, "[i]t is questionable which clothing they hate[d] more."[127]

Harrison's most startling observation, however, is one that appears also as a quote in Truman's letter to Eisenhower: "As matters now stand, we appear to be treating the Jews as the Nazis treated them except that we do not exterminate them."[128] In this context Harrison makes recommendations that would be inconceivable in a contemporary human rights context. One was to ensure avenues of legal immigration for displaced Jews from Europe to colonial Palestine (a recommendation that would at least look very different in a context in which formal colonization no longer exists).[129] The other was to evacuate German civilians from their homes, in order to make room for the DPs.[130] Though this recommendation would likely be thought of today as a war crime,[131] it was carried out in staggering numbers, as historian R.M. Douglas has recently shown.[132] As Douglas explains, such operations occurred while the allies were also prosecuting Germans in Nuremberg for comparable activities.[133] In Harrison's legal imagination, displacing Germans represented a measure of justice, precisely because the German civilian population was thought of as accountable for their government's atrocities.[134] As he says quite plainly, they deserved it.[135]

The DP crisis became, along with Évian, the most glaring example of the failure of human rights in the transnational governance vein.[136] In the Allied force's attempt

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123. *Id.*

124. *Id.* § I(2).

125. *Id.* § I(6).

126. *Id.* § I(3).

127. HARRISON REPORT, *supra* note 111, § I(3).

128. *Id.* § IV(3); Letter to General Eisenhower, *supra* note 110.

129. *Id.* § IV(2)(a)–(b). Palestine was colonized under the British Mandate. For an analysis of the crucial role the League of Nations' mandate system had in the history of international law, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 115–195 (2004).

130. HARRISON REPORT, *supra* note 111, § IV(3).

131. Rome Statute of the International Criminal Court art. 7 §1(d), July 17, 1998, 2187 U.N.T.S. 90 (specifying that "[d]eportation or forcible transfer of population" constitutes a crime against humanity).

132. *See generally* R. M. DOUGLAS, ORDERLY AND HUMANE: THE EXPULSION OF THE GERMANS AFTER THE SECOND WORLD WAR (2012).

133. *See id.* at 334 ("[T]he charter of the International Military Tribunal at Nuremburg . . . criminalized deeds by Germany and its allies while leaving identical deeds, if perpetrated by anyone else, untouched . . . .").

134. Thus, Truman writes that evicting Germans "is one way to implement the Potsdam policy that the German people cannot escape responsibility for what they have brought upon themselves." Letter to General Eisenhower, *supra* note 110 (internal quotation marks omitted).

135. *Id.*

136. *See, e.g.*, Naomi S. Stern, *Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO. IMMIGR. L.J. 313, 314 (2005) (positing that the failure of the Evian conference to create an international solution to the refugee problem foreshadowed "the U.S.'s failure to act on the refugee crisis during the Holocaust").

to produce policies independently of the aspirations of the subjects of rights, not only did human rights end up resting on inconsistent and contradictory philosophies, those who saw themselves as the defenders of rights, namely the Allied force, ended up violating the rights of the DPs (as Harrison demonstrated in the most unequivocal way).

Harrison's coupling of seemingly unpolitical humanitarianism with the particular remedies he suggested may sound quite peculiar to a contemporary reader. "For some of the European Jews, there is no acceptable or even decent solution for their future other than Palestine. This is said on a purely humanitarian basis with no reference to ideological or political considerations so far as Palestine is considered."[137] How can a position that came to side with the Jewish national movement be regarded as "humanitarian" or free of politics? As Harrison's comparison between the administration of DP camps and Nazi atrocities suggests, transnational networks mandated with enforcing rights came dangerously close to the violations against which they sought to protect.[138] At least for Harrison, such unreliable international instruments would leave the victims of catastrophe no choice but to act for themselves.[139]

With the reference to "considerable force" in the following passage, Harrison's message transitions to the next part of this Article, which is about human rights as sovereignty.[140] This emphasis on force suggests a real skepticism of whether the United States—or any party for that matter—could really grant protection to those in need without literally *taking sides*. Either be with the Jewish DPs now, Harrison tells Truman, or you will very soon have to be against them:

> Unless this and other action, about to be suggested, is taken, substantial unofficial and unauthorized movements of people must be expected, and these will require considerable force to prevent, for the patience of many of the persons involved is, and in my opinion with justification, nearing the breaking point. It cannot be overemphasized that many of these people are now desperate, that they have become accustomed under German rule to employ every possible means to reach their end, and that the fear of death does not restrain them.[141]

II. THE RIGHTS OF SOVEREIGNTY

Shortly before Weis wrote his defense of the transnational governance of refugees, displaced Jews and Jewish paramilitaries literally enacted the analogy of the flagless vessel on the high seas.[142] As Harrison predicted, fear did not restrain them. Whatever the precise understanding of human rights the *Exodus* demonstrated, it differed greatly from any idea of human rights as transnational governance. While transnational governance relied on the cooperation between world superpowers to

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137. HARRISON REPORT, *supra* note 111, § IV(2)(b).

138. *See id.* § IV(3) ("As matters now stand, we appear to be treating Jews as the Nazis treated them except that we do not exterminate them.").

139. *See id.* § IV(2)(a) ("It cannot be overemphasized that many of these people are now desperate . . . to employ every possible means to reach their end . . . .").

140. *Id.*

141. *Id.*

142. *See* HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xix–xxii (outlining the status of Jews as illegal immigrants and their displaced status among sovereign nations).

solve the "refugee problem," the *Exodus* represented a paradigm of human rights in which the stateless vindicate their own rights.[143] This came to be articulated by the establishment of a state.[144] From the founding on, universal human rights would be defensible through the constitutive commitments of the newborn state and its political processes and deliberations.[145]

The assumption that human rights can only be granted by sovereignty has been extremely influential and is still held by many.[146] Under such an assumption, the movement in the *Exodus* story from migration to constitution is seamlessly translated into a movement from revolution to constitution:[147] Instead of the stateless falling into a lacuna in international law managed by the incoherent networks of transnational governance, the *Exodus* ostensibly demonstrated that the rightless could abandon lawlessness and establish sovereignty.[148] Only by doing so could they secure their own rights—those rights that Lauterpacht found lacking from the UDHR.[149] In this narrative, the *Exodus* affair is indivisible from the various state-building policies—diplomatic, military, and administrative—which could only have one intelligible result: the establishment of an independent state. The state, accordingly, vindicates the rights of the rightless and facilitates their enforcement by solidifying them within an institutional framework.

Though the Jews of the *Exodus* were deported to Germany, the story acquired iconic status in Israel's official history.[150] In this narrative, it remains one of great courage and, indeed, a story of political success.[151] It is commonly understood as a watershed in the responses of international superpowers to the Jewish refugee problem after Jewish extermination during the Second World War: "Slowly, despite everything, the story seeped into the conscience of people all over the world. The

143. *See id.* at xv–xvi, xx–xxi (detailing the importance of the *Exodus* as a microcosm of the illegal immigration movement and the power of those without a voice to claim their own).

144. *See id.* at xxi ("[T]he *Exodus* Affair has been part of the myth surrounding the founding of the State of Israel.").

145. *See generally* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

146. Louis Henkin wrote in 1994 that "[e]ven for the daring international lawyer, human rights remain national rights, rights to be enjoyed in a state's domestic legal order." Louis Henkin, *A Post-Cold War Human Rights Agenda*, 19 YALE J. INT'L L. 249, 249 (1994) (citing Louis Henkin, *International Human Rights as "Rights"*, 1 CARDOZO L. REV. 425, 438 (1979) ("[T]he international law of human rights is made by states assuming obligations . . . .").

147. This movement is exemplified in Michael Walzer's analysis of the *biblical* Exodus story. MICHAEL WALZER, EXODUS AND REVOLUTION (1985).

148. *See* HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xx (observing that the persistent illegal immigration of Jewish DPs into Palestine following World War II played a "key role in creating a link in the minds of world public opinion and decision makers between a solution for the problem of the Jewish DPs and the establishment of a Jewish state in Palestine").

149. Lauterpacht, *supra* note 79, at 372–73.

150. HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xxi; *see also* DIDI HERMAN, AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS, AND ENGLISH LAW 105 (1998) ("*The Exodus*'s journey has been recorded in historical sources, and in popular culture, as a key catalyst leading to the end of British rule in Palestine and the creation of Israel.").

151. *See* HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xxi (discussing the book's portrayal of personal acts of heroism and courage along with its examination of the political effect of the *Exodus* affair upon the creation of the Jewish state).

name *Exodus* acquired a face."[152] Most of the *Exodus* refugees, we are told, found their way back to Palestine, either legally or with forged documents.[153] In Palestine, and then in Israel, they built their own homes.[154]

The *Exodus* affair is thus recounted as one of national self-determination.[155] It is only one phase among several: the initial Zionist colonization of Palestine since the late nineteenth century;[156] the establishment of civilian institutions and Jewish paramilitary forces under British rule in Palestine;[157] the resettlement of Holocaust refugees (among them those of the *Exodus* and other clandestine boats);[158] the war of the disempowered Jews against multiple Arab forces bent on their annihilation and against a hostile Palestinian population;[159] and finally, the declaration of independence.[160] This story emphasizes that even though the refugees of the *Exodus* were sent back to German soil, their message was heard the world over.[161] In this political imagination, the *Exodus* signals one important chapter in a story running from the ancient Israelites' forty year journey in the Sinai Desert to the European ghetto.[162] Instead of a teleological narrative of increasing individuality and universality (as transnational governance provided), we find a narrative of a solidifying collectivity and particularity (at which Harrison already hinted).

Perhaps the most articulate narrator of the role of the *Exodus* in this metahistorical story of self-determination is Israeli author Yoram Kaniuk.[163] Kaniuk, a novelist who in his late teens participated as a paramilitary soldier in Israel's war of independence, and, among other roles, served on a Jewish migrant boat, unfolds this

152. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 149. From the perspective of the rights of encounter expounded below, the reference to "a face" may not be arbitrary and may relate to the very nature of human rights. *See generally* LEVINAS, TOTALITY AND INFINITY, *supra* note 30, at 194–219.

153. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 149.

154. *See id.* ("The land where Camp Poppendorf was located was where they had begun their journey years earlier, and it was where they also completed it.").

155. *See id.* at ix (establishing that the state of Israel was born through the struggle of the *Exodus*).

156. GILBERT ACHCAR, THE ARABS AND THE HOLOCAUST: THE ARAB-ISRAELI WAR OF NARRATIVES 10 (G. M. Goshgarian trans., 2010).

157. *See* DANIEL BYMAN, A HIGH PRICE: THE TRIUMPHS AND FAILURES OF ISRAELI COUNTERTERRORISM 13–14 (2011) (describing the creation of the paramilitary force, the Haganah, to defend against Arab violence).

158. *See generally* DALIA OFER, ESCAPING THE HOLOCAUST: ILLEGAL IMMIGRATION TO THE LAND OF ISRAEL, 1939–1944 (1990) (examining the clandestine efforts to bring refugees attempting to escape the Holocaust to Palestine).

159. *See generally* MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 183–84, 231 (2002) (detailing how Israel faced Arab forces from multiple countries and battled on multiple fronts).

160. *Cf.* KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at ix (acknowledging that Israel's declaration of independence was signed in 1948 but arguing that the state was actually born with the arrival of the *Exodus* at Haifa).

161. *See* HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xv, xxii (detailing the name recognition of the *Exodus* as a world-wide symbol).

162. *See id.* at 150 ("The *Exodus* became the Macabees, the ghettoes, Joshua Ben-Nun.").

163. Yoram Kaniuk, 1930–2013, was a great writer. As the book covers of his English translations obstinately testify, the *New York Times* once called him "one of the most innovative, brilliant novelists in the Western World." YORAM KANIUK, THE LAST JEW (Barbara Harschav trans., 2007) (quoting the *New York Times* on the back cover). But as author Nicole Krauss describes, he died feeling under-appreciated. Nicole Krauss, *Born Again*, THE NEW YORKER, June 12, 2013, http://www.newyorker.com /online/blogs/books/2013/06/yoram-kaniuk-postscript.html (describing his struggle with defeat and obscurity). For background on Kaniuk and his death, see Isabel Kershner, *Yoram Kaniuk, Maverick Israeli Novelist, Dies at 83*, N.Y. TIMES, June 10, 2013, www.nytimes.com/2013/06/11/books/yoram-kaniuk-maverick-israeli-novelist-dies-at-83.html?_r=0.

story in his *Commander of the* Exodus.[164] This work is centered on the ship's legendary Captain, Yossi Harel.[165] Harel, who grew up on a kibbutz in Palestine, joined the Jewish paramilitary when he was fourteen.[166] He is described as the true salt of the earth, a partisan with a code of honor and silence passed to him by his brothers in arms.[167] Before he joined the immigration operations, we are told, Harel trained in covert action.[168] He studied the hidden pathways of his home country's rocky deserts, and he participated in "deterrence" and revenge operations geared toward civilian casualties among the Palestinian Arabs.[169]

For Kaniuk, who based his book on conversations with Harel, the *Exodus* affair was not merely one of the stages through which Israeli independence was realized, it was the decisive one.[170] Kaniuk declares this in the book's first paragraph:

> The State of Israel was not established on May 15, 1948, when the official declaration was made at Tel Aviv Museum. It was born nearly a year earlier on July 18, 1947, when a battered and stricken American ship called *President Warfield*, whose name was changed to *Exodus*, entered the port of Haifa with its loud speakers blaring the strains of "Hatikva."[171]

Hatikva later became Israel's national anthem,[172] and Kaniuk's message—the message carried by this boat—is abundantly clear. An act of unauthorized migration finds its necessary expression in sovereignty.[173] Shifting independence temporally from declaration to migration suggests that there is no conceptual gap between the *de facto* action and its *de jure* realization within the institutional structure of the state. If the *Exodus* was indeed a literal embodiment of Weis's dilemma of the stateless, it

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164. The English version came out in 1999. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13.

165. This is, in Hegel's terms, "original history":

> The author's spirit, and that of the actions he narrates, is one and the same. He describes scenes in which he himself has been an actor, or at any rate an interested spectator. It is short periods of time, individual shapes of persons and occurrences, single, unreflected traits, of which he makes his picture .... And his aim is nothing more than the presentation to posterity of an image of events as clear as that which he himself possessed in virtue of personal observation, or life-like descriptions. Reflections are none of his business, for he lives in the spirit of his subject; he has not attained an elevation above it. If, as in Caesar's case, he belongs to the exalted rank of generals or statesmen, it is the prosecution of his own aims that constitutes the history.

G.W.F. HEGEL, THE PHILOSOPHY OF HISTORY 2 (E. Gans, ed., J. Sibree, trans., 1837).

166. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 4.

167. *Id.* at 3–5.

168. *Id.* at 8.

169. *See id.* at 8–9 (noting Harel's role in the development of "future reconnaissance units" of the Israeli army). Indeed, Kaniuk fashions Harel in his early years as a true "partisan," in Carl Schmitt's sense of the term. *See* CARL SCHMITT, THEORY OF THE PARTISAN: INTERMEDIATE COMMENTARY ON THE CONCEPT OF THE POLITICAL 18–20 (G. L. Ulmen trans., 2007) (conceptualizing a "partisan" as an irregular fighter with an intense political character).

170. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at ix.

171. *Id.*

172. Ilan Ben Zion, *How an Unwieldy Romantic Poem and a Romanian Folk Song Combined to Produce 'Hatikva'*, TIMES OF ISR., Apr. 16, 2013, http://www.timesofisrael.com/how-an-unwieldy-romantic-poem-and-a-romanian-folk-song-combined-to-produce-hatikva/.

173. *See* KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 206–07 (finding that the Israeli war of independence provided the second chapter to the *Exodus*' first chapter).

suggests an answer to this dilemma that is a far cry from his reliance on transnational governance. The stateless peoples did not enforce their rights by appealing to the UDHR, nor were their internationally issued Nansen passports and identity cards capable of granting them identity. Their own power made this transformation. If there is anything *transnational* about this power, it is the idea of heroic sacrifice in the face of omnipotent imperial armies.[174] Unauthorized migration is thus no longer relegated to the sphere of *bare life*, but is part and parcel of a revolutionary liberation struggle.[175] It is imagined as collective and public action: an expression and at the same time a foundation of a community and its will.

Retelling of the *Exodus* story, Kaniuk emphasizes the continuity between migration, the act of founding, and the war Jews fought for their independence in Palestine.[176] As he describes at length elsewhere in his work, this war entailed the forceful displacement of the local Palestinian population, understood as a necessary part of a struggle for survival.[177] Harel personally partook in assassination operations, and as Kaniuk tells us, one of the refugees who arrived on the *Exodus* from Europe ended up finding work as a teacher in "an Arab dwelling whose inhabitants had fled under duress."[178] Those who deny this violence in the name of a purported international rule of law, says the author in another work, are deceiving themselves and their listeners.[179] Echoing Lauterpacht's critique of a certain style of international law, Kaniuk dismisses human rights as the hypocrisy of the privileged.[180] And this endorsement of violence already suggests the reasons for rejecting an understanding of human rights as granted by sovereignty: The protection of the rights of some who become members of a polity comes at the price of the violation of the rights of those who are excluded from membership.[181]

Philosopher Hannah Arendt did not think that the *bare life* of people outside of political communities could be the source of rights.[182] But her work does not embrace sovereignty. Arendt engages in the critique of the foundational violence that Kaniuk

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174. Harel constantly returns to a classic novel he read in his boyhood about the Armenian genocide and its resistance: *The Forty Days of Mousa Dagh* by Franz Werfel. *Id.* at 5, 49, 86. For Kaniuk, this becomes an opportunity for a word play: Mousa Dagh is juxtaposed with Masadah, the mythic site where members of the Jewish resistance to Roman rule collectively committed suicide. *Id.* at 5–6, 85–86. *See generally* FRANZ WERFEL, THE FORTY DAYS OF MUSA DAGH (Geoffrey Dunlop trans., 1934).

175. *See* HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xx (explaining that the illegal immigration exemplified by the *Exodus* affair was part of an organized political movement).

176. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 207.

177. *See, e.g.*, *id.* at 199 (observing that the Jewish immigrants who were allowed entry into Palestine on the Pans vessels could be considered actors in the displacement of Palestinians and fighters in the struggle for Palestine).

178. *Id.* at 146.

179. *Id.* at 199–207.

180. For Lauterpacht's view, see *supra* text accompanying notes 79–90. However, instead of defending international law against this hypocrisy, like Lauterpacht sought to do, Kaniuk ends up adopting a political theory much closer to that of his contemporary and rival, Schmitt. *See generally* Koskenniemi, *Image of Law in International Relations*, *supra* note 89.

181. *See* KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at ix–xi (recognizing that "the British practically halted immigration [to the Yishuv] in 1939," employing violence against the stateless refugees from the European Holocaust).

182. *See*, ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 293 (explaining the instability of inalienable human rights through the experience of the stateless during the interwar period in Europe).

accepted as inevitable.[183] Arendt's cursory remarks on the subject in "The Decline of the Nation State and the End of the Rights of Man" do not explore Jewish unauthorized migration to Palestine through the Mediterranean Sea (though the phenomenon was no doubt familiar to her).[184] Arendt does, however, consider the role of Israeli sovereignty within the more general context of a question about the *source* of rights, which is the question being treated here.[185] Arendt points out that when refugees assert themselves within the framework of sovereignty, they are likely to reproduce displacement, as if in a vicious circle.[186] Thus, as in the context of transnational governance, the protection of rights becomes continuous with their violation.[187] The displacement that resulted from the establishment of Israel reflects how sovereignty and *bare life* are irrevocably bound up together.[188] Human rights as instruments of transnational governance are at best unenforceable protections that merely assist superpowers in the management of *bare life*, and at worse ways of justifying Nazi policies, minus the killing. But human rights as the protections granted by sovereignty fare no better. Their realization rests upon the violence that generated *bare life* to begin with:

> After the war it turned out that the Jewish question, which was considered the only insoluble one, was indeed solved—namely, by means of a colonized and then conquered territory—but this solved neither the problem of the minorities nor the stateless. On the contrary, like virtually all other events of our century, the solution of the Jewish question merely produced a new category of refugees, the Arabs, thereby increasing the number of the stateless and rightless by another 700,000 to 800,000 people. And what happened in Palestine within the smallest territory and in terms of hundreds of thousands was then repeated in India on a large scale involving many millions of people. Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly

183. *See, e.g.*, Roger Berkowitz, *Hannah Arendt on Human Rights*, *in* HANDBOOK OF HUMAN RIGHTS 59, 65 (Thomas Cushman ed., 2012) ("At bottom, the only truly human right—the right to have rights—is the right to speak and act as a member of a people. Confusion over this point—and thus the efforts of human rights advocates to extend human rights to life and liberty (and also to second and third generation rights like economic prosperity)—cleaves human rights from its foundation in the human condition and risks, therefore, exposing the entire edifice of human rights as nonsense upon stilts.").

184. *See* ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 273 ("[M]inorities within nation-states must sooner or later be either assimilated or liquidated."). In Hebrew, these migrants are often referred to as *ma'apilim* or "ascendants." *E.g.*, Pnina Lahav, *A "Jewish State . . . to Be Known as the State of Israel": Notes on Israeli Legal Historiography*, 19 LAW & HIST. REV. 387, 392 n.14 (2001) ("The term 'ma'apilim' has a special meaning in the Zionist-Israeli ethos and cannot be reduced to 'immigrants.' It denotes 'climbing a particularly steep and difficult terrain . . . .'").

185. ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 299 ("[T]he restoration of human rights, as the recent example of the State of Israel proves, has been achieved so far only through the restoration or the establishment of national rights.").

186. *See id.* at 290 (citing events in Palestine and India as examples of the cycle of displacement).

187. *See id.* at 295–96 ("The calamity of the rightless is . . . not that they are oppressed but that nobody wants even to oppress them.").

188. Agamben, a major commentator on Arendt's work, positions the inextricable nature of sovereignty and *bare life* at the centerpiece of his most well known book, *Homo Sacer*. *See* AGAMBEN, HOMO SACER, *supra* note 32, at 11 ("[T]he two analyses cannot be separated, and . . . the inclusion of bare life in the political realm constitutes the original—if concealed—nucleus of sovereign power.").

> established states on earth which were created in the image of the nation-state.[189]

Thus, the dialectic movement tying the enforcement of human rights to their violation is irrevocable in both the teleological construction of transnational governance and of sovereignty: the one in which salvation is supposed to express itself in universal and individual terms articulated by global superpowers, and the one in which it is supposed to be concretized within state institutions.

But the story of the *Exodus* encapsulates yet another theory of human rights, which does not fall easily within either paradigm. This theory does not reproduce such dialectic.

III. THE RIGHTS OF ENCOUNTER

To consider this third option, return yet again to the image with which this article opened: Weis's analogy of a flagless vessel on the high seas.[190] This analogy merits more attention than Weis granted it.[191] It will prove most fruitful if approached as an embodied, physical encounter. Indeed, it may function as a kind of hypothetical or thought experiment, illustrating the legal nature of human rights by imaginatively placing the reader in the particular position it describes.

The author chose to stage this dilemma on the "open sea" for evident reasons. The sea was traditionally thought of as outside of all sovereign territories and free for the navigation of all.[192] As Robert Cover wrote,

> [T]he high seas themselves had something of the law of nature about them. They were the shared province of all nations and the substance of the rules that were supposed to govern transactions upon the sea had always been associated with the law of nature. It was in international law that the great continental jurists had applied their speculations to natural law.[193]

For these jurists, it historically represented a problem of dividing jurisdictions and responsibilities. Dutch jurist Cornelius van Bynkershoek famously formulated the

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189. ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 290.

190. *See* Weis, *supra* note 1, at 193 ("A stateless person—and this applies to equally to refugees—has been compared to a vessel on the open sea, not sailing under any flag.").

191. *See, e.g.*, CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF *JUS PUBLICUM EUROPAEUM* 43 (G. L. Ulmen trans., 2003) (highlighting the lack of boundaries at sea); *see also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 109 (1975) (explaining that the sea has traditionally been viewed as free of the laws of nations); *cf.* Weis, *supra* note 1, at 193–94 (ignoring analogy between a stateless person and a flagless vessel except as a jumping-off point for a discussion of "certain developments on the international plane which affect the position of a specific group of individuals, the refugees").

192. Carl Schmitt puts this in a characteristically ominous light when he writes that "the peaceful fisherman has the right to fish peacefully precisely where the belligerent sea power is allowed to lay its mines, and the neutral party is allowed to sail freely in the area where the warring parties have the right to annihilate each other with mines, submarines, and aircraft." SCHMITT, *supra* note 191, at 43.

193. COVER, *supra* note 191, at 109. Consider also Herman Melville's *Benito Cereno*. A merchant vessel is attacked off the Argentinean shoreline by a mutinied slave ship. As long as the ship is at sea, the events on board remain unintelligible. When Captain Cereno docks at shore, both law and comprehension are restored. As an admiralty tribunal recounts the whole story, the chain of events is for the first time coherently exposed. HERMAN MELVILLE, BENITO CERENO 56, 63–70 (1856); *see also* KAHN, CULTURAL STUDY OF THE LAW, *supra* note 10, at 74 ("The theorized state of nature appears not so much as a prepolitical state as an ever-present threat to the existing state.").

eighteenth century cannonball rule, according to which a strip of water measured by the reach of a shot would count as part of a state's sovereign territory.[194] This, however, did not change the basic principle asserted by his predecessor, Hugo Grotius: The sea remained outside the reach of sovereignty.[195] The law applicable on the high seas was historically composed of customary norms, which developed between merchants from European seafaring empires.[196] These travelers showed solidarity that did not always exist on the continent.[197] This solidarity often united them against "savage" non-Europeans, who presented both danger and economic opportunity.[198] Sailing without a flag would violate custom, placing the flagless vessel literally beyond the pale of law.[199] It was precisely in order to benefit from being outside law that pirates carried no recognized state flag.[200]

Weis's attempt to devise a metaphor illustrating an extra-legal problem still captures something of this world.[201] Arendt made the same point: The stateless person was a "legal freak."[202] However, the two metaphors—Weis's and Arendt's—are very different from one another. While labeling the refugee a "freak" simply casts her condition as exceptional to the extreme, calling her a flagless vessel on the high seas is already imagining an encounter. The image of a flagless vessel suggests questions such as: Who are the refugees? And which legal authority is responsible for them? If one imagines oneself on the high seas sailing under one's own national flag but outside of sovereign waters, one must also ask: What do I have to do with this person? How am I implicated in a refugee's life? And perhaps most importantly, how should I respond to her call of distress?[203]

The common law recognizes no duty of rescue apart from the exceptional context of the high-sea commons.[204] Law is accordingly thought to draw a sharp line

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194. SCHMITT, *supra* note 191, at 180.

195. *See id.* at 179–80 (describing Grotius's book *Mare Liberum*, which "signaled the development of a new stage of the freedom of the sea").

196. *See id.* at 179, 182 (giving examples of customs that can be viewed as early developments in the law of the sea).

197. *See generally*, MELVILLE, *supra* note 193 (in which a captain of an American ship feels compelled to offer assistance to a Spanish ship in the wake of a slave mutiny). Although this fictional story presents an American traveler, the American seafaring tradition reflects the evolution of the European seafaring empires.

198. *See generally id.*

199. *See* Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 527 (explaining that ships have long been accountable only to the country whose flag they fly).

200. *Cf.* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 551, 609 (2008) ("Although a ship flying no flag could be boarded, from the slave traders' perspective, the advantage of this approach may have been to avoid susceptibility to criminal punishment under the law of their 'home' country.").

201. Weis, *supra* note 1, at 193.

202. ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 32, at 278.

203. This way of posing the question inevitably implicates an ethical question, one in which responsibility for the other is always directed at an individual *personally*. *See* LEVINAS, TOTALITY AND INFINITY, *supra* note 30, at 215 ("To hear [the Other's] destitution which cries out for justice is not to represent an image to oneself, but is to posit oneself as responsible, both as more and as less than the being that presents itself in the face.").

204. For a challenge of this tradition, see generally Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152 (1999). Regarding the tradition at sea, see Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399, 414

between killing someone (which is a crime) and simply letting one die (which can be perfectly fine).[205] But the flagless vessel analogy suggests, in a hinted and underdeveloped way, a context in which this line is blurred. The theory this metaphor suggests, if used as a thought experiment describing an embodied encounter, is in tension not only with the idea of human rights as protected by sovereignty. It is also inconsistent with Weis's own turn to the transnational law of international organizations.[206] Instead of sovereignty or transnational organizations, it is each and every one of us that must experience the law that binds us in a concrete situation. Legal questions are bound to the circumstances in which they appear. In the encounter with a refugee imagined as a "flagless vessel," the relevant question is about rules that would apply in a particular decision: whether to allow someone to board a deck or to cross a border.[207]

The authority from which Weis borrowed his illustration of a flagless vessel on the high seas was the father of international legal positivism, German-British jurist Lassa Oppenheim.[208] In his classic 1905 treatise *International Law*, the London professor imagined the person-of-no-flag quite differently than did Weis.[209] For Oppenheim, the image did not present a lawyer's dilemma (or any other dilemma, for that matter).[210] To the contrary, the image was inserted in order to introduce a measure of legal certainty about something that might otherwise have presented a question.[211] Oppenheim sees this person's legal status as crystal clear: "The position of such individuals destitute of nationality may be compared to vessels on the Open Sea not sailing under the flag of a state, *which likewise do not enjoy any protection whatever*" (emphasis added).[212] Indeed, continues Oppenheim, saying that refugees and the stateless are protected under international law would merely be a confusion: "In practice, stateless individuals are in most States treated more or less as though they were subjects of foreign States, but as a point of international legality there is *no restriction whatever* upon a State's *maltreating them to any extent*" (emphasis added).[213]

(1998). Oxman writes that "[t]he duty of states to require ships of their nationality to rescue persons in danger or distress is one of the traditional hallmarks of the law of the sea." *Id.*

205. *See, e.g.*, Barber v. Superior Court, 195 Cal. Rptr 484, 491–93 (Ct. App. 1983) (holding that a physician's cessation of life support devices was not an affirmative act or culpable failure to perform a legal duty so as to constitute homicide).

206. *See* Weis, *supra* note 1, at 218 ("In the absence of the Protecting Powers there is a mandatory obligation on the belligerent state to request a neutral state or such an organization to undertake the functions performed by a Protecting Power.").

207. This interrogation of rescue remedies is complementary to a foundational interrogation of the violence of law, and it is not by chance that both appear on the frontier of formalized jurisdiction. On violence and the border, see generally KAHN, CULTURAL STUDY OF LAW, *supra* note 10, at 94.

208. Weis, *supra* note 1, at 193 (citing LASSA OPPENHEIM, INTERNATIONAL LAW VOL. I 611 (H. Lauterpacht ed., 6th ed. 1940). For a discussion of Oppenheim's positivism, see Mathias Schmoeckel, *The Internationalist as Scientist and Herald: Lassa Oppenheim*, 11 EUR. J. INT'L L. 699, 706–09 (2000); *see generally* Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401 (2002) (arguing that Oppenheim's positivism was not amoral, apolitical, or atheoretical by examining some of Oppenheim's other works).

209. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE VOL. I 366 (1905).

210. *See id.* at 366–67 (outlining the measures that could be taken to handle the absence of a person's legal status).

211. *See id.* at 366 (presenting the stateless person as flagless vessel).

212. *Id.*

213. *Id.* Agamben often refers to a class of people (each person labeled by the Roman legal term "homo sacer") who can be "killed with impunity." *See* AGAMBEN, HOMO SACER, *supra* note 32, at 12–13.

Oppenheim's articulation of this idea had significant traction in mainstream international legal literature, and during World War II, international lawyers cited these words approvingly.[214] Georg Schwarzenberger, a German-Jewish jurist who fled the Nazis, put forth the same idea in another variation: the refugee is a *res nullius*—ownerless property, free to be acquired by anyone.[215] If international human rights law is either a matter of transnational governance or of sovereign power, it may seem that Oppenheim's contention would be true with regard to the *Exodus* as well. But is it really the case that when an individual is not protected by positive sources of domestic or international law, she can simply be done away with?

A part of the *Exodus* story that remains perhaps not as well known is the short (and failed) legal battle that the Jewish deportees waged against their order of deportation from Palestine.[216] This battle sheds a different light on the "flagless vessel" dilemma. It demonstrates how in certain circumstances, humans can impose the duties that correspond to their rights on authorities that are not their own governments or mandated transnational organizations. They can only do so inasmuch as it is no longer considered legally possible to "maltreat[] them to any extent."[217] Through such action, they can gain rights that would not otherwise be afforded to them by law. This effect is not reducible to the constitution of sovereignty, and emanates from an independent source: human presence. The theory behind this argument is encapsulated—even if in the most provisional way—in a single word of the British court's opinion regarding the *Exodus*, in *R. v. Secretary of State for Foreign Affairs, Ex parte Greenberg*.[218]

As the *Exodus* sailed north from France to Germany, six members of the group granted power of attorney to a team of two lawyers, D.N. Pritt and S.N. Bernstein, who filed an application for a writ of *habeas corpus* on their behalf.[219] Pritt and Bernstein argued before the Court of Appeals of England and Wales that the passengers were held illegally and should therefore be immediately released.[220] Pritt, the senior of the two, was a communist who, in his private practice, took on numerous

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214. For example, on October 7, 1942, W. R. Bisschop delivered introductory remarks to a conference on "Nationality in International Law," at the British Grotius Society, saying that "[i]ndividuals are objects of the Law of Nations. It is only through the medium of their nationality, that is to say their being members of a State, that individuals can enjoy benefits from the Law of Nations. Such individuals as do not posses any nationality enjoy no protection whatever and if they are aggrieved by a State they have no way of redress since there is no State which would be competent to take their case in hand." W. R. Bisschop, Nationality in International Law, Papers Read Before the Society in the Year 1942 (Oct. 7, 1942), *in* 28 TRANSACTIONS OF THE GROTIUS SOC'Y, 1942, at 151, 152. Loewenfeld too cites Oppenheim, and continues to say that: "[W]hat cannot be denied at the background of this opinion is the fact that certain ethical ideas based on Christian morals have, and will again require, the help of International Law. Yet a guarantee of the so-called Rights of Mankind cannot be found in such facts." Loewenfeld, *supra* note 1, at 59, 59–60.

215. *See* GEORG SCHWARZENBERGER, INTERNATIONAL LAW 171 (1949) (discussing the domicile of stateless persons in international law).

216. *See* D. N. PRITT, THE AUTOBIOGRAPHY OF D. N. PRITT, PART TWO: BRASS HATS & BUREAUCRATS 266 (1966) (describing the legal action from the attorney's point of view).

217. OPPENHEIM, *supra* note 209, at 366.

218. R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) (Eng.).

219. PRITT, *supra* note 216, at 266.

220. *Id.*

political cases and especially labor disputes.[221] It was neither a matter of transnational governance nor a matter of sovereignty that interested Pritt in this case.[222] For him, the case was more about making a political point than about winning in court:

> The idea that hundreds of Jews who had left the country where they had been subjected to all the horrors of Nazism from 1933 to 1945 should be forcibly returned to that country by orders of the British Labour Government shocked a great many Jews—and a great many non-Jews—in Britain, and one of the Jewish organizations consulted me professionally as to what could be done. I advised them that there was an arguable if not very strong case for the propositions: (1) that, from the moment the ships sailed westwards from Palestine for anywhere but Cyprus, the Jews were illegally detained, since the order of the High Commissioner for Palestine deporting them could have no effect beyond Palestine territorial waters, and in any case could not empower the British Government or anybody else to tip them out into a country to which they did not want to go; and, (2) that the remedy of Habeas Corpus could be invoked against the Foreign Secretary.[223]

There was some controversy as to the question of whether the *President Warfield* was intercepted on the high seas or in Palestine's territorial waters (the opinion uses the vessel's official name, rather than *Exodus*).[224] This was apparently a crucial issue even as the boat was intercepted. "'This British Assault,' said Yossi [Harel] on the loudspeaker so that all the British officers on the ships would hear, 'is taking place in international waters. We are not responsible if soldiers are killed. If any do get killed, you are to blame, not us!'"[225]

The British court, however, did not really believe the attack was on the high seas. "On the whole," wrote Judge Jenkins, "I think that the better view is that it took place inside territorial waters, but, be that as it may, the ship was escorted into territorial waters, and while it was within the jurisdiction of Palestine a deportation order was made in respect of the immigrants in the ship . . . ."[226] With this determination, the Court of Appeals started with an attempt to simply avoid Weis's dilemma.[227] Weis analogized refugees to boats outside the jurisdiction of any legal power.[228] In the Court's construction, however, the moral dilemma was "domesticated" within the dictates of immigration rules.[229] Judgment in de-territorialized and legally

221. *See generally* PRITT, *supra* note 216; *see also* Denis Noel Pritt, 1867-1972, *Barrister, MP and Independent Labour Politician*, COMMUNIST PARTY OF GREAT BRITAIN ARCHIVE, http://www.communistpartyarchive.org.uk/group.php?cid=CP-IND-MISC&pid=CP-IND-MISC-04 (describing Pritt's political leanings)

222. *See* PRITT, *supra* note 216, at 267 ("There was at the worst nothing to be lost but the costs; there was no other remedy; and the proceedings might be helpful in rousing public opinion.").

223. *Id.* at 266.

224. R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) at 552 (Eng.).

225. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 137.

226. The order was given under the Palestine Defense (Emergency) Regulations of 1945 (the same law that Israel later invoked in expelling the Palestinians from the newly established state). *Sec'y of State for Foreign Affairs*, 2 All E.R. at 552.

227. *See id.* (outlining the justification for maintaining British jurisdiction over the Jewish deportees).

228. Weis, *supra* note 1, at 193.

229. *Sec'y of State for Foreign Affairs*, 2 All E.R. at 552–53.

undetermined circumstances could be replaced by the application of positive (territorial) law.

The applicants argued that once they were brought out of the British protectorate, they could no longer be legally held by British forces.[230] The authority to deport them was, according to this argument, strictly territorial, and could not extend to Gibraltar, the Atlantic Ocean, or to the German port they were approaching.[231] As Pritt recounts, however, "the Vacation Judge, in the end, decided against us."[232] A deportation order, explained Jenkins, must carry with it the enforcement authorities to execute the order.[233] More fundamentally, the judge did not accept that the deportees were at the time of the *habeas* application held under British custody at all:

> [T]he immigrants . . . were pressed to land [at Port de Bouc] and they refused. They were told that, if they did not land, they would be taken to Hamburg . . . . [T]hese immigrants, having been given the warning and the choice, deliberately elected to go on in the ships . . . . Therefore, in my opinion, it would be possible to dispose of this case really on the short ground that, whatever the position was at any point of time before arrival at Port de Bouc, there can now be no question of illegal restraint, since the immigrants remained *in the ships of their own free will* . . . ."(emphasis added)[234]

"For these reasons," concluded Jenkins, "a case for a writ of habeas corpus has not been made out."[235] The applicants were charged with trial expenses.[236]

In the narrative of the *Exodus* as an assertion of sovereignty, Judge Jenkins plays the role of a villain.[237] A remarkable aspect of his judgment is the fact that he made no mention of what obviously moved Pritt and others who followed the case:[238] the recent atrocities against the Jews in Europe and the role of the country to which they were being deported in those atrocities.[239] The word "refugee" is not included in the text at all, although the passengers proactively communicated their identities to the British authorities.[240] As one commentator suggests, this lack of attention to the passengers' histories can be thought of as a kind of dehumanization.[241] However, the

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230. PRITT, *supra* note 216, at 266.

231. *Id.*

232. *Id.* at 267. A "Vacation Judge" is a fill-in judge who is supposed to dispose of urgent issues when a court goes on vacation.

233. *Sec'y of State for Foreign Affairs*, 2 All E.R.at 555.

234. *Id.* at 555–56.

235. *Id.* at 556.

236. *Id.*

237. *See* HERMAN, *supra* note 150, at 106 ("These silences suggest that Jenkins J deliberately chose to deem these facts irrelevant to the legal issue before him.").

238. *Id.*

239. *See id.*("However, once the judge chose to deem this context irrelevant, it became unremarkable that he took no interest in the prospect of the passengers being sent to Germany, which Jenkins J referred to merely as the ship's 'next destination,' which the 'immigrants' intended to go on to 'of their own free will.'").

240. *Id.* at 106–07. While Pritt used the term "displaced Jews" in his oral argument, the judge ignored this nomenclature as well. *Id.* at 106.

241. *See id.* at 106–07 (referencing the willingness of judges to ignore the then-current Jewish European hardships and localizing this willingness in "racialization").

text of the opinion unwittingly discloses another kind of normative commitment and invites another interpretation.

Describing the applicants for the writ of *habeas corpus*, Judge Jenkins writes: "These six persons . . . set sail . . . with the intention either of getting into Palestine by stealth, or, if intercepted, of *embarrassing* the authorities who would then *have on their hands* a further 4,500 people to be dealt with somehow" (emphasis added).[242] The Judge describes this behavior with some contempt. But the challenge he exposes merits attention. It amounts to a rough outline of the binding nature of human rights—beyond transnational governance and beyond sovereignty. What are the underlying assumptions of planning to embarrass government officials by putting oneself "on their hands . . . to be dealt with somehow"?[243] This is where Jenkins takes a small step away from Oppenheim and the assumption that the only possible source of rights is sovereignty.[244] By raising this as a problem, the judge already assumes that the people simply cannot be maltreated to any extent—whatever the positive law on this issue may be.[245] This is perhaps the most fundamental premise of the non-positivist theory of human rights as "rights of encounter."

Every word in Jenkins's passage is critical. Among them is the image of *hands*.[246] The figurative language captures something important about the scene Jenkins envisions. It implies human fragility: close the fingers into a fist, and the refugees on your hands will perish. By challenging political authorities not to close their hands, unauthorized migrants are able to push the line between killing a person and letting her die.

Perhaps the single most important word in Jenkins' opinion is "embarrassing."[247] It only makes sense to talk about human rights once this potential embarrassment appears. Judge Jenkins is concerned that this embarrassment will somehow have coercive power over British authorities.[248] As Lauterpacht emphasized in the context of his analysis of the UDHR, coercive power is a necessary condition for a norm to be intelligibly called "law."[249] Jenkins believed that when *President Warfield* left Europe, it exploited the unstated, tacit kind of law that bars the fingers from tightening up into a fist.[250]

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242. R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) at 551–52 (Eng.) (emphasis added).

243. *Id.* at 552.

244. *See id.* at 553 (rejecting the concept that rights are conferred by sovereignty).

245. *See id.* at 552–53 (dismissing the relevant Palestinian law in favor of the refugees).

246. *Id.* at 552.

247. *Sec'y of State for Foreign Affairs*, 2 All E.R. at 552.

248. *Id.*; *see* Thomas Keenan, *Mobilizing Shame*, 103 S. ATLANTIC Q. 435, 435–36 (2004) ("It is now an unstated but I think pervasive axiom of the human rights movement that those agents whose behavior it wishes to affect—governments, armies, businesses, and militias—are exposed in some significant way to the force of public opinion, and that they are (psychically and emotionally) structured like individuals is a strong social or cultural context that renders them vulnerable to feelings of dishonor, embarrassment, disgrace, or ignominy."); *see also* PAUL KAHN, OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL 112–42 2010 (discussing the relationships between shame, moral judgment, and knowledge).

249. Lauterpacht, *supra* note 79, at 363–65 (explaining that coercive power is necessary to make a document into law).

250. *See, e.g.*, Patrick Barkham, *PM Calls Asylum Protest Blackmail*, THE GUARDIAN (Jan. 25, 2002), http://www.theguardian.com/world/2002/jan/26/immigration.uk/print (discussing the Australian prime minister labeling the actions of unauthorized migrants protesting the delay of asylum applications as "moral blackmail"); Danielle Every & Martha Augoustinos, *'Taking Advantage' or Feeling Persecution? Opposing Accounts of Asylum Seeking*, 12 J.SOCIOLINGUISTICS 648, 659–60 (2008) (comparing differing perspectives on this "moral blackmail").

We therefore have more or less the same encounter, outlined by three lawyers with different backgrounds: a prominent professor and one of the main figures of nineteenth century international law (Lassa Oppenheim);[251] a chief legal adviser to a United Nations (UN) humanitarian agency (Paul Weis);[252] and a British Appellate Court judge (Jenkins).[253] Oppenheim had a very clear-cut view about the respective rights and duties of the two sides of this encounter: they had none.[254] Weis raised the issue, hoping that international powers could be gradually moved to take responsibility.[255] And Jenkins rejected the migrants' claims, but hinted that there is a perceived duty at stake—not in some projected future—but in the present.[256]

To be sure, the unauthorized migrants of the *Exodus* invoked this duty quite directly. In a handwritten letter addressed to the British agents during the deportation, they invoked their own humanity.[257] The letter starts: "British soldiers and officers! You are waging a battle against peaceful innocent people, which [sic] only crime consists in that they want a home just like hundreds of peoples . . . !"[258] The next lines are revealing:

> We have been dragged away with brutality from the shores of Palestine, and for about two months already we are being led on the sea, locked in . . . barbed wire, just [as] if we were dangerous criminals[.] Now you want [to] get us off with force in Hamburg back to our enemies, back to the murder [of] people, [who] wanted to annihilate the world, and bestially destroyed our parents and children and exterminated more than a third of our people. You are sending us back to pains, sufferings and downfall!!! British soldiers and officers! To Day you are compelled to do the same thing the Germans did before, against whom you fought so heroically! [sic][259]

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251. *Lassa Francis Lawrence Oppenheim*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/430214/Lassa-Francis-Lawrence-Oppenheim.

252. Weis, *supra* note 1, at 193.

253. R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. (A.C.) 550 at 550 (Eng.).

254. OPPENHEIM, *supra* note 209, at 369.

255. *See* Weis, *supra* note 1, at 208–11 (explaining the increasing international coordination regarding refugees).

256. *See Sec'y of State for Foreign Affairs*, 2 All E.R. at 555–56 (condoning the decision to allow refugees to remain on the *Exodus*).

257. *See* Batsheva Sobelman, *ISRAEL:* Exodus *Commander Dies at 90*, L.A. TIMES (Apr. 27, 2008), http://latimesblogs.latimes.com/babylonbeyond/2008/04/israel-exodus-1.html (appealing to the pathos of British soldiers by listing the travails they have encountered).

258. *Id.*

259. *Id.*

The intercepted *Exodus* enters the Port of Haifa.

The same message was printed on a banner that was tied to the boat, making it as visible as possible.[260] The message refers to characteristics of human life that belong to all humans as such, namely family and hope.

The political theory of human rights as encounter can be abstracted from this relationship, at an international border, between a powerless individual and a powerful official.

The relevance of Judge Jenkins's opinion to the scenario should already be clear.[261] The Jewish refugees posed a challenge to the British Navy: "You, and no one else, will decide if I will have a life worth living." This type of challenge is what Jenkins is referring to when he speaks of *embarrassment*.[262] When those who seek to pose such a challenge identify moral precepts to which a relatively powerful addressee claims to be bound, they can put the addressee in a position Max Weber labeled with the term "ethics of conviction."[263] Saying "you and no one else," captures the addressee in the position characterized by Weber: "here I stand, I can do no other."[264]

Following the first paragraph of Kaniuk's literary-historical account of the *Exodus* affair quoted above, he continues with a second paragraph:

> The State of Israel came into existence before it acquired a name, when its gates were locked to Jews, when the British fought against survivors of the Holocaust. It came into existence when its shores were blockaded—against

260. *The Maritime History of the Struggle for Israel's Independence*, PALYAM.ORG, http://www.palyam .org/indexEn.

261. *See generally Sec'y of State for Foreign Affairs*, 2 All E.R. at 550.

262. *Id.* at 552.

263. WEBER, *supra* note 34, at 92.

264. *Id.*

> those for whom the state was eventually designated—by forty-five model C warships, the most modern warships the British built toward the end of World War II, which hadn't managed to see service. The fleet was gigantic even by today's standards .... It came into being when they closed its gates by means of tens of thousands of soldiers, thousands of police and intelligence agents from the CID, on land, in the ports, and throughout Europe, and by means of detention camps in Atlit and Cyprus.[265]

The first paragraph quoted above demonstrated powerfully the idea that human rights are only enforced within the context of sovereignty. But here Kaniuk suggests a different sensibility. He still stresses the importance of the state.[266] But the curious thing about the passage is that the vindication of the Jewish cause is expressed by its *negation*.[267] It is not enough to say here that the narrative is constructed as one of the weak defeating the powerful. Such a conventional account would appear if Kaniuk would write that the doors of Palestine would eventually open for the passengers of the *Exodus*. It is consistent with a story of a violent struggle for sovereignty.[268] Here, instead, the moment of founding is *when those doors are still closed.*

To be sure, this narrative of the rights of encounter is not about self-sacrifice or martyrdom. According to Kaniuk's narration, only *after* having been exposed to the Holocaust survivors' incredible will to survive did Harel decide the ship would not fight the British forces unto death.[269] He "wouldn't agree to become the architect of a new Masada, even in the name of a national myth for a resurrected generation."[270] This position is contrasted with that of other Haganah operatives on board, who "stuck to the struggle" even after "having faced the eyes of the children that gazed at them day after day."[271] But "the command [Harel] accepted hadn't been to bring a ship full of corpses to Palestine."[272]

Though there were casualties, the story is more accurately framed under the title of embarrassment. Precisely as Judge Jenkins feared, the actions of the British Navy were somehow encoded as illegitimate.[273] And this development cannot be reduced to a violation of the rules of transnational governance or of the law of an existing sovereign entity. Jenkins's reference to embarrassment speaks to the fact that there was indeed a source of law beyond sovereignty. At issue is a kind of self-embarrassment. This experience arises when the self violates a law that one has resolved to follow. But the invocations of humanity in the refugees' letter (only wanting a home), and of crimes against humanity (the comparison to Germans), are

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265. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at ix.

266. *See id.* (narrating the events of 1947 that led to the creation of Israel in 1948).

267. *Id.*

268. Such a viewpoint is encapsulated in other moments in the book; for example, when he quotes the opinion of some of the Haganah leaders, according to which the migrant boats were "battering ram[s]" with which British control in Palestine would be ousted. KANIUK, COMMANDER OF THE *EXODUS supra* note 13, at 36.

269. *Id.* at 142.

270. *Id.*

271. *Id.*

272. *Id.* at 143.

273. *See* R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) at 552 (Eng.) (referring to the refugees' voyage as an attempt to embarrass British officials).

presumably not intended only for the British soldiers and officers.[274] They already imply a potentially vaster transnational audience. After World War II (and particularly in the wake of the Nuremberg Trials), the Western Bloc purported to form an alliance founded both on power and on principle.[275] The human rights encounter challenges that power. It puts its fidelity to principle to the test.

IV. AGAINST REDUCTIONISM

An obvious challenge to the idea of a law of encounter would be a kind of reductionism. Such an argument would attempt to translate the enforcement stemming from encounter either to transnational governance or to sovereignty. Law, such an objection might add, is inextricably tied to violence, which exists in both sovereignty and transnational governance (but is more often denied in the latter).[276] The idea of law without violence falls into an empty utopianism at best, and a deceptive denial of its own violence at worst.[277] This is what disturbed Lauterpacht with the UDHR and has been a looming concern for international lawyers ever since.[278]

An argument reducing the rights of encounter to sovereignty would likely claim that the *Exodus* migrants were basically the instrument of a nationalist movement.[279] In this view, the voyage of the *Exodus* was essentially a military operation, and it is necessary to contextualize and historicize it in order to show it would not be possible without partisan violence.[280] As one commentator put it, embarrassment was one strategy among many that the Zionist movement employed.[281] Thus, as explained above, the affair can only be understood as part and parcel of one policy with orders that were later given by Haganah leaders to expel the Palestinians.[282] This created the Palestinian refugee problem, which is yet to be resolved.[283]

But the relevant events demonstrate that the phenomenon in question is qualitatively different from war, even in the form of a "partisan" or revolutionary war.[284] Particularly relevant here is the testimony of John Stanley Grauel, a former

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274. Sobelman, *supra* note 257.

275. *Id.*

276. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

277. *See generally* KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 85.

278. *See* Hathaway & Shapiro, *supra* note 29, at 267–70 ("[I]nternational law fails . . . to be a legal regime for two reasons: (1) it lacks its own enforcement mechanisms, and (2) it lacks internal mechanisms that employ brute force.").

279. "At the end of World War II, Zionist leaders sought to make the post-war fate of the Jewish DPs a major item on the international agenda, aiming to create a link, in the minds of global policymakers, between solving the problem of European Jewish DPs and the founding of a Jewish State in Palestine (Eretz-Israel). One means at their disposal was organized illegal immigration to Palestine by sea, namely, the *Ha'apalah*, or *Aliyah Bet*." Aviva Halamish, *American Volunteers in Illegal Immigration to Palestine, 1946–1948*, 9 JEWISH HIST. 91, 91 (1995).

280. *See id.* (describing the military oversight of the immigration).

281. HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xx ("Illegal immigration had the potential to embarrass the British for callously preventing the entry of Jewish survivors of the Holocaust into their homeland, and thus making full use of the moral force of the Zionist cause.").

282. *See id.* (discussing the illegal immigration tactics used by the Haganah branch as a means of establishing a Jewish state in Palestine).

283. *After 65 Years, Plight of Palestinian Refugees Must Be Fully Addressed, UN Agency Chief Says*, UN NEWS CENTRE (Nov. 4, 2014), http://www.un.org/apps/news/story.asp?NewsID=49251#.VGDE9d5hr8E.

284. If anything, it is closer to civil disobedience, which, as Hannah Arendt explained in her essay "Civil Disobedience," is a self-help remedy for realizing rights that are not institutionally protected. *See*

Methodist minister from Massachusetts, who was a volunteer aboard the *Exodus*.[285] Grauel's story is not one about revolutionary fighters. Only because the migrants on the boats *did not* come to fight against the British, could their story have the "embarrassing" effect that Jenkins feared (and knew) it might have.[286]

As Grauel explained, this non-belligerent stance was premeditated.[287] One of the most contentious issues was the question of whether the Jews aboard the *Exodus* used firearms or not.[288] Grauel testified that before embarking from France, the crew searched all the refugees' belongings, making sure there would be no weapons on board: "three pistols were found and thrown into the sea."[289] When the British attacked with clubs and "sprayed the hurricane deck with three blasts from a machine gun,"[290] Grauel fought back with other refugees on board, "throwing potatoes and canned goods" at the British soldiers.[291] The same descriptions appear in Kaniuk's account: "[T]he first three [British] invaders were locked inside the pilot deck, and youngsters previously trained for this purpose tossed crates and flung screws, tin cans, and rotten potatoes at them."[292] There is some form of retaliation here, and indeed some minimal measure of violence. But it importantly signals an abstention from a military overthrow of an existing legal order. Unauthorized migration becomes a paradigm of resistance, a word Harel uses repeatedly, but not one of a politics that extends war by other means.[293]

Conversely, the *Exodus* affair can be explained away as a product of transnational governance: according to such an account, only because it was the interest of transnational superpowers that displaced Jews find their way to the Middle East did their message finally prevail.[294] This also has some truth in it. The *Exodus* had a considerable role in the transnational legal processes of the time.[295]

HANNAH ARENDT, CRISES OF THE REPUBLIC: LYING IN POLITICS; CIVIL DISOBEDIENCE; ON VIOLENCE; THOUGHTS ON POLITICS AND REVOLUTION 69 (1972) (arguing that a disintegration of political systems precedes revolution and stems from the citizens' justified doubts about their government's legitimacy).

285. *Claims British Attack Timed with Marshall Plan Parley*, CAN. JEWISH REV., Aug. 15, 1947, at 10, *available at* http://www.multiculturalcanada.ca/node/409811/full?display=full.

286. For background about the volunteers, see HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at 89–90. Halamish's analysis of the motivations of American Jewish volunteers is consonant with the analysis proposed here, inasmuch she shifts the main weight from nationalism to a kind of universalist sense of guilt. This guilt is comparable to the British soldiers' alleged "embarrassment."

287. *See generally Claims British Attack Timed with Marshall Plan Parley*, *supra* note 285.

288. HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at 94.

289. *Claims British Attack Timed with Marshall Plan Parley*, *supra* note 285.

290. *Id.*

291. *Id.*

292. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 136.

293. See Michel Foucault's inversion of Clausewitz's proposition that "war is politics by other means." Foucault examines the idea that "politics is the continuation of war by other means." MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975–76, 15–16 (David Macey trans., 2003).

294. One historian has recently gone so far as claiming that the 1951 Refugee Convention has "Israeli roots." Gilad Ben-Nun, *The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*, 27 J. REFUGEE STUD. 101, 101 (2013).

295. *Cf.* HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xxi (connecting the *Exodus* with the" policies and activities of the British, French, Americans and the Zionists, as well as the United Nations Organization and its Special Committee on Palestine").

Grauel, for example, testified before the United Nations,[296] which later cited his testimony as part of the factual basis for its recommendation of the partition plan, leading to Israel's recognition by the UN in 1948.[297] As Prime Minister Golda Meir explained, Grauel was a "perfectly worthy gentile" and could therefore give the testimony, while "no Jewish witness was to be believed."[298] Though Meir credited Grauel for this achievement, her bitterness also expressed resentment toward networks of transnational governance, implicitly described as closed and undemocratic.[299] Because the migrants generated the encounter, they were granted a position in a transnational sphere that was otherwise closed to them. Strictly from the perspective of transnational governance, there was no reason for the DPs to be transferred to Palestine, but they did end up achieving sovereignty there.[300] The rights of encounter are primary, not secondary, to the rights generated by transnational governance networks.

Another type of objection to a theory of human rights based on the encounter between state authorities and non-citizens is that such an understanding of human rights is restricted only to particularly abhorrent state policies. When the paradigm of a rights violation is "maltreating" someone "to any extent," policies that fall short of that are not even counted.[301] Making the Nazi regime the archetypical example of a rights violation, as sometimes was the case in the discussion about the *Exodus*, risks granting a free pass to many other kinds of wrongs.

The rights of encounter are narrow in scope: The British presumably could have found a host of policy solutions short of returning people who were persecuted by the Nazis directly to Germany.[302] In fact, the British had regularly applied seemingly less confrontational solutions with the passengers of other migrant ships.[303] Standard practice was expelling migrants to wait in offshore detention camps on islands under imperial control as far from Palestine as Mauritius,[304] and as close to Palestine as Cyprus.[305] To paraphrase Harrison, such solutions could in effect mean "treating the

296. *Claims British Attack Timed with Marshall Plan Parley*, *supra* note 285.

297. *Obituary, Rev. J. S. Grauel, 68, A Supporter of Israel*, N.Y. TIMES, Sept. 10, 1986, www.nytimes.com/1986/09/10/obituaries/rev-j-s-grauel-68-a-supporter-of-israel.html.

298. Jerry Kingler, *John the Priest: Reverend John Stanley Grauel, the Man Who Helped Make Israel Possible*, PALYAM.ORG, http://www.palyam.org/Hahapala/Teur_haflagot/John_the_Priest; *see generally* RONALD COHN & JESSE RUSSELL, JOHN STANLEY GRAUEL (2012).

299. Authors such as David Kennedy and Benedict Kingsbury have offers sophisticated contemporary iterations of this critique. *See, e.g.*, David Kennedy, Challenging Expert Rule: The Politics of Global Governance, The Julius Stone Memorial Address 2004 (June 17, 2004), *in* 27 SYDNEY L. REV. 1, 2–3 (2005) (examining the complex role of legal experts who "rule" undemocratically in international affairs); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 1–2 (2006) (discussing the challenges of the "regulatory governance of global markets" and the "emergence of a 'global administrative space'" to the "standard inter-state, consent-based models of international law").

300. Lahav, *supra* note 184, at 392–93.

301. OPPENHEIM, *supra* note 209, at 366.

302. *See, e.g.*, HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at 2 (discussing various solutions for the Jewish refugees).

303. *See* Kochavi, *supra* note 13, at 384 (describing British practice of directing migrants to offshore detention camps).

304. *E.g.*, *Effect of the European War upon the Situation in Palestine; British Policies Regarding Jewish Immigration into Palestine*, III FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1940, 830, 854–55 (1958).

305. *E.g.*, Kochavi, *supra* note 13, at 384. This foreshadowed later American practices with Haiti and Australian practices with Nauru and Papua New Guinea. *See* Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013* 54 HARV. INT'L L. REV. 315, 333–34 (2013)

Jews as the Nazis treated them" except that they would "not exterminate them."[306] The lack of stability in such solutions, however, is already explained in Harrison's response to it.[307] Imposing such solutions quickly collapses into a need to take sides: Is the preservation of life for or against the interests of those lives that are to be preserved?

My argument does not aim to reduce the importance of the perhaps more robust rights of sovereignty, or of those granted by transnational governance; nor does it say that the violence of law is necessarily objectionable. But it is both conceptually and practically important to distinguish these rights—human rights—from those discussed in the transnational governance discourse and from those of sovereignty.

V. HUMAN RIGHTS AND HISTORY

The *Exodus* case study and its historical context suggest that history is informative in a phenomenological study of human rights. The aim of such a study is to characterize how human rights obligations are experienced by those who make human rights claims and by addressees of such claims who find themselves bound by human rights.[308] Assuming that "human rights" can only meaningfully exist for those who experience them, this characterization makes it possible to proceed to the fundamental question of legal theory: What are human rights?[309]

In a recent book review (and an independent contribution to legal scholarship), Professor Phillip Alston reassesses the new salience of history in the study of human rights.[310] Alston reviews Professor Jenny Martinez's book, *The Slave Trade and the Origins of Human Rights Law*, and dedicates significant attention to Professor Samuel Moyn's much commented upon *The Last Utopia: Human Rights in History*.[311] Alston directs separate criticisms toward both authors, who have generated a "heated controversy" with respect to the origins of human rights.[312] With respect to both, however, his bottom line is the same.[313] Their controversy is in some basic way misguided, "due primarily to a failure to acknowledge the polycentric nature of the human rights enterprise."[314] As Alston explains, "[a]ttempts to capture the alleged

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[hereinafter Mann, *Dialect of Transnationalism*] (detailing migration issues between the United States and Haiti as well as between Australia and the nations of Nauru and Papua New Guinea).

306. HARRISON REPORT, *supra* note 111, § IV(3).

307. *Id.* § I.

308. *Cf.* Mann, *Dialect of Transnationalism*, *supra* note 305, at 387–89 (explaining the premises of human rights law).

309. *See, e.g.*, Alston, *supra* note 35, at 2048 (evaluating Martinez's thesis that the abolitionist movement coincided with the development of the theory of human rights); *cf.* Mann, *Dialect of Transnationalism*, *supra* note 305, at 391 (posing the question: "What are the rights that accrue to all humans?").

310. Alston, *supra* note 35, at 2043.

311. *Id.* at 2045. A recent volume of *Qui Parle* brought together some of the most preeminent human rights theorists for a discussion of Moyn's work and its impact on the assessment of human rights issues in the twentieth century. *E.g.*, Zachary Manfredi, *Recent Histories and Uncertain Futures: Contemporary Critiques of International Human Rights and Humanitarianism* 22 QUI PARLE 3, 9 (2013).

312. Alston, *supra* note 35, at 2044–45.

313. *Id.* (outlining the author's argument regarding the origins of the controversy).

314. *Id.* at 2045.

essence of that enterprise by viewing it through a single lens are intrinsically flawed and potentially deeply misleading."[315]

While Martinez argues that human rights originate in nineteenth century antislavery commissions,[316] Moyn situates the starting point in American human rights activism during the Cold War, specifically in 1977.[317] Alston regards only the latter as a "revisionist" historical account.[318] However, both aim to destabilize the orthodox narrative about an "international constitutional moment" at the end of World War II.[319] As the standard story goes, the human rights regime was born in the post-war efforts that led to the framing of the UDHR and the establishment of the United Nations.[320] Both authors advance the thesis that the orthodox story is historically inaccurate.[321] For Martinez, placing the point of departure *earlier* illuminates the binding corrective force of human rights law.[322] For Moyn, placing it *later* can free the readers from the language of human rights in favor of a richer political vocabulary.[323] But these two options are not exhaustive of all that is to be gained from a study of human rights and history.

The *Exodus* case study began from a more standard point of departure, largely tracking the "orthodox" narrative of emergence of human rights law post WWII. It led from international cooperation in the interwar period to a constitutive moment following the war.[324] This was not meant as endorsement of the standard history. Other historical incidents could have just as well been chosen. Some of these would presumably be before and some after the disembarkation of the *Exodus* in 1947.[325] The theory of human rights as a law of encounter does not make the claim that human rights are timeless or binding in every culture or in every individual. However, it is not intended to make a claim about human rights' historical origins either, and it is agnostic about when they emerged as a "legal consciousness."[326] What matters is that,

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315. *Id.*

316. *Id.*

317. *Id.* at 2044.

318. *See* Alston, *supra* note 35, at 2045, 2066 ("In Moyn's view, the phrase 'human rights' did not enter the English language until the 1940s, and it was not until the 1970s (1977 to be precise) that the international human rights movement first emerged.") (citations omitted).

319. *See, e.g.*, Slaughter & Burke-White, *supra* note 145, at 1–2 (defining a "constitutional moment" and its applicability to relevant moments in time).

320. *See* Alston, *supra* note 35, at 2065 ("By far the most common starting point for modern histories of human rights is the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948.").

321. *See id.* at 2064 (detailing how the authors are shaping the new historiography of human rights).

322. *See id.* at 2044 ("Not content with staking out a large historical claim, she also implies that genealogy matters by claiming that the nineteenth-century history that she recounts has major implications for many of the key contemporary debates over human rights, so much so that this history should change the way we think about the entire field . . . .").

323. *See id.* at 2073 (outlining Moyn's favoring his own criteria due to "distrust of the multilayered and often amorphous human rights movement").

324. *See, e.g.*, Slaughter & Burke-White, *supra* note 145, at 1 (detailing the emergence of interstate relations and agreements post-World War II).

325. *See generally* Alston, *supra* note 35.

326. For two important studies of "legal consciousness," see generally Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 6 (1980) [hereinafter Kennedy, *Historical Understanding*]; Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 323 (2005). While for both authors legal consciousness is to be studied from the critical remove of the social scientist, this article is an attempt to provide an answer to a different question: What makes it possible to occupy the internal position with respect to the legal consciousness of human rights?

as reflected by the invocation of embarrassment, the actors find themselves already committed to some form of human rights. While staying silent about the origins of those rights, history proves useful in exploring philosophical concerns surrounding them: What are human rights? What are the circumstances in which human rights claims and human rights commitments can appear? And how do those bound by them experience such a commitment?

The search for origins Alston finds in Moyn and in Martinez, as in other contemporary commentators, assumes that we already know what we are talking about when we talk about rights.[327] That assumption is what makes possible, for example, the way Moyn "emerges triumphal" finding that prior to 1977 the term only rarely appeared.[328] His study *begins* from an understanding of what human rights are and proceeds to search where his particular understanding of human rights starts to appear.[329] Martinez makes this assumption explicitly when she writes that what interested her about the commissions was the way they "align . . . with institutional characteristics of *contemporary international human rights law*. . . ." (emphasis added).[330] The assumption is appropriate for part of her purpose, namely uncovering where contemporary institutions came from.[331] However, it has limited relevance for answering the question what is the normative force such institutions realize, or should realize, and what makes such a force binding (if it does).[332] Neither author uses history as a point of access into a central question of jurisprudence, namely, what grounds the normative demands of non-citizens.[333] Instead, they simply adopt different versions of positivism.[334]

Unlike both Martinez and Moyn, the perspective offered here does not regard the object of inquiry—human rights—as a social fact, ready for the analysis of the social scientist, independently of her own agency. Rather than knowing what human rights are, many of us may experience being committed to them without knowing what that commitment may be.[335] The phenomenological approach allows this experience to be conceptualized.[336] Such an approach draws from historical moments that illuminate those commitments toward humans that are, at times, binding on powerful authorities by virtue of their agencies.[337] The inquiry potentially becomes

327. *See* Alston, *supra* note 35, at 2080–81 (detailing how the growth in discourse centers around the alleged shortcomings of previous wisdom).

328. *Id.* at 2049.

329. *E.g.*, *id.* at 2068.

330. Jenny S. Martinez, *Human Rights and History*, 126 HARV. L. REV. F. 221, 221 (2012) (emphasis added).

331. *Id.*

332. *Cf.* Alston, *supra* note 35, at 2079 ("But the weakness of the bolder claim that she makes is that she fails to trace the historical evolution of either the basic normative claims of the antislavery movement or the techniques that were pioneered at the time.").

333. *See generally id.* at 2065–67.

334. *Id.* at 2074.

335. This formula is drawn from Emmanuel Levinas's interpretation of the Jewish idea of doing before hearing in his essay "The Temptation of Temptation." EMMANUEL LEVINAS, *The Temptation of Temptation*, *in* NINE TALMUDIC READINGS 30, 41–42 (Annette Aronowicz trans., 1990).

336. "Phenomenology" refers to a philosophical method that begins from inquiry of the embodied experience of the self. The truth-value of that experience is typically bracketed, in order to allow for a rich account of what it is like to occupy the first-person position. *Phenomenology*, STAN. ENCYCLOPEDIA PHIL. (Dec. 16, 2013), http://plato.stanford.edu/entries/phenomenology/.

337. *See generally id.*

helpful in clarifying where it is appropriate to invoke such commitments and how they can best be expressed. Stated in the most general terms, human rights represent a commitment to the idea that rights do not stem solely from legal institutions, be they transnational or sovereign ones. Once that simple fact is realized, certain state policies are rendered simply unavailable to the policy maker.[338] But the political structures of positive law surrounding human rights commitments sometimes help occlude that from view (as Judge Jenkins's underlying commitments were occluded from his own view).[339] The task becomes to reorganize politics in ways that bar societies and their individual members from inflicting violence they purport not to wield as a matter of principle.[340] In the context of the human rights of unauthorized migrants, there are plenty of such "blind spots" today all over the world.[341] Precisely because of this theoretical motivation, the standard postwar moment proved a useful starting point. Rather than an alternative moment of inception, the historical inquiry outlines the structure of rights. This structure is far from what a standard positivist story would allow.

The study above is merely a beginning; much more work is needed in human rights and history in order to more fully explore the possibilities of the approach suggested here. The idea is first and foremost to identify what people do for themselves precisely when they are shut *out* of both sovereignty and transnational governance. There are significant lessons in legal theory to be drawn, for example, from the actions of unauthorized migrants crossing borders today in order to enforce their own rights.[342] These different historical and contemporary examples may together reorient basic questions of normativity. Within the context of such a wider project, for example, the passengers of the *Exodus* will no longer appear (only) as the protagonists of a story about the establishment of Israeli sovereignty.[343] They will also have a role in a story of human rights as self-help. Among other chapters in this story are the journeys the world's poorest migrants and refugees embark on today.[344] Think, for example, of the rickety boats leaving North Africa for Italy.[345] Recently, when many of the migrants (once again) tragically drowned, these stories reached the front pages of international news.[346]

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338. The sharpest positive law formulation of this intuition has been codified in Article 15 of the European Convention of Human Rights, which specifies that particular rights may not be derogated even in the event of "public emergency *threatening the life* of the nation;" (emphasis added). Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221.

339. *See* HERMAN, *supra* note 150, at 105–06 (addressing Judge Jenkins's deliberate omissions from his decision concerning the *President Warfield*).

340. *Cf.* Mann, *Dialectic of Transnationalism*, *supra* note 305, at 346–47 (explaining the need for "legalized processes" to hold countries accountable).

341. *E.g.*, *id.* at 387.

342. *See, e.g.*, Tom Foreman, *The Witch's Brew: Desperation, Hope, and Children on the Border*, CNN, July 18, 2014, http://www.cnn.com/2014/07/17/us/immigration-overview/ ("Hope is a wonderful thing when it spurs struggling people to aspire to better circumstances and a more promising future, lifting communities out of poverty."); *see generally* Kennedy, *Historical Understanding*, *supra* note 326.

343. HALAMISH, THE *EXODUS* AFFAIR, *supra* note 105, at xvi.

344. *See, e.g.*, Luke Mogelson, *The Dream Boat*, N.Y. TIMES, Nov. 15, 2013, http://www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html?_r=0 (documenting the perilous Indonesian-Australian route traveled by refugees).

345. Lizzy Davies, *31 Migrants Drown en Route to Lampedusa*, THE GUARDIAN, July 28, 2013, http://www.theguardian.com/world/2013/jul/28/migrants-drown-lampedusa-crossing.

346. *E.g.*, *id.*; Mogelson, *supra* note 344.

In his review of the important recent work in the history of human rights, Alston concludes by embracing a kind of polymorphism.[347] In the final lines of his review, he writes: "The history of human rights is both long and deep, which is not to say that its progress has been linear, steady, or even predictable. But we need to understand the struggles that have shaped the movement, for better and worse, over the centuries and to acknowledge the role of precedents, including historical precedents, in terms of paving the way for change."[348] For him, human rights are a multifaceted and pluralistic tradition, composed of various elements of transnational governance, sovereignty, and even "historical precedents."[349] While Alston's inclusion of "historical precedents" was indispensable for the argument above,[350] in the final analysis his approach is unsettling. By being so inclusive, it potentially ends up voiding human rights of particular normative meaning.

Consider Alston's observation that Moyn relies considerably upon the work of Professor Martti Koskenniemi.[351] The central point of the literature Koskenniemi has generated is that human rights have no particular normative content at all.[352] Stated more boldly, the argument is that there is no analytic distinction between cases of human rights enforcement and cases of human rights violation.[353] The trivial examples abound: protecting the freedom of speech may often be convincingly described as violating privacy;[354] protecting the exercise of religious freedoms may just as well be a violation of the rights of minorities to inclusion in the public sphere,[355] etcetera. While acknowledging the importance of Koskenniemi's work—"the most brilliant international law scholar of his generation"[356]—Alston does not address the major concern Koskenniemi's critical jurisprudence represents.[357] Indeed, Alston's pluralism seems to *invite* the indeterminacy critique. It provides no normative measure by which to read the rich traditions of human rights.[358] If all of these "polymorphous"

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347. Alston, *supra* note 35, at 2081.

348. *Id.*

349. *See id.* at 2077, 2081 (arguing that human rights must be understood in light of multiple variables that include historical precedents).

350. *Id.* at 2080–81.

351. *Id.* at 2073.

352. *See, e.g.*, Koskenniemi, *The Future of Statehood*, *supra* note 119, at 399 (stating that a polity cannot easily be defined in terms of human rights because knowability and harmony cannot be "sustained in a manner sufficiently compelling for the conduct of politics"); Koskenniemi, *Human Rights Mainstreaming*, *supra* note 34, at 54–55 (expressing skepticism about the involvement of human rights in governance because "mainstreaming" may empty human rights of their meaning or support the wrong preferences).

353. *Cf.* Koskenniemi, *The Future of Statehood*, *supra* note 119, at 399; Koskenniemi, *Human Rights Mainstreaming*, *supra* note 34 at 54–55.

354. *See, e.g.*, Scott Shorr, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1757–59 (1995) (explaining that the protection of free speech under the First Amendment can violate personal privacy interests in the context of corporate data management).

355. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 128 (1992) (explaining that, despite the Establishment Clause doctrine, the U.S. government sometimes infringes upon the rights of minorities where what is considered "secular" by the majority is "fraught with religious significance to a minority").

356. Alston, *supra* note 35, at 2073.

357. *See generally id.* (failing to address Koskenniemi's concerns that human rights have no particular normative content).

358. *See generally id.* at 2081.

traditions need to be accommodated, none of them can be truly determinative when it comes to making politically significant decisions.[359]

The proposed approach shrinks an inflated human rights discourse to very limited and exceptional circumstances in which it is justifiable to speak about human rights *law*: paradigmatically but not only limited to circumstances in which one partakes in killing an innocent person outside of the context of war (by action or omission). This approach does not attempt a democratic inclusion of all relevant cultural and historical materials, as Alston seems to demand.[360] Rather, it seeks to actively choose from history, in an inquiry aimed to locate baselines beyond which the account of equally convincing competing claims no longer rings true. To be sure, there could be differences among us regarding where those baselines lie. What is more important is that they exist; and that one acknowledges them and actively interrogates places in which they appear unexpectedly. This is the baseline that Harrison's report illustrates perhaps most vividly of all.[361] Remember that Harrison identifies conditions that humans simply will not endure without some form of active resistance.[362] And in cases of such resistance, the addressee of their message must either respond to their claim or become their enemy and potentially spell their annihilation.[363] A return to history in the study of human rights may not only reflect where some preconceived notion of rights started. It might also be useful in reminding us that we are caught in such dilemmas more often than we think. It shows us that others before us were caught in such dilemmas. If they did not respond appropriately, under their own measures, it becomes all the more urgent to recognize that it can only be one's own task to decide how to do so.

CONCLUSION

Imagine that you are not able to realize what you believe to be a life worth living. You know that somewhere else—perhaps across the Mediterranean—realizing such a life may be possible, but you are not allowed to traverse the invisible border in the water.[364] So you decide to cross illegally and seek a dignified life elsewhere. You know that on the high seas you can move with no restrictions. But you also know that at some point, you are bound to encounter an armed agent of the navy or the coast

359. *See* Samuel Moyn, *Human Rights in History*, THE NATION, Aug. 11, 2010, *available at* http://www.thenation.com/article/153993/human-rights-history# ("Because they promise everything to everyone, they can end up meaning anything to anyone.").

360. *See* Alston, *supra* note 35, at 2077, (arguing that a meaningful history of human rights must "disaggregate and address separately the different analytical dimensions" of human rights because human rights cannot be "reduced to one or two variables").

361. *See Harrison Report*, *supra* note 111, § IV (indicating that Jews require preferential treatment as a remedy for the actions of the Nazis).

362. *See id.* §§ I, IV(2)(a) (describing the deplorable conditions faced by European Jews in World War II and noting that the desperate Jews in the DP camps are not restrained by the "fear of death" to "employ every possible means to reach their end").

363. *E.g.*, *id.* § IV(2)(a).

364. The fact that the line is in the water is only important here inasmuch as I am thinking of a territory from which sovereignty is absent. But this can also be land, and though the world is divided between states, some areas maintain the same character as global no-man's land. This is perhaps best reflected by Immanuel Kant. See IMMANUEL KANT, *Perpetual Peace*, *in* POLITICAL WRITINGS 93, 106 (Hans Reiss ed., H. B. Nisbet trans., 1991) ("The community of man is divided by uninhabitable parts of the earth's surface such as oceans and deserts, but even then, the *ship* or the *camel* (the ship of the desert) make it possible for them to approach their fellows over these ownerless tracts, and to utilise as a means of social intercourse that *right to the earth's surface* which the human race shares in common.").

guard, whose duty it will be to enforce the law. This official will be much more powerful than you. What you may be able to do, to repeat Judge Jenkins' formulation, is to put yourself in their hands.[365]

Now imagine that you are with the navy or coast guard, and you encounter a flagless vessel on the high seas. You believe that if you conduct your task and send the passengers of this vessel back to where they came from, they will be exposed to a serious risk. They may not be able realize a life worth living. Or perhaps they will be killed. Both sides of this encounter are aware of the existential challenge it presents to them, testing their moral constitution. In the *Exodus* affair, presumably some members of the British Navy felt the command of the encounter with *bare life*. This command is reflected, for example, in the poignant way Lieutenant Commander Bailey, one of the commanders of the interception team, likens the ship to an animal:

> *President Warfield* was a phantom vision as it sailed at full speed with all its dead aboard in the dark of night, with two huge Zionist flags waving on the ship's masts, illuminated by our own large searchlights. Her siren wailing in the night sounded like a wounded, lowing cow escaping to hide itself.[366]

With such a siren, a refugee can tell the border guard at sea: either allow me in and show fidelity to your principles; or show fidelity to your duty and lose your claim to be carrying it out under the dictates of your principles.

The rights of encounter are binding upon all human beings not by virtue of transnational legal arrangements or by virtue of sovereign rule. From the side of the powerful party in the encounter, they are binding only inasmuch as humans claim to morally respect human beings as such. From the side of the powerless party they are binding only inasmuch as humans make human rights claims with the challenge of their presence. They must be willing to take a risk.

The powerful party in the encounter cannot exercise this judgment without the power that the "powerless" party of the encounter exerts on the former—the power of its very presence. "Presence" in this context should not be understood as something that the body alone could furnish. Countless human beings on our planet do not have this relevant kind of presence, although they do have bodies. Presence is something that must be taken and claimed by a certain way of stepping into the (coast guard's) searchlight. From that searchlight, the encounter also must reach the third-party transnational audience, which may translate it into the necessary *embarrassment*. This is reflected at the minimal level by the active attempt to assert one's own right to a dignified life, regardless of citizenship, or lack thereof.

A global *grundnorm* stems from the experience of making a place for oneself in the world, on the one hand and, from the experienced obligation towards those who strive for such a place, on the other. This minimal obligation, once realized and confronted directly, has thoroughgoing political implications. It just might turn out that the way states and international institutions are organized today does not realize that obligation, and therefore lacks the most fundamental form of legal legitimacy.

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365. *See* R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) at 551–52 (noting that British ships at sea that intercepted Jewish refugees would "have on their hands" additional people "to be dealt with some how").

366. KANIUK, COMMANDER OF THE *EXODUS*, *supra* note 13, at 141.

The legitimacy norm of human rights should not be understood as a standard leading incrementally to a better world, or to salvation. Human rights should be understood as imperatives that arise in relatively exceptional circumstances, typically at the borderlines of state jurisdiction and in conditions of heightened risk. Imperatives that tell those who take them as their own what they must do right now, regardless of some imagined deliverance.

The father of legal positivism, John Austin, wrote: "A man is no more able to confer a right on himself, than he is able to impose on himself a law or a duty."[367] But human rights are not positive rights. The powerless party of the human rights encounter violates the first part of Austin's assertion. The powerful party violates its second part. Each party is dependent on the other in doing so.

367. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 305 (1832).

An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights

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SUMMARY

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INTRODUCTION

Charles Evans Hughes said more than a hundred years ago that "[w]e are under a Constitution, but the Constitution is what the judges say it is."[1] Today, nevertheless, in Latin America, it would be more appropriate to say that we are under the American Convention on Human Rights, but the Convention is what the judges of the Inter-American Court of Human Rights say it is. This change in the paradigm comes thanks to the conventionality control theory developed by the Inter-American Court of Human Rights ("Court" or "Inter-American Court") in the last several years.[2] In brief, this conventionality control (or control of conventionality) demands that inter-American and domestic judges examine the compatibility of national rules and practice with the American Convention on Human Rights ("Convention" or "American Convention")[3] as interpreted by the Inter-American Court.[4] For domestic judges, this duty comes in addition to traditional constitutionality control or judicial review within their respective States.

Since the Court started to use the concept of conventionality control, a plethora of articles have explained its origins, legal foundations, development, characteristics,

1. Charles Evans Hughes, Governor of New York, Speech before the Elmira Chamber of Commerce (May 3, 1907), *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906–1908, at 133, 139 (1908).

2. *See generally* DANIEL TODA CASTAN, THE TRANSFORMATION OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: THE STRUCTURAL IMPACT OF THE INTER-AMERICAN COURT'S CASE LAW ON AMNESTIES 34–39 (2013).

3. *Cf.* American Convention on Human Rights art. 64, Nov. 22, 1969, 1144 U.N.T.S. 144, *available at* http://www.oas.org/en/iachr/mandate/Basics/convention.asp [hereinafter American Convention] (noting that it is a duty of court members to provide judgment on the compatibility of national and Convention rules).

4. *See infra* Part I.

consequences, and limits.[5] In this Article I will not repeat these explorations. On the contrary, I will take a different path, presenting the conventionality control as part of a bigger project pursued by the Court (and its supporters) in conceiving itself as an Inter-American constitutional court. My analysis of the conventionality control is also part of a bigger personal project in which I analyze and offer constructive criticism of the structure and functioning of the inter-American system and propose ways to improve it.[6]

First this Article will discuss how the theory of conventionality control partly modifies the theoretical paradigm on which the inter-American system of human rights rests.[7] Traditionally, the inter-American human rights system was conceived of as being subsidiary and complementary to the national legal order. The conventionality control, however, does not act in a complementary or subsidiary manner, but places the American Convention and its inter-American judicial interpreter, the Court, at the top of the legal order. The Convention is no longer a subsidiary treaty but an integral, fundamental, and hierarchically superior norm of the national domestic legal system. In this way, the Court is developing a new principle, which I will refer to as the integration principle. This principle comes to complement, not to replace the traditional principle of subsidiarity. This

5. For a more detailed analysis of the conventionality control concept itself, see Karlos Castilla, *El control de convencionalidad: un nuevo debate en México a partir de la sentencia del caso* Radilla Pacheco, XI ANUARIO MEXICANO DE DERECHO INTERNACIONAL 593 (2011); Eduardo Ferrer Mac-Gregor, *Reflexiones sobre el control difuso de convencionalidad. A la luz del caso* Cabrera García y Montiel Flores vs. México, XLIV BMDC 917 (2011) [hereinafter Ferrer Mac-Gregor, *Reflexiones*]; Sergio García Ramírez, *El control judicial interno de convencionalidad*, V REVISTA IUS, julio–diciembre 2011, at 1; Rolando E. Gialdino, *Control de constitucionalidad y de convencionalidad de oficio. Aportes del Derecho Internacional de los derechos humanos*, LA LEY 1295 (2008); Juan Carlos Hitters, *Control de constitucionalidad y control de convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos)*, 7 ESTUDIOS CONSTITUCIONALES, no. 2, 2009, at 109; Adelina Loianno, *El marco conceptual del control de convencionalidad en algunos fallos de la Corte Suprema argentina "Arancibia Clave", "Simón", "Mazzeo"*, *in* EL CONTROL DE CONVENCIONALIDAD 113 (Susana Albanese ed., 2008); Ernesto Rey Cantor, *Controles de convencionalidad de las leyes*, *in* 8 LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL: ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTAS AÑOS COMO INVESTIGADOR DEL DERECHO 225 (Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea eds., 2008); Oswaldo Ruiz-Chiriboga, *The Conventionality Control: Examples of (Un)Successful Experiences in Latin America*, 3 INTER-AM. & EUR. HUM. RTS. J. 200 (2010); Néstor P. Sagüés, *El "control de convencionalidad", en particular sobre las constituciones nacionales*, LXXIII LA LEY 1, 1–3 (2009), *available at* http://www.joseperezcorti.com.ar/Archivos/DC/Articulos/Sagues_Control_de_Convencionalidad_LL_2009.pdf [hereinafter Sagüés, *El "control de convencionalidad"*].

6. *See generally* Ariel Dulitzky, *50 años del Sistema Interamericano de Derechos Humanos: Una propuesta de reflexión sobre cambios estratégicos necesarios*, *in* 60 AÑOS DESPUÉS: ENSEÑANZAS PASADAS Y DESAFIOS FUTUROS 491 (Gonzalo Aguilar Cavallo ed., 2008); Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, 2011 QUEBEC J. INT'L L. (SPECIAL EDITION) 127 [hereinafter Dulitzky, *Time for Changes*]; Ariel E. Dulitzky, *La OEA y los derechos humanos: nuevos perfiles para el Sistema Interamericano*, 25 DIÁLOGO POLÍTICO no. 4, 2008, at 69; Ariel Dulitzky, *Las Peticiones Individuales ante la Comisión Interamericana de Derechos Humanos o el Amparo Interamericano en Contexto*, *in* TRATADO DE DERECHO PROCESAL CONSTITUCIONAL: ARGENTINO, COMPARADO Y TRANSNACIONAL 667 (Pablo Luis Manili ed., 2010); Ariel Dulitzky, *Reflexiones sobre la judicialización interamericana y propuesta de nuevos perfiles para el amparo interamericano*, *in* LA REFORMA DEL PROCESO DE AMPARO: LA EXPERIENCIA COMPARADA 327 (Samuel B. Abad Yupanqui & Pablo Pérez Tremps eds., 2009) [hereinafter Dulitzky, *Reflexiones*].

7. *See infra* Part II.

transformation occurred, this Article argues, despite the lack of clear textual support in the Convention.

Then, this Article delves into some of the consequences of this new approach. It explains that the conventionality control, by demanding that national judges apply the American Convention over domestic legislation as interpreted by the Court, positions the Inter-American Court as a kind of inter-American constitutional court.[8] The conventionality control also changes the role of domestic judges by requiring them to be the guardians of the supremacy of the Convention as interpreted by the Court. Additionally, the Court may be requiring Latin American tribunals to exercise a judicial review that they are prevented from doing under their own Constitutions. Rather than having a single Inter-American Court as the treaty's interpreter, this Article speculates about the consequences of having thousands of Latin American courts and tribunals,[9] as required by the conventionality control, each interpreting the American Convention. This Article then presents some questions on the proper balance between national and inter-American judges. In sum, I argue that the conventionality control is one of the tools the Court uses to define its own identity and role in the hemisphere and to continue the move to a more *judicialized* approach to human rights protection. Nevertheless, this Article argues that the Court's approach to conventionality control is unidirectional as it does not properly embraces domestic judges in this enterprise.

In order to overcome the limits of the Court's approach, this Article develops an alternative justification and framework for the integration principle.[10] It recognizes that social change will come from within the countries. Thus, making the Convention an integral part of the domestic system could facilitate and promote social change based on human rights standards. The proposal also conceives the relationship between the Court and Latin American judges as a political one where each of them responds to different constituencies and demands at the same time. The integration model, I argue, facilitates the socialization process by which international human rights norms are implemented at the local level. Recognizing the importance of Latin American judges, the proposed integrated model advocates for a more balanced relationship and for a cautious loyalty with the Court and a willingness to question or challenge the Court, rather than a mechanical embracement of its case law.

This Article concludes with a proposal that takes seriously both the conventionality control and the integration principle.[11] This Article proposes amendments to the Convention, as well as procedural and jurisprudential changes to

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8. *See infra* Part III.

9. I use the term "Latin American judges" instead of a more comprehensive and appropriate term like American judges (as judges from the Americas and not the parochial equation of the United States and America as synonymous). By doing so, I am aware that I am leaving aside and making invisible the judges from the English-speaking countries that have ratified the Convention. This is a traditional and well-deserved critique and problem of the inter-American system in general. *See generally* Auro Fraser, *From Forgotten through Friction to the Future: The Evolving Relationship of the Anglophone Caribbean and the Inter-American System of Human Rights*, 43 REVISTA IIDH, Enero–Junio 2006 at 207 (criticizing the absence of Anglophone Caribbean nations in discussions regarding the inter-American system of human rights). I do so only because the focus of my study is the relationship between the inter-American human rights system and Latin American countries.

10. *See infra* Part IV.

11. *See infra* Part V.

strengthen and deepen the principle of integration to complement that of subsidiarity. My proposal attempts to overcome some of the critiques to the conventionality control.

I. The Conventionality Control in Brief

The American Convention is a treaty that has been ratified and is currently in effect in 23 Member States of the Organization of American States (OAS).[12] The Convention creates two organs as "means of protection" and with "competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to th[e] Convention":[13] the Court and the Inter-American Commission on Human Rights (the Commission).[14] For the Court to intervene in individual cases, States need to ratify the Convention and to make an additional declaration accepting the contentious jurisdiction of the Court.[15] According to its statute, the Court "is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention."[16] The Convention indicates that the "judgment[s] of the Court [are] final and not subject to appeal."[17] States "undertake to comply with the judgment of the Court in any case to which they are parties."[18]

In the context of deciding individual cases, traditionally the main task of the Court was to determine whether a state action or omission constituted a violation of the Convention and whether there was international state responsibility.[19] Nevertheless, in the last two decades, the Court greatly expanded its reach. Of particular importance in this evolution are the expansive and detailed remedies ordered by the Court.[20] Another crucial and recent tool used in this enterprise is the use of the conventionality control theory.[21] This theory was first explicitly used by the Inter-American Court in 2006 in *Almonacid-Arellano v. Chile*:

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12. *American Convention on Human Rights "Pact of San Jose, Costa Rica" B-32*, ORG. OF AM. STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Oct. 30, 2014) (detailing both the current Member States of the Organization of American States who have ratified the Convention, a well as Venezuela's denunciation, which took effect September 2013).

13. American Convention, *supra* note 3, art. 33.

14. *Id.*

15. *See id.* art. 62 (declaring that Member States who have ratified the Convention have the additional power to give the Court jurisdiction over any and all cases relating to the "interpretation or application" of the Convention).

16. Org. of Am. States, Statute of the Inter-American Court of Human Rights, G.A. Res. 448, art. 1 (Oct. 1979), *available at* http://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp [hereinafter Statute of the Inter-American Court].

17. American Convention, *supra* note 3, art. 67.

18. *Id.* art. 68.

19. *See, e.g.*, Castillo Petruzzi v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, para. 90 (May 30, 1999) (stating that although "[t]he Court does have authority to rule that States that violate human rights bear international responsibility," it does not have the authority to investigate or punish beyond this).

20. *See, e.g.*, Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 368, 371 (2008) (discussing the Court's recent increased propensity to grant equitable relief).

21. Sometimes the Court uses the expression "control of the conformity" between domestic law and the human rights treaties to which the State is a party. *E.g.*, Mendoza v. Argentina, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, para. 221 (May 14,

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, *the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.* (emphasis added).[22]

While the need for the compatibility of domestic legislation with the Convention is nothing new in the Court's jurisprudence,[23] *Almonacid,* for the first time, introduced the requirement that national judges exercise this compatibility control between the domestic norms and the Convention.[24] In *Dismissed*

2013).

22. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006). *Almonacid* involved the lack of judicial investigation and punishment in the extrajudicial execution of a political dissident by Chilean security forces. *Id.* para. 3. Previously there were references to "control of conventionality" or similar language in some concurring opinions by Judge Sergio García Ramírez. *E.g.*, Vargas-Areco v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, paras. 6, 12 (Sept. 26, 2006) (García-Ramírez, J., concurring) (addressing the Court's duty to "control[] compliance" with the convention); Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, para. 3 (Sept. 7, 2004) (García-Ramírez, J., concurring) (comparing the Court's duty to determine the "conventionality" of State action to a domestic judiciary's duty to "control[] constitutionality"); Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, para. 27 (Nov. 25, 2003) (García-Ramírez, J., concurring) (discussing the court's "treaty control" obligation).

23. *E.g.*, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, para. 58 (Dec. 9, 1994) [hereinafter International Responsibility] ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty. Furthermore, if such violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the state in question. [In addition,] the enforcement by agents or officials of a state of a law that manifestly violates the Convention gives rise to international responsibility for the state in question. If the enforcement of the law as such constitutes an international crime, it will also subject the agents or officials who execute that law to international responsibility."); *cf.* Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Inter-Am. Ct. H.R. (ser. A) No. 13, para. 57 (July 16, 1993) ("Within the terms of the attributes granted it by Articles 41 and 42 of the Convention, the Commission is competent to find any norm of the internal law of a State Party to be in violation of the obligations the latter has assumed upon ratifying or adhering to it, but it is not competent to decide whether the norm contradicts the internal juridical order of that State.").

24. In fact, some have argued that the requirement that judges verify the compatibility of domestic legislation with the Convention existed prior to *Almonacid*; the only innovation of *Almonacid* was to name this obligation "conventionality control." *See* Humberto Nogueira Alcalá, *Los desafíos del control de convencionalidad del* corpus iuris *Interamericano para las jurisdicciones nacionales*, XLV BMDC 1167, 1175 (2012) [hereinafter Nogueira Alcalá, *Los desafios*] (noting that the *Almonacid* case formalized the requirement for conventionality control).

Congressional Employees v. Peru, the Court specified that the conventionality control (no longer referring to it as "a sort of ") must be exercised ex officio or sua sponte by all judicial authorities.[25] Additionally, the Court clarified that judges must exercise the control within "the context of their respective spheres of competence and the corresponding procedural regulations."[26] It added that "[t]his function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action."[27]

In *Cabrera García v. Mexico*, the Court extended the obligation to exercise conventionality control from the judiciary to all "domestic legal provisions," "at all levels."[28] A further step in this evolution came in *Atala Riffo v. Chile*, in which the Court included the conventionality control in the section on reparations, demanding that judges exercise this control of conventionality as a form of reparation for human rights abuses.[29] Finally in *Gelman v. Uruguay*, the tribunal continued to expand and explain the scope of the control by requiring that the control be exercised by all state authorities, not only judges.[30] It added that all States Parties to the Convention and all their organs were legally required to exercise the conventionality control using the Court's interpretation of the treaty even if their State was not part of the specific case.[31]

Since *Almonacid*, the Court has consistently used this control of conventionality in a multitude of cases. The cases where the Court applied this theory differed in their factual situations, the legal issues discussed, the States involved, or the domestic judge's use of the American Convention.[32] In other words, the Court has used the theory across the board regardless of the particularities of the case.

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25. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128 (Nov. 24, 2006). The case dealt with the lack of effective remedies for congressional staffers illegally removed from their positions. *Id.* paras. 102–32.

26. *Id.* para. 128.

27. *Id.*

28. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 225 (Nov. 26, 2010). The claim concerned two Mexican peasants and environmentalists who were illegally detained and tortured by the Mexican Army. *Id.* paras.. 2, 53.

29. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, paras. 281–84 (Feb. 24, 2012). In *Atala*, the Court dealt with the illegal use of the sexual orientation of a mother to determine the custody of her daughters after her divorce. *Id.* para. 59.

30. Monitoring Compliance with Judgment, Order of the Court, "Considering," para. 66 (Inter-Am. Ct. H.R. Mar. 20, 2013), *available at* www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13_ing.pdf. *Gelman* relates to a case of enforced disappearance and the subsequent application of an amnesty law in the judicial investigation of the case. *Id.* para. 1.

31. *Id.* paras. 66–69.

32. *E.g.*, García Cruz v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 273, paras. 59–61 & nn.76, 82 (Nov. 26, 2013) (concerning detention and due process); Mendoza v. Argentina, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, para. 221 (May 14, 2013) (concerning juvenile life imprisonment without parole); Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser C.) No. 259, paras. 142–44 (Nov. 30, 2012) (concerning a civilian massacre); Apitz Barbera v. Venezuela, Monitoring Compliance with Judgment, Order of the Court, "Considering," paras. 26–37 (Inter-Am. Ct. H.R. Nov. 23, 2012), *available at* http://www.corteidh.or.cr/docs/supervisiones/apitz_23_11_12_ing.pdf (concerning dismissal of judges); Furlan v. Argentina, Preliminary Objections, Merits,

In sum, the conventionality control requires that all State authorities, but particularly judges, apply the Convention as interpreted by the Court in all their interventions. While there are a variety of ways that the conventionality control can be interpreted in good faith, there is, however, a danger that it can be interpreted in an absolutist way that causes strong doubts about its prospects and potential unintended consequences. In this absolutist interpretation, the Convention becomes an integral component of the domestic legal system and is transformed from a complementary or subsidiary international treaty creating international obligations to a domestic norm hierarchically superior to the domestic legal system including national constitutions.[33] And in this transformation the Court is placed as the final and sole proper interpreter of the Convention. The lack of analysis provided by the Court and the expansive language in its latest decisions suggest that this absolutist way is the Court's view of the conventionality control. Hence in this Article I will focus on that absolutist interpretation for purposes of my argument to show the potential problems and how to overcome them.

II. FROM SUBSIDIARITY TO INTEGRATION AND BACK

A. *The Traditional Understanding of the Principle of Subsidiarity*

The traditional principle of subsidiarity is foundational to both the protective function of international human rights law and the institutional functions and identity of human rights supervisory bodies.[34] The inter-American system was conceived as complementary or auxiliary to the national/domestic rights protection system. This subsidiarity principle is expressed in the Preamble of the American Convention, which conceives of the treaty as "reinforcing or complementing the protection provided by the domestic law of the American States."[35] Procedurally, the main manifestation of the principle of subsidiarity is the requirement that a petitioner exhaust all domestic remedies prior to accessing the inter-American bodies.[36] The State must have the possibility to resolve matters at the domestic level before being sued internationally.[37] The subsidiarity principle stems from the idea that States have the primary responsibility to protect the rights of individuals through their domestic

Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, paras. 302–05 (Aug. 31, 2012) (concerning lack of due process due to delay); Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, paras. 176–77 (Nov. 24, 2010) (concerning extrajudicial execution, enforced disappearances, and amnesty laws); Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser C.) No. 213, paras. 14–15 (May 26, 2010) (concerning extrajudicial execution of a politician).

33. I thank Tara J. Melish for this pertinent observation.

34. Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L., 389, 438 (2009). *See generally* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

35. American Convention, *supra* note 3, pmbl.

36. *E.g.*, *id.* art. 46.

37. *E.g.*, Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 61 (July 29, 1988) ("The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction . . . .").

legal systems and practices, and in case they fail to do so, the American Convention and the organs that it creates (the Court and the Inter-American Commission) act as a complement to domestic laws and practices in redressing victims.[38] Importantly, subsidiarity is also premised on the understanding that local actors, including legislators and judges, are in the best position to appreciate the complexity of circumstances on the ground. Those local actors are better suited to understand what measures may be most effective for internalizing human rights norms in distinct social, economic, cultural, historical, and political contexts.[39]

The subsidiarity principle recognizes that the domestic legal order has primary responsibility to respect and guarantee the rights recognized in the Convention through Article 1.1.[40] Article 2 refers to the "exercise of any of the rights or freedoms . . . not already ensured by legislative or other provisions" and to the States' commitment to adopt, "in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."[41] The Convention adds in Article 43 that "[t]he States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention."[42] The Convention is not required to be part of the domestic legal system and does not replace those domestic legal orders. Importantly, States are only required to effectively guarantee the conventional rights.[43] The Convention only functions as a subsidiary normative framework constituting the minimum level of protection of rights that must be recognized and guaranteed by the States and also requiring local judges to justify their decisions taking into account the Convention.[44]

From the text of the Convention nothing can be derived about how the Convention should be domestically incorporated nor if it should rank at any particular level in the domestic system. It is for each State to decide what place to assign the Convention in its domestic legal system.[45] It could be that, for

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38. *See, e.g.*, Acevedo-Jaramillo v. Peru, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 157, para. 66 (Nov. 24, 2006) ("[T]he State is the principal guarantor of the human rights and that, as a consequence, if a violation of said rights occurs, the State must resolve the issue in the domestic system and redress the victim before resorting to international forums such as the Inter-American System for the Protection of Human Rights . . . .").

39. Melish, *supra* note 34, at 443.

40. American Convention, *supra* note 3, art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . .").

41. *Id.* art. 2.

42. *Id.* art. 43.

43. *See id.* art. 2 (providing that when States have not adopted rights or freedoms protected by the Convention they should "undertake to adopt, in accordance with their constitutional processes," measures to guarantee Conventional rights).

44. *See id.* art. 29(b) ("No provision of this Convention shall be interpreted as: restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party . . . .").

45. *See, e.g.*, Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/85, Inter-Am. Ct. H.R. (ser. A) No. 7, para. 33 (Aug. 29, 1986) (addressing how States can come into conformity with their obligations under the

convenience, some States choose to grant a hierarchical status to facilitate compliance with the Convention,[46] but there is no international obligation to do so.[47] As a policy matter, I agree that it makes sense to have the Convention as a domestic norm at the highest possible level and to require judges to apply it. Because of this position I would make the conventionality control requirement explicit, as I will explain later.[48]

B. The Integration Principle

In its more radical version that appears to flow from the decision of the Court, the conventionality control changes this traditional and well-accepted principle by demanding that the Convention operate not only complementarily but rather in a concurrent manner at the highest level of the national legal system.[49] By requiring domestic judges in each of their cases to examine the compatibility of state actions or omissions and the compatibility of the national legal framework with the Convention, the Inter-American instrument becomes an integral part of domestic legal systems at the highest possible level. This is what I call the integration principle.

The integration principle seeks to embed the American Convention in national legal systems in order to provide solutions where justifications for subsidiarity fail.[50] Subsidiarity generally works when there is a functioning democratic system and, particularly, an independent and effective judiciary.[51] The Court never had this privilege, as most of the cases that it dealt with (and in part still deals with) involve issues where grave and massive human rights violations have taken place[52] and the national courts are unable, incapable, powerless, or unwilling to intervene.[53] In other cases decided by the Court the main problems originated in failures by those same national courts to secure due process guarantees[54] or to provide effective remedies

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Convention).

46. As most Latin American constitutions do. *See infra* note 64 and accompanying text.

47. *See infra* notes 65–66 and accompanying text.

48. *See infra* Part V.B.1.

49. *See* TODA CASTAN, *supra* note 2, at 34–35 (describing conventionality control as consisting of two types of control: "that exercised by the Court itself, and that exercised by national authority").

50. *See, e.g.*, Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 136–37 (2008) (explaining the integration principle in the context of the European Convention on Human Rights (European Convention)).

51. *See, e.g., id.* at 128 (explaining that subsidiarity "finds its animating spirit" in the availability domestically of effective remedies, among other things).

52. *See, e.g.*, David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 2 (David J. Harris & Stephen Livingstone eds., 1998) ("[Cases in the Inter-American system] have been much more to do with the forced disappearance, killing, torture and arbitrary detention of political opponents and terrorists than with particular issues concerning, for example, the right to a fair trial or freedom of expression that are the stock in trade of the European Commission and Court.")

53. *Cf.* Nuno Garoupa & Maria A. Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 CARDOZO J. INT'L & COMP. L. 593, 616 (2011) (discussing how Latin American judiciaries are "perceived as incompetent, ineffective, politically, and financially corrupt" and that they "tend to be weak in terms of their credibility and legitimacy" despite efforts to reform them).

54. *See, e.g.*, Richard J. Wilson, *Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America*, 14 SW. J.L. & TRADE AMERICAS 287,

for human rights abuses.[55] Some but not all of those problems could be attributed to the lack of use of the American Convention by domestic courts.[56]

So, it is not surprising that the Court sought to develop new tools and new theories to deal with these structural issues and problems.[57] Some examples of the Court's innovative approaches to overcome domestic deficiencies are the expansive approach to reparations,[58] the detailed factual determinations that go into the minutia (as any other international tribunal does),[59] the Court's refusal to apply the European standard of a margin of appreciation,[60] and the flexible approach to exemptions to the requirement to exhaust domestic remedies.[61] The integration principle via the conventionality control is another attempt to respond to the limitations of the subsidiarity principle given the context in the Americas by pushing national institutions to "appropriate the Convention and make it their own.[62] From this perspective, the Court's approach departs from the subsidiarity principle. Rather than giving leeway to domestic courts to decide how to implement the Convention it imposes a particular one: direct applicability of the Convetion.

Traditionally, it was argued that one of the main differences between the European and the inter-American system was the existence of a democratic State and independent judiciary in Europe, which was lacking in Latin America.[63] The emergence of the conventionality control doctrine and the integration principle show that currently, after almost thirty years of a sustained move to more stable democratic governance in Latin America, the Court may have more confidence in the judiciary of the region. Rather than giving leeway to Latin American States on

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295–98 (2007) (addressing the Court's jurisprudence where State tribunals suspend due process protections).

55. *See, e.g., id.* at 312 (discussing a case where the Court found that the availability of only limited appeals was an inadequate remedy under the Convention).

56. *See, e.g.*, Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q., 856, 884 (2009) (stating that States Parties routinely fail to make "Convention based rights operative under domestic law" or judges may apply "norms of domestic law in contravention of their state's engagements under the American Convention"); *see also* Claudio Nash Rojas, *Control de convencionalidad. Precisiones conceptuales y desafíos a la luz de la jurisprudencia de la Corte Interamericana de Derechos Humanos*, *in* ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, 489, 491 (Christian Steiner ed., 2013) (explaining that domestic judges do not consistently apply the Convention).

57. *E.g.*, Harris, *supra* note 52, at 10–11(discussing the Court's interpretation innovations).

58. *E.g.*, Antkowiak, *supra* note 20, at 371–86.

59. *See, e.g.*, Álvaro Paúl, *In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights*, 55 REVISTA IIDH 57, January-June 2012, at 80 (referring to the "tribunal's attempt to settle as many facts as possible – probably for giving a more colorful account of the facts").

60. *See, e.g.*, Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 NW. J. INT'L HUM. RTS. 28, 61–63 (2012) (discussing the Court's hostility to the margin of appreciation standard).

61. *E.g.*, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, para. 42 (Aug. 10, 1990).

62. *See* Carozza, *supra* note 34, at 75 (addressing how the European Court of Human Rights (ECHR) has allowed European States to interpret the Convention to make it a part of domestic law).

63. *E.g.*, Henry Steiner & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 869 (2d ed. 2000) (describing the hostile, authoritarian environment within which the Inter-American system developed, as compared to the experience of its European counterpart).

how to incorporate and use the Convention, the Court prefers to take a stronger position, requiring that the Convention be fully integrated into the domestic legal system.

In fact, the Court follows a trend initiated by Latin American constitutions more than twenty or thirty years ago. The constitutional reform process that took place in the region in the last three decades gave international human rights treaties a special status within the constitutional framework.[64] But this Latin American process was done as a political choice by the reformers and not as a legal obligation coming from the Inter-American Court.[65] In these countries where the Convention has a constitutional status, the conventionality control becomes part of the judicial review or constitutionality control because of the decision of the constitutional framers and not of the Court.[66] In these countries the Convention becomes part of what is known as the "constitutional bloc" composed by the Constitution and those treaties with constitutional status. Judicial review checks the compatibility of any state action or omission with the "constitutional bloc".[67] Finally, it is important to note that not all the constitutions of the States Party to the Convention grant a special status to the Convention or to human rights treaties in general.[68]

The integration principle, by requiring a constant use of the American Convention and Inter-American precedents by domestic courts, expands and complements the subsidiary principle. The integration principle shares the same foundational idea of subsidiarity: Interpretation and implementation of human rights law should "occur[] at the domestic level, as close as possible to the affected individual," and the "struggle over the meaning of rights and their application to concrete . . . situations [should] take place within domestic control mechanisms."[69]

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64. *See generally* Ariel E. Dulitzky, *La aplicación de los tratados sobre derechos humanos por los tribunales locales: un estudio comparado*, *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES 33 (Martín Abregú & Christian Courtis eds., 2004) [hereinafter Dulitzky, *La aplicación*] (quoting the Constitutions of Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paragua, Peru, and Venezuela). In the last ten years, the Constitutions of Bolivia (2009), CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [C.P.] art. 13; Brazil (2004), CONSTITUTIÇÃO FEDERAL art. 109 (Braz.); Dominican Republic (2010), CONSTITUCION DE LA REPUBLICA DOMINICANA art. 74; Ecuador (2008), CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR art. 84 (2008); and Mexico (2011), Constitución Política de los Estados Unidos Mexicanos, *as amended*, art. 1o, Diario Oficial de la Federación [DO], 10 de junio de 2011, all gave a new or revised constitutional status to international human rights treaties.

65. *Cf.* Dulitzky, *La aplicación*, *supra* note 64, at 43–44 (describing the political choice some Latin American constitutional framers made to require special procedures to protect human rights and human rights treaties).

66. *E.g.*, Valério de Oliveira Mazzuoli, *O controle jurisdicional da convencionalidade das leis no Brasil*, *in* ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, *supra* note 56, at 417, 419 (discussing how Brazilian constitutional framers implemented conventionality control independent of the court).

67. *See, e.g.*, Rodrigo Uprimmy, EL BLOQUE DE CONSTITUIONALIDAD EN COLOMBIA: UN ANÁLISIS JURISPRUDENCIAL Y UN ENSAYO DE SISTEMATIZACIÓN DOCTRINAL 10 (2005), *available at* http://redescuelascsa.com/sitio/repo/DJS-Bloque_Constitucionalidad%28Uprimny%29.pdf (discussing how Columbia's judicial system interprets and uses "bloque de constitucionalidad").

68. For example, various constitutions fail to mention the Convention or provide a particular status to human rights treaties. *E.g.*, CONST. OF BARBADOS (1966); GRONDWET VAN DE REPUBLIEK SURINAME [CONSTITUTION] 1987; CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL (Uru.).

69. Melish, *supra* note 34, at 452.

The Court has explained the connection between the principle of subsidiarity and the conventionality control. According to the Tribunal there is "a dynamic and complementary control . . . between the domestic authorities (who have the primary obligation) and the international instance (complementarily), so that their decision criteria can be established and harmonized."[70] "[I]t is only if a case has not been settled at the domestic level, as corresponds in the first place to any State . . . in effective exercise of control of conformity with the Convention [conventionality control], that the case can be lodged before the [Inter-American] system . . . ."[71] Conceived in this way, the integration principle could be understood in fact as an aspect of the subsidiarity principle.

But there is another aspect of the conventionality control that informs the integration principle that appears to be a limitation and restriction to the subsidiarity principle. Subsidiarity presupposes that, under international law, States are required to comply with the treaty, and under both international and domestic law, States are free to choose how and at what level to incorporate the Convention into their domestic legal systems.[72] The conventionality control, as it appears to be understood by the Court, not only requires, as a matter of an international obligation, that the Convention be incorporated as domestic law but also that it have a higher status than any other domestic norm, including the Constitution or any other lower legislative act.[73] If domestic judges must check the compatibility of all state action, whether constitutional or legislative, with the American Convention as a matter of international and domestic law, this means that the Convention must be of a higher legal rank. If it were at the same hierarchical level as the rest of the normative order, judges would simply apply the principle *lex posterior derogat priori*, or that the act later in time should prevail over the earlier one, or the principle *lex specialis derogat generali,* which claims that the special or specific law overrules the general law.[74]

Treaties, including the American Convention, do not specify how domestic law incorporates those international norms.[75] The relationship between international treaties and domestic law is subject to the national constitutional and legislative framework.[76] States have traditionally been given wide latitude in this matter.[77] Subsidiarity, Carozza explains,

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70. Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, para. 143 (Nov. 30, 2012).

71. *Id.* para. 144.

72. Carozza, *supra* note 34, at 62–63 ("[T]he institutional supervision and enforcement of international human rights law is notable mostly for the extent that it still relies so heavily on states' discretion regarding the degree and manner of implementation of human rights domestically.").

73. *See, e.g.*, Sagüés, *El "control de convencionalidad", supra* note 5, at 2 ("En Estados donde la doctrina jurisprudencial establecida por la Corte Suprema o el Tribunal Constitucional es obligatoria para los tribunales inferiores, ella también reviste materialmente condición de norma, y por ende, está captada por dicho control. Incluso, la constitución nacional, no exceptuada en los veredictos aludidos . . . . El pacto assume así condición de supraconstitucionalidad." [In states where the jurisprudence established by the Supreme Court or Constitutional Court is obligatory for lower courts, this also takes on the characteristics of a legal norm, and consequently, is understood to have as much control . . . . In this way the Pact takes on the conditions of supraconstitutionality.]).

74. *E.g.*, Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670, 680 (2011).

75. Carozza, *supra* note 34, at 62–63.

76. *Id.* at 63.

> open[s] up a wide range of possibilities for the precise role of international norms; the treaties themselves do not specify that domestic law must follow any particular pattern of incorporation. Rather, the relationship of international treaties to domestic law will be subject to the requirements and possibilities of domestic constitutional and statutory law. While some states will allow for the direct applicability of human rights treaties, others will internalize the international norms through legislation, and still others may maintain an entirely dualist approach that gives international law no domestic effect at all.... [T]he mechanisms of implementation and enforcement accord very wide latitude to states.[78]

In the past, the Court consistently insisted that domestic norms, including a State's constitution, need to conform to the Convention.[79] But up to *Almonacid,* it never required judges to directly apply the Convention. It always left it to the judicial authorities' discretion how to secure such compatibility.[80] Of course, the wide latitude simultaneously requires full compliance with the treaty.[81]

In contrast, the conventionality control as understood by the Court makes it mandatory that the Convention function as a domestic and legally binding standard with a higher rank than any other legislation, including the Constitution. Thus, the conventionality control theory breaks the traditional scheme for the incorporation of international law into domestic law. The integration principle makes the Inter-

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77. *Id.*; *see also* U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras. 13, 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (stating that the International Covenant on Civil and Political Rights, a treaty similar to the American Convention, "allows a State Party to pursue [the Covenant's substantive guarantees] in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law," and observing that "the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law"); Indep. News & Media PLC v. Ireland, App. No. 55120/00, 2005-V Eur. Ct. H.R. 33, 61 ("A State remains free to choose the measures which it considers best adapted to address domestically the Convention matter in issue...."). Even in Europe, where most national constitutional courts and other high courts of appeal have decided that there is a constitutional obligation to enforce the European Convention and to faithfully apply the European Court's jurisprudence, those same constitutional courts have stressed that the European Convention does not have formal constitutional rank. *See, e.g.*, Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, BEPRESS (Oct. 2009) 13, http://works.bepress.com/alec_stone_sweet/33/ ("[M]ost constitutional courts have stressed that the Convention does not have formal constitutional rank....). The European constitutional courts have asserted that "it is the national Constitution that ultimately regulates the relationship between the domestic legal order and the Convention system," not the European Court or the European Convention itself. *Id.*

78. Carozza, *supra* note 34, at 63–64.

79. *See, e.g.*, International Responsibility, *supra* note 23, para. 58 ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.").

80. Nogueira Alcalá, *Los desafíos*, *supra* note 24, at 1175.

81. The *Medellin v. Texas* case decided by the U.S. Supreme Court exemplifies the negative effects of the wide latitude given to States regarding how to incorporate international treaties and execute international judgments. 552 US 491, 509–11 (2008) (discussing the enforceability of International Court of Justice decisions in the United States and that the U.S. government is not obliged to follow such decisions).

American Court, rather than the State, the final interpreter on how international human rights commitments deriving from the American Convention are translated into domestic law.[82] As such, the Court is taking an absolutist construction of the conventional duties, accepting only one method to give effect to the treaty.[83] The integration principle also challenges the traditional concept that a State may commit itself to protect human rights on an international plane by ratifying a human rights treaty, but those rights may not be self-executing on the domestic plane.[84] By instructing domestic courts not to enforce national laws that violate the Convention, the treaty becomes self-executing regardless of what the domestic legal system establishes.[85]

The integration principle as developed by the Inter-American Court, via the conventionality control, resembles more the European Union (EU) model than the European human rights system model. In effect, the legal system of the EU is based on the assumption of the primacy of community law over domestic law.[86] The Court of Justice of the European Union (CJEU) has consistently insisted that European law prevails over national legislation.[87] The principle of supremacy of European law was introduced by the CJEU in the *Costa v. ENEL* case in 1964, where the CJEU understood that the European Community created its own legal system, which "became an integral part of the legal systems of the Member States and which their courts are bound to apply."[88] Moreover, it ruled that European law "could not, because of its special and original nature, be overridden by domestic legal provisions,

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82 *See, e.g.*, Cabrera García v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 225 (Nov. 26, 2010) ("In its case law, this Court has acknowledged that domestic authorities are bound to respect the rule of law, and therefore, they are required to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, all its institutions, including its judges, are also bound by such agreements, which requires them to ensure that all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end. The Judiciary, at all levels, must exercise ex officio a form of 'conventionality control' between domestic legal provisions and the American Convention, obviously within the framework of their respective competences and the corresponding procedural regulations. In this task, the Judiciary must take into account not only the treaty itself, but also the interpretation thereof by the Inter-American Court, which is the ultimate interpreter of the American Convention.").

83. *Cf.* Melish, *supra* note 34, at 445 (addressing the United States's jurisdictional aggressiveness in rejecting absolutist construction of human rights law that denies to the United States the right to decide how to incorporate international human rights law domestically).

84. *See, e.g.*, 138 CONG. REC. 8071 (1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the [International Covenant on Civil and Political Rights] are not self-executing.").

85. *See, e.g.*, JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 217 (2d ed. 2012) ("The Inter-American Court has taken the unprecedented step of declaring that State laws in violation of the American Convention lack legal effect domestically. In essence, the Inter-American Court is instructing domestic courts not to enforce those national laws that violate the American Convention." (citation omitted)).

86. *E.g.*, Consolidated Version of the Treaty on the Functioning of the European Union declaration 17, Mar. 30, 2010, 2010 O.J. (C 83) 1, 343 [hereinafter TFEU] ("[I]n accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States . . . .").

87. *E.g.*, Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1126, 1146.

88 Case 6/64, Costa v. ENEL, 1964 E.C.R. 587, 593.

however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."[89] This is exactly the same rationale that the Inter-American Court takes with regard to the American Convention. This position has never been taken by the European Court of Human Rights (European Court).[90] And it is important to insist, the American Convention is a human rights treaty that does not create nor intends to create an inter-American legal system.

C. The Conventionality Control and the Legal Constraints of Domestic Judges

In this metamorphosis of the Convention from an international treaty to a hierarchically superior domestic norm, the Court is asking local tribunals to exercise both judicial review and conventionality control even if those tribunals are not constitutionally authorized to perform them. The Court appears to be ignoring that Article 2 of the Convention, which requires that the rights be guaranteed in accordance with "constitutional processes."[91] In particular, the Court is asking domestic courts not to apply rules contrary to the Convention even if the Convention has a rank similar to or lower than the law (or Constitution) in question, or even if the judge does not have the authority to override legal norms.[92]

The Court has tried to overcome this problem by simplistically stating that judges should exercise conventionality control within their powers.[93] But this does not solve the problem when judges, as they do in most countries, lack such powers to avoid the application of the Constitution or other laws. Nor does it explain how judges can exercise this control in a country where judicial review of constitutionality

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89. *Id.* at 594.

90. In Europe, constitutional courts have stressed that the European Convention does not have a formal constitutional rank and it is the Constitution, not the European Convention or the European Court that regulates the relationship between the domestic legal order and the European treaty. Stone Sweet, *supra* note 77, at 13.

91. American Convention, *supra* note 3, art. 2(1).

92. The European Court, to the contrary, has been more aware of those constraints, stating that it "cannot be oblivious of the substantive or procedural features of [Member States'] respective domestic laws." Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 31 (1979). The most extreme example of the Inter-American Court's position is *Boyce v. Barbados* regarding the death penalty in that Caribbean country. Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007). In this case, the Court required the conventionality control to be performed even in countries where the judges themselves cannot exercise judicial review or, for that matter, conventionality control. *Id.* paras. 60, 78–80. Article 26 of the Constitution of Barbados prevents courts from declaring the unconstitutionality of laws that have been enacted before the entry into force of the Constitution, that is, before November 30, 1966. CONST. OF BARBADOS § 26. Such is the case of the law providing for the mandatory imposition of the death penalty for murder cases. *Boyce*, Inter-Am. Ct. H.R. (ser. C) No. 169, para. 75. So the courts of Barbados in the case which was under consideration by the Court were legally prevented from exercising judicial review. The Court, however, criticized the Judicial Committee of the Privy Council of the United Kingdom of Great Britain (which at that time acted as the court of appeals of Barbados) for making "purely constitutional analysis that did not take into account the State's obligations under the American Convention as interpreted by this Court's jurisprudence." *Id.* para 77. It added that the analysis of the Judicial Committee of the Privy Council should not have been limited "to the issue of whether the [law] was unconstitutional. Rather, the question should have also been whether it was 'conventional.'" *Id.* para. 78.

93. *E.g.*, Dismissed Congressional Employees v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128 (Nov. 24, 2006).

is concentrated in a constitutional or Supreme Court.[94] Several Latin American constitutions explicitly require the compatibility of international treaties with the Constitution and allow constitutional courts to declare the unconstitutionality of treaties, even in countries where human rights treaties are granted a special status.[95] Moreover, the Court has required that judges perform this conventionality control ex officio or sua sponte,[96] when in many countries judges are forbidden to resolve more than what was requested and argued by the parties.[97] Judges may even be officially barred from exercising ex officio judicial review.[98]

The Court's position is even more extreme than the requirements and practices of a fully developed integration system such as the EU. In the EU context, "national courts have come to accept the twin doctrines of supremacy and direct effect" elaborated by the CJEU and thus "now routinely set aside national legislation when it conflicts with EU directives, regulations, and Treaty provisions."[99] Yet the domestic courts have not fully accepted the idea that European law prevails over domestic constitutions[100] or embraced the idea of being "subservient lower courts of a new judicial hierarchy in which the [CJEU] act[s] as supreme federal tribunal."[101] Many European tribunals "have attached reservations to their acceptance of supremacy and direct effect" of European law.[102] Those domestic European courts

94. For example, Colombia, Peru, Costa Rica, and Guatemala, to name a few. *E.g.*, Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189, 205–09 & 203 tbl.4 (2005); *see also* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1216–17 (2011) (addressing the problem of requiring judges without authority to exercise judicial review to do so).

95. *E.g.*, C.P. art. 202.9 (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 82; CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 241.10; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 272.e.

96. *Dismissed Congressional Employees*, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128.

97. *Cf.* Keith S. Rosenn, *Judicial Review in Brazil: Developments under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 294 n.16 (2000) (mentioning that the Supreme Federal Tribunal of Brazil cannot address issues sua sponte when its jurisdiction is arises from an extraordinary appeal).

98. For the evolution of the situation in Argentina, see Agustín Gordillo, *La progresiva expansión del control de constitucionalidad de oficio*, 2004-E LA LEY 2004-E 1231, 1231-33 (2004), *available at* http://gordillo.com/articulos/art11.pdf.

99. Arthur Dyevre, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?*, 9 EUR. CONST. L. REV. 139, 140 (2013).

100. This is particularly the case of the German Federal Constitutional Court. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, 132 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 287 (290–91), 2012 (requiring treaties to be compatible with the German constitution); BVerfG Sept. 7, 2011, 129 BVERFGE 124 (149–50), 2011 (considering the constitutionality of the Maastricht Treaty); BVerfG June 30, 2009, 123 BVERFGE 267 (330), 2009 (considering the constitutionality of the Lisbon Treaty); BVerfG June 7, 2000, 102 BVERFGE 147 (161–64), 2000 (stating that the court would not exercise its jurisdiction to review the compatibility of European law with German constitutional law); BVerfG Oct. 12, 1993, 89 BVERFGE 155 (181), 1993 (determining that Germany could constitutionally ratify the Maastricht Treaty); BVerfG Oct. 22, 1986, 73 BVERFGE 339 (387), 1986 (reviewing the procedures of the European Court of Justice to determine whether they provide adequate protection under the German Constitution); BVerfG May 29, 1974, 37 BVERFGE 271 (278), 1974 (stating that the European Court of Justice is without authority to determine the compatibility of European law with local law). *See generally* Erich Vranes, *German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis*, 14 GERMAN L.J. 75 (2013) (discussing the limits of EU law influence on the German constitution).

101. Dyevre, *supra* note 99, at 140.

102. *Id.*

have tried to accommodate and reconcile two conflicting goals: (1) the imperative to ensure the application and supremacy of European law over national legislation, and (2) the desire to keep integration under control by preserving an at least hypothetical last word for the States.[103] The European national courts conceive themselves primarily, and quite naturally, as organs of their State, and have tried to fit the 'European mandate' formulated by the CJEU within the framework of the powers attributed to them by their national constitutional system.[104]

To the contrary of these European courts, by placing the Convention above national legal orders, including national Constitutions, it appears that the Court is not merely going further than the European judicial system. It resembles more a conception of the Convention as a federal Constitution and setting the Court as a supreme court in a federal State. For instance, the Supremacy Clause of the U.S. Constitution not only stipulates that the Constitution, the laws of the United States, and the international treaties "shall be the supreme Law of the Land" but also commands local and state judges to disregard any other conflicting rule in the laws or constitution of their State.[105] And by virtue of this supremacy, the Supreme Court can exercise judicial review over state courts and override their decisions.[106] This is exactly what the Court requires from Latin American States: Make the Convention the "supreme Law of the Land." But, again, the Convention is not a federal constitution; the OAS has not created a federal State or a federal supreme court in the form of an Inter-American Court.

D. The Weak Legal Justification of the Conventionality Control or the Integration Principle

Given the explicit silence of the Convention on the conventionality control or integration principle, some authors have tried to find a justification as an implicit principle of the Convention or a principle that can be derived from other norms of the Convention or from general principles of international law.[107] These authors argue that Article 25 of the Convention—by requiring the existence of a simple, prompt, and effective remedy for the protection of the rights recognized in the Convention—requires the exercise of control of conventionality over judges dealing with those remedies.[108] Nevertheless, while there must be a judicial remedy that allows the protection of the rights recognized conventionally, it does not follow that the Convention must be directly incorporated or given a higher ranking. Article 25

103. *Id.* at 141–42.

104. *Id.* at 153.

105. U.S. CONST. art. VI, cl. 2. Similar provisions are found in article 33 of the Argentine Constitution and article 133 of the Mexican Constitution. Art. 33, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.); Constitución Política de los Estados Unidos Mexicanos, *as amended*, art. 133, DO, 10 de junio de 2011 (Mex.).

106. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 314–15 (1816).

107. *E.g.*, Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, 9 ESTUDIOS CONSTITUCIONALES 531, 589–90 (2011) [hereinafter Ferrer Mac-Gregor, *Interpretación conforme*], *available at* http://www.scielo.cl/scielo.php?script=sci_arttext&pid =S0718-52002011000200014&lng=es&nrm=iso.

108. *See, e.g.*, Ruiz-Chiriboga, *supra* note 5, at 214 (discussing how state courts can use and have used Article 25 of the Convention in their own jurisprudence).

only requires the existence of a simple, prompt, and effective remedy.[109] This recourse should be used to ensure the effectiveness of the treaty rights, either directly if the Convention has been incorporated into domestic law, or indirectly if the Convention has been incorporated by national legislation. The critical point is the right to be protected, regardless of which norm recognizes that right. Additionally, Article 25 does not establish that the Convention should prevail over domestic legislation. Article 25 only refers to the "fundamental rights recognized by the constitution or laws of the State concerned or by this Convention," without hierarchical distinctions.[110] In fact, the Convention itself allows domestic law to prevail over the Convention if the national norm provides broader protection.[111]

Other authors have tried to justify the special domestic status of the Convention as required by the Inter-American Court by resorting to general principles of international law.[112] Those principles are reflected in Article 27 of the Vienna Convention on the Law of Treaties, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,"[113] and Article 32 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part."[114] According to these authors, these rules mean that the Convention (after *Almonacid*) not only should operate above domestic law, but also that it has always done so, regardless of the recent case law of the Court.[115] In other words, the supremacy of the Convention comes from the mere fact that it is an international treaty, not because of the Court's doctrine of conventionality control. I disagree. The Vienna Convention and the Articles of Responsibility refer to the international responsibility of the State, not to the manner of incorporation of treaties or their hierarchical position in domestic law. These standards prevent a State from justifying the violation of any treaty, including the Convention, by arguing that an internal norm or provision requires it. But it does not follow that the Convention should have direct applicability and precedence over domestic law or the Constitution.[116]

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109. *See* American Convention, *supra* note 3, art. 25 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . . .").

110. *Id.*

111. *See id.* art. 29.b ("No provision of this Convention shall be interpreted as [r]estricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party . . . ."); *cf.* Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos*, *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, *supra* note 64, at 163 (explaining the concept of *pro homine*, which suggests an expansive interpretation of human rights).

112. *See generally* Ferrer Mac-Gregor, *Interpretación conforme*, *supra* note 107.

113. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

114. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex art. 32, U.N. Doc. A/res/56/83 (Jan. 28, 2002).

115. *See, e.g.*, Ferrer Mac-Gregor, *Interpretación conforme*, *supra* note 107, at 572–76 (providing examples through language from Latin American courts that suggest that the Convention has been held superior to domestic law both prior to and after *Almonacid*).

116. *Cf.* Ximena Fuentes Torrijo, *International and Domestic Law: Definitely an Odd Couple*, 77 REV. JUR. U.P.R. 483, 488–89 (2008) ("It is an unprecedented reading of Article 27 of the Vienna Convention

Of course it could be argued that the European Convention is not explicitly required to be domestic law, yet it is routinely used by domestic judges, and the precedents of the European Court are systematically followed in practice by national courts.[117] The same can be said of the United States, where judicial review, or the power to invalidate laws as unconstitutional, is not expressly stated in the Constitution.

III. FROM THE INTER-AMERICAN COURT TO AN INTER-AMERICAN CONSTITUTIONAL COURT

The theory of conventionality control emphasizes the Court's self-identification as an Inter-American Constitutional Court. It also attempts to position the Convention as an inter-American constitution.

A. The Conventionality Control and the Judicialization of the Inter-American System

With the theory of conventionality control and the integration principle, the Court places judges in a central role as responsible for ensuring the effectiveness of conventional standards.[118] In this way, the integration principle serves a second goal in addition to transforming the Convention into an integral part of the domestic legal system. By virtue of the control of conventionality requirement, Latin American judges become integrated into an inter-American judicial system, guarantor of the Convention. This inter-American judicial system includes the Court and all national judges or state authorities exercising judicial functions. In the Court's view, the judicial enforcement of the Convention, whether national or Inter-American, becomes central to the promotion and protection of human rights.[119] Judges, rather than legislators or executive or administrative authorities, are at the core of Convention enforcement and guarantee.[120] In part, this belief was reflected by former Judge and President of the Court, Antonio Cançado Trindade, when he argued that the courts are "the most developed form of protection of the rights of the human person."[121]

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on the Law of Treaties to claim that it establishes an obligation . . . to place treaties above the ordinary laws of each country's legal system.").

117. *See, e.g.*, Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 23 EUR. J. INT'L L. 401, 422–23 (2012) ("[T]he Italian case is symptomatic, in which ordinary judges autonomously treat the Convention as if it is EU law.").

118. *See supra* Part II.B–C.

119. *E.g.*, Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, paras. 142–43 (Nov. 30, 2012).

120. *See, e.g.*, Dismissed Congressional Employees v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, para. 128 (Nov. 24, 2006) (describing the role of domestic judges in upholding the guarantees of the American Convention).

121. President of the Inter-American Court of Human Rights, *Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen Its Protection Mechanism*, para. 84, OEA/Ser.G Doc. CP/CAJP-1781/01 (Apr. 5, 2001) [hereinafter *Basis for a Draft Protocol*].

As such, the conventionality control could be seen as a tool used by the Inter-American Court to advance its effort to "*judicialize*"[122] the inter-American system. In the last two decades much emphasis has been placed on the process of *judicialization* of the system, or in other words, on the centralization of the individual complaint mechanism, particularly the one that ends with a judgment of the Court, as the instrument par excellence for the protection and promotion of human rights in the region.[123] In fact, this is a trend that could be observed worldwide, reflected in the creation and use of international courts and tribunals and a judicially-focused development of certain areas of international law.[124] The clearest example of this approach in the human rights area is the transformation of the European human rights system into one with a single judicial and permanent body.[125]

B. The Conventionality Control as Constitutional Control or Judicial Review

The conventionality control doctrine as developed by the Court could be seen as an attempt to place the Convention as an inter-American constitution and the Court as an inter-American constitutional court. The discourse used by the Court when referring to the conventionality control clearly resembles the constitutional language of judicial review. Or, as one author explained, the conventionality control brings constitutional law doctrines into international human rights law.[126]

Former Judge and President of the Court, Sergio García Ramírez, who is credited with the creation of the theory of conventionality control,[127] highlighted the similarity between conventionality and constitutionality control.[128]

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122. *See, e.g.*, Dulitzky, *Reflexiones*, *supra* note 6, at 342 (defining "judicialization" in the context of the inter-American system).

123. Dulitzky, *Time for Changes*, *supra* note 6, at 142–43.

124. *See, e.g.*, Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order* 2–6 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-05, 2011), *available at* http://ssm.com/abstract=1753015 (discussing the development of international tribunals in various different areas of law).

125. *E.g.*, Rudolf Bernhardt, Current Developments, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145, 145 (1995); Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11 Entry into Force and First Year of Application*, 79/80 BOLETIM DE DOCUMENTAÇÃOE DEREITO COMPARADO 221, 223 (1999).

126. Ferrer Mac-Gregor, one of the judges of the Court, explained that in the conventionality control "[e]xiste . . . una asimilación de conceptos del derecho constitucional [there exists . . . an assimilation of concepts of constitutional law]." Ferrer Mac-Gregor, *Reflexiones*, *supra* note 5, at 928 (translation by author). It clearly shows an internationalization of constitutional law, particularly in bringing the constitutional guarantees as procedural instruments for the protection of fundamental rights and as safeguards of constitutional supremacy to the conventional guarantee of courts and quasi-judicial mechanisms for the protection of human rights under international covenants when these have not been enough, also setting a conventional supremacy. *Id.* at 928–29 (translation by author).

127. *Id.* at 942; Víctor Bazán, La Corte Interamericana de Derechos Humanos y las cortes nacionales: acerca del control de convencionalidad y la necesidad de un diálogo interjurisdiccional sustentable 6 (6–10 diciembre 2010) (unpublished manuscript), http://www.juridicas.unam.mx/wccl/ponencias/13/215.pdf.

128. Dismissed Congressional Employees v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, paras. 4–5 (Nov. 24, 2006) (García Ramírez, J., concurring) (highlighting the similarities between the control of constitutionality and the conventionality control deposited in international court).

Judge García Ramírez—and the Court, which followed him in this aspect—not only assimilated the conventionality control to judicial review or control of constitutionality, he also highlighted the similarity of the Inter-American Court to a constitutional court.[129] García Ramírez argued that the Inter-American Court should not become a jurisdiction of last resort for those who cannot find justice in their own country.[130] On the contrary, the Mexican judge understood that only a few cases per year should be resolved by the Inter-American Court,[131] or else otherwise it would be "impracticable and disturbing."[132] The Court should deal only with "big issues"[133] and develop case law and standards in some paradigmatic cases rather than being a human rights court to provide remedies for individual victims in as many cases as necessary.[134] It should be more like an inter-American constitutional court than a court of last resort for victims of human rights abuses.

This position reflects the debates in Europe that had focused on whether the European Court of Human Rights should provide "individual" or "constitutional" justice.[135] Proponents of the first view argue that "the right of individual petition is the centrepiece of the [European system]" that requires the European Court know each case and provide a remedy for any person whose rights have been violated.[136] Meanwhile, proponents of the constitutional justice position understand that the European Court should focus on providing fully reasoned decisions in cases that raise important or novel and complex issues of law that are of particular importance to the State concerned or that involve allegations of serious human rights violations.[137] Something similar has been proposed in relation to the U.N. Human Rights Committee to focus on encouraging, clarifying, interpreting, and explaining the International Covenant on Civil and Political Rights rather than attempting to solve all the individual cases that may arise.[138]

Certainly the clearest expression of the vision of the conventionality control as a constitutionality control and the Court as an inter-American constitutional court is when the Inter-American Court not only asserts the incompatibility of a domestic norm with the Convention but also assumes the power to invalidate those domestic norms. In the famous *Barrios Altos v. Peru* case the Court did not limit itself to deciding that Peru's amnesty law was incompatible with the American Convention,

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129. *Id.* para. 4 ("I have compared the function of international human rights tribunals to the mission of national constitutional courts.").

130. *See id.* para. 11 (stating that the international sphere is "not a substitute" because "the vital battle for human rights will be won in the domestic sphere").

131. García Ramírez, *supra* note 5, at 131.

132. *Id.* (translation by author).

133. *Id.* (translation by author).

134. *Id.*

135. *See, e.g.*, Steven Greer & Andrew Williams, *Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?*, 15 EUR. L.J. 462, 466 (2009) (arguing that despite the reluctance of "the Council of Europe as a whole," the ECHR should abandon the "discredited" individual justice motif for a constitutional justice jurisprudence).

136. Helfer, *supra* note 50, at 127.

137. *Id.*

138. *See* Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 15, 17–18 (Philip Alston & James Crawford eds., 2000) (arguing that the Human Rights Committee can best impact human rights by "exploring and explaining" its governing covenant rather than "summarily" applying it in each case).

but rather ruled that "consequently, [the law] lack[s] legal effect,"[139] adding that the lack of legal effect "has generic effects" beyond the *Barrios Altos* case itself.[140] The invalidation of national norms with general effects is a typical power of a constitutional court exercising judicial review, not of an international tribunal determining international responsibility of a State.[141] As such, *Barrios Altos* could be seen as the genesis of this constitutional court approach and the conventionality control. In another manifestation of its constitutional court approach, the Court has also ordered the transfer of cases from the military to the civil jurisdiction, even though the domestic legislation does not grant jurisdiction over military personnel to regular courts.[142]

In the past, the Court did not arrogate the power to invalidate domestic legislation. Prior to *Barrios Altos*, the Court had stated,

> [T]he promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.[143]

The tribunal also stated that "[i]f the Court were to find the existence of such a violation, it would have to hold that the injured party be guaranteed the enjoyment of the rights or freedoms that have been violated and, if appropriate, that the consequences of such violation be redressed and compensation be paid."[144] By seizing the power to "quash national court rulings [and] order national governments to amend legislation or revise administrative practices," the Inter-American Court, through the conventionality control and other tools, has assumed the role of what Professor Laurence R. Helfer calls "'direct' embeddedness."[145] This approach is typical of a deep-integration regime such as the EU,[146] or of a constitutional court, but not of an international human rights system.

In Europe, where there is a strong ongoing debate on whether the European Court should become a constitutional court,[147] the defenders of the constitutional

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139. Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, para. 51 (Mar. 14, 2001); *see also* Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 171 (Sept. 26, 2006) ("[The law] has no legal effects.").

140. Barrios Altos v. Peru, Interpretation of the Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, Sec. VII, para. 2 (Sept. 3, 2001).

141. *Cf.* Binder, *supra* note 94, at 1215–17 (discussing the similarities between constitutional review and the Court's insistence of conventionality control by domestic courts).

142. Cabrera García v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, paras. 233–35 (Nov. 26, 2010).

143. *See, e.g.*, International Responsibility, *supra* note 23, para. 58 ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.").

144. *Id.* para. 48.

145. *See* Helfer *supra* note 50, at 135 (addressing how by not having the power to "quash national court rulings [and] order national governments to amend legislation or revise administrative practices," the ECHR does not have "an integrated judicial hierarchy," or "'direct' embeddedness").

146. *Id.*

147. *E.g.*, Steven Greer & Luzius Wildhaber, *Revisiting the Debate about 'constitutionalising' the*

vision do not advocate for granting the power to the European tribunal to quash domestic legislation. Those who advocate for seeing the European Convention as a Constitution and the European Court as a constitutional court argue that the European system has many constitutional characteristics.[148] First, as the European Court has stated, the European Convention is "a constitutional instrument of European public order."[149] In its American counterpart, several authors have argued that the conventionality control contributes to the construction, consolidation and harmonization of an inter-regional legal order, or the formation of an *ius commune*.[150] Second, "human rights litigation in national legal systems is, almost by definition, 'constitutional' because it raises fundamental questions about the distribution of benefits and burdens and about the structure of social and institutional relationships, because it tests the limits of the exercise of public power by reference to specified interests framed as rights, and because it impacts significantly only on the docket of the highest courts, particularly at the supreme or constitutional court level."[151] For these proponents, it would be "difficult to understand, therefore, how human rights litigation with such a clear constitutional complexion at the national level could lose this characteristic when it is taken" to the European Court.[152] Third, the European Convention is "increasingly acquiring 'constitutional status' in member States."[153] Something similar is happening in Latin America, as I already explained.[154] If domestically the Convention has constitutional status, these advocates ask how this constitutional sense could be lost at the transnational level.[155] Fourth, "to a large extent, the [European Court] decides broadly the same kind of issues as a domestic supreme or constitutional court, and also in largely similar ways."[156] But even with all those similarities to a constitutional court, no one in Europe advocates for granting the European Court the power to nullify domestic legislation, as the Inter-American Court does.

Barrios Altos and *Almonacid*, read together, show that the judicialization and constitutionalization process is a project that the Court initiated a decade-and-a-half ago. It is an ambitious one that surprisingly did not generate the strong debate that is taking place in Europe.

European Court of Human Rights, 12 HUM. RTS. L. REV. 655, 667 (2012) (arguing to turn the ECHR into a constitutional court).

148. *E.g.*, *id.*

149. Loizidou v. Turkey, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) at 22 (1995) (Preliminary Objections).

150. *E.g.*, García Ramírez, *supra* note 5, at 127. Similarly, Ferrer Mac-Gregor mentions that the conventionality control of the Court "is gradually creating an *ius commune constitutionale* on human rights for the Americas or, at least, for Latin America." Ferrer Mac-Gregor, *Reflexiones*, *supra* note 5, at 967 (translation by author). Sagüés also argues that control of compliance "is presented as one of the most immediate and practical tools to develop an *ius commune* in the region, particularly as a homogeneous view on fundamental human rights." Nestor Pedro Sagüés, *Obligaciones Internacionales y Control de Convencionalidad*, 8 ESTUDIOS CONSTITUCIONALES 117, 119 (2010) (translated by author).

151. Greer & Wildhaber, *supra* note 147, at 667.

152. *Id.* at 667–68.

153. *Id.* at 668.

154. *See supra* Part III.A.

155. *See, e.g.*, Greer & Wildhaber, *supra* note 147, at 668 ("[H]ow could [the ECHR] gain [constitutional] status at the national level without having it at the transnational level in some sense already?").

156. *Id.*

C. *The Court as the Final Interpreter of the Convention*

The conventionality control theory is also used by the Court to impose its authority as final interpreter of the Convention. The Court argues that the parameter of conventionality control is not only the Convention itself, but also its own case law.[157] Domestic judges should follow the Convention as interpreted by the Court. According to the Court, because it is empowered to enforce and interpret the Convention,[158] its interpretations acquire the same effectiveness as the Convention's text.[159] For instance, in *Gomes Lund v. Brazil*, a case challenging the validity of the Brazilian amnesty law,[160] the Brazilian Supreme Court did consider the arguments brought against the amnesty law, including those arguing its incompatibility with international law and Inter-American case law. The Brazilian court decided that the Inter-American precedents were not applicable, as it understood that the Brazilian amnesty law was different from the other cases decided by the Court.[161] Nevertheless, the Inter-American Court stated that the Brazilian Supreme Court did not exercise control of conventionality.[162] It appears that, for the Court, the only valid conventionality control is the one that coincides with its own decisions. In other words, a domestic judicial interpretation of the Convention differing from the Court's previous decisions is not an acceptable conventionality control.

There is some logic to the proposition that domestic tribunals should follow Inter-American precedents. Obviously, the opinions of the Court have highly persuasive force, as they come from the judicial body created to interpret the Convention.[163] Consistency and procedural-economy reasons also call for States to follow those precedents. In fact, many national judges in many countries follow the Court's jurisprudence.[164] If States do not follow the Court's interpretation it is possible that the case could be referred to the Inter-American system and eventually the Court may rule on it according to its own precedent. There is even some normative support for this idea. Article 69 of the Convention, by requiring that all States Party to the Convention be notified of the judgments of the Court,[165] seems to suggest an intention to promote the use of the Court's reasoning.[166]

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157. *See, e.g.*, Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006) ("To perform this task [of conventionality control], the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court . . . .").

158. American Convention, *supra* note 3, art. 63.

159. Ferrer Mac-Gregor, *supra* note 5, at 63.

160. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010).

161. S.T.F., 2008/148623, Relator: Min. Eros Grau, 29.04.2010, 180, DIÁRIO O DO JUDICIÁRIO [D.J.e.], 19.09.2011, para. 42, *available at* http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adpf153.pdf.

162. *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, para. 177.

163. *See, e.g.*, Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1839–40 (2011) (explaining the impact of the Court's declarations on the jurisprudence of the Inter-American Court and its influence in the interplay between national and international law).

164. *See, e.g., id.* at 1844–47 (providing examples of the region's courts that have followed the Inter-American Court's interpretation).

165. American Convention, *supra* note 3, art. 69.

166. *See, e.g.*, Nogueira Alcalá, *Los desafíos*, *supra* note 24, at 1179–80 (discussing Article 69 of the

Although policy and judicial economy reasons justify adhering to decisions rendered by the Court, such reasons do not create the legal obligation that the Court seeks to impose. Nowhere in the text of the treaty is it established that the Court's decisions are binding on States Parties to the Convention but not parties to the case, or that national courts must respect the Court's jurisprudence. Article 68.1 clearly states that "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties,"[167] but it is silent with respect to cases to which they are not party.

The Convention does not create a system in which national courts must, in all cases, follow the decisions of the Court as if they were hierarchically inferior courts. Through conventionality control theory, the Court transforms international law into a system of precedent, similar to common law. The Court is also betting that Latin American tribunals, based on civil law traditions, with a lesser emphasis on case law and precedents,[168] will follow the Court's jurisprudence. At the same time, the Court may be contributing to a process, already in progress, of the transformation of the Latin American legal systems with more emphasis on interpretation of legal texts and reliance on precedents.[169]

IV. THE RELATIONSHIP BETWEEN LATIN AMERICAN AND INTER-AMERICAN JUDGES

Judges from countries that ratified the Convention are required by the Court to exercise conventionality control.[170] That means that there could be thousands of judges interpreting the content and scope of the American Convention. Domestic judges become inter-American judges at the national level.[171] In other words, the location of the interpretation of the Convention is not only in Costa Rica at the headquarters of the Inter-American Court.[172] On the contrary, there are multiple geographical points of conventional interpretation. While the Court asserted, as previously explained, its role as final interpreter of the Convention,[173] so far it has failed to develop a proper theory on the value of those Latin American precedents in developing the content of the Convention.

Convention and its objective to make sure States Parties have a thorough knowledge of what the Convention requires).

167. American Convention, *supra* note 3, art. 68(1).

168. *Cf.* Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL LEGAL STUD. 173, 182 (2009) ("Civil law systems look askance upon precedent because the code, and not its judicial incrustations, is the law."); *see generally* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW (3d ed. 2007).

169. *See generally* Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT'L L. REV. 1031 (2011) (discussing modern developments in Latin American jurisprudence).

170. *See supra* Part I.

171. Noguiera Alcalá, *Los desafíos*, *supra* note 24, at 1170.

172. *Basis for a Draft Protocol*, *supra* note 121, para. 2.

173. *See supra* Part III.C.

A. Multiple Inter-American Interpreters of the American Convention

A very positive consequence of the conventionality control is that now there will be multiple inter-American interpeters of the Convention, something that both the subsidiarity and integration principles seek to achieve. If each Latin American judge, in each case he or she decides, applies the Convention as the Court requires, there will be thousands of national precedents on the scope of the treaty. In fact, in most situations, the only precedents on rights protected by the Convention will come from national judges. With only a dozen or so cases a year decided by the Court, there are many areas where the national judges will be acting with no specific interpretive guidance from the Tribunal.[174] This decentralized system of conventionality control is already creating a strong Latin American jurisprudence on the Convention.[175] The interpretation of the Convention by Latin American judges in fact could be: "(a) an expansive or broad interpretation, (b) an innovative interpretation, (c) a corrective interpretation, (d) a receptive interpretation, (e) a neutralizing interpretation and (f) a conflicting interpretation."[176] In the first possibility, a national judge interprets the Convention or national legislation in a more protective or expansive way than the Court does.[177] In the innovative interpretation, the national judge is called to interpret the Convention in areas where there is no case law from the Inter-American Court.[178] In the corrective interpretation, the national court changes its previous case law based on a decision from the Inter-American Court requesting it to do so.[179] In the receptive interpretation, national judges use the decisions of the Court handed down in cases involving third countries.[180] In the neutralizing interpretation, the national judge formally applies the Convention but avoids following the case law of the Court, for instance by arguing that the case at hand is different from the one decided by the Court.[181] Finally, in the conflicting interpretation, the national court rules against the

174. For instance, there are no cases on the non-imposition of the death penalty on pregnant women, American Convention, *supra* note 3, art. 4.5; the right to compensation, *id.* art. 10; the right to reply, *id.* art. 14; the right to assembly, *id.* art. 15; or most aspects of freedom of religion, *id.* art. 12. *See generally* NICOLÁS ESPEJO YAKSIC & CARLA LEIVA GARCÍA, DIGESTO DE JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (ENERO DE 1984–FEBRERO DE 2012) (2012) (discussing each case that has come before the court over a twenty-eight-year period and arranging them by article of the Convention).

175. For instance, a search of the case law of the Peruvian Constitutional Court referring to the American Convention recovers over 250 decisions (http://tinyurl.com/oksmx2q); and over 400 decisions for the Mexican Supreme Court (http://tinyurl.com/mcd4u9x) and 495 for only 2013 by the Costa Rican Constitutional Chamber (http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_libre.aspx?strErr=).

176. Humberto Nogueira Alcalá, *Diálogo interjurisdiccional y control de convencionalidad entre los tribunales nacionales y la Corte Interamericana de Derechos Humanos en Chile*, *in* ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, *supra* note 56, at 511, 531 [hereinafter Nogueira Alcalá, *Diálogo*] (translation by author).

177. *Id.* at 531–32.

178. *Id.* at 532–33.

179. *Id.* at 533–34.

180. *Id.* at 534–35.

181. *Id.* at 540.

mandates of the Court in a particular case or the Inter-American case law in general.[182]

So, the Latin American interpretation of the Convention could be consistent with, partially consistent with, or contradictory to current or future Inter-American case law or among other domestic Latin American decisions. These consistencies or contradictions could be found at a horizontal level among courts of the same country and of the same level. In those circumstances a higher court could unify the interpretation of the American Convention at the national level. But those consistencies or contradictions can also occur transnationally when courts in different countries decide on the same conventional issue without a superior tribunal to unify or reconcile the interpretations. There may also be consistencies or contradictions between the Court and national courts. And finally, consistencies or contradictions may exist between the Commission and the Court[183] and between the Commission and national tribunals. The potential for intra-judicial conflict is omnipresent in a pluralistic system where multiple high courts and judges assert jurisdiction over the Convention.[184]

The emergence of multiple inter-American judges could generate, for some, concerns about the risks caused by the fragmentation of inter-American human rights (or international) law that could endanger its stability, consistency, "credibility, reliability and, consequently, authority."[185] As I will develop later, I do not share those concerns about potential tensions among different inter-American

182. Nogueira Alcalá, *Diálogo*, *supra* note 176, at 542.

183. For example, for several years the Commission considered in cases of enforced disappearances whether there is a violation of Article 3 of the Convention, while the Court rejected that proposition. *Compare* Lorenzo Manrique v. Peru, Case 10.824, Inter-Am. Comm'n H.R., Report No. 56/99, OEA/Ser.L.V/II.102, doc. 6 rev. para. 110 (1999) (finding an enforced disappearance to be a violation of Article 3 of the convention), Núñez Santana v. Peru, Case 10.815, Inter-Am. Comm'n H.R., Report No. 55/99, OEA/Ser.L.V/II.102, doc. 6 rev. para. 111 (1999) (same), Cruz Gómez v. Guatemala, Case 10.606, Inter-Am. Comm'n H.R., Report No. 11/98, OEA/Ser.L.V/II.98, doc. 6 rev. para. 57 (1998) (same), Medina Charry v. Colombia, Case 11.221, Inter-Am. Comm'n H.R., Report No. 3/98, OEA/Ser.L.V/II.98 doc. 7 rev. para. 64 (1998) (same), Lemus Garcia v. Guatemala, Case 8076, Inter-Am. Comm'n H.R., Report No. 55/96, OEA/Ser.L.V/II.95 doc. 7 rev. para. 24 (1996) (same), *and* Juventino Cruz Soza v. Guatemala, Case 10.897, Inter-Am. Comm'n H.R., Report No. 30/96, OEA/Ser.L.V/II.95 doc. 7 rev. para. 43 (1996) (same), *with* Ticona Estrada v. Bolivia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191, paras. 68–71 (Nov. 27, 2008) (finding an enforced disappearance not to be a violation of Article 3 of the Convention), La Cantuta v. Perú, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, paras. 117–21 (Nov. 29, 2006) (rejecting that an enforced disappearance violated Article 3 despite the State's concession), *and* Bámaca-Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, paras. 176–81 (Nov. 25, 2000) (establishing that an enforced disappearance was not a violation of Article 3 of the Convention despite the State Party not presenting any argument on the issue). Finally, the Court changed its jurisprudence in *Anzualdo Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 90 (Sept. 22, 2009) ([T]he Tribunal reconsiders its previous position and deems it is possible that . . . the forced disappearance may entail a specific violation of [Article 3] . . . .").

184. *Cf.* Stone Sweet, *supra* note 77, at 12–13 (discussing the problems of constitutional pluralism in Europe).

185. *See* Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, [2000] 2 part 2 Y.B. Int'l L. Comm'n 143, 147–49 U.N. A/cW.4/SER.A/2000/Add.1(Part2)/ Rev. 1, U.N. Sales No. E.03 V.7 (Part 2) (2006) (expressing concern about the risks to the authority and credibility of international law posed by the fragmentation of international law).

interpreters.[186] To the contrary I accept such possibilities as a matter of fact given the multiplicity of actors with different roles, loyalties, and constituencies.

The conventionality control exercised by the Court and its insistence on making its precedents binding could be seen as contributing to the unity or defragmentation of international or inter-American law.[187] Nevertheless, in the inter-American context there is no court that has the final word unifying the interpretation of the Convention. The Court is not a supreme inter-American court with powers to unify jurisprudence. As stated, the judgments of the Court are binding only for that specific case and for the parties in the case.[188] Even if it were possible for the Court to settle a question in a case, this does not mean that all national courts must retroactively overturn their decisions that are contradictory to the Court's decision. So it is possible that thousands of national cases that were decided in ways that are contradictory to subsequent case law of the Inter-American Court remain untouched. Given the requirements that petitions be submitted to the Commission within six months of the final decision of a case[189] and the length of Inter-American procedures,[190] most of these cases with national jurisprudence that contradicts that of the Court cannot be litigated at the Inter-American level. So this contradictory national jurisprudence will remain in force.

I embrace the emergence of multiple inter-American judges at the local level. As I explained, the subsidiarity principle reflects the idea that social change will come from local actors closer to local realities.[191] The contradictions and inconsistencies—rather than expressing pathologies, mistakes, or unfortunate side-effects of the proliferation of inter-American interpreters—reflect the different political contexts in which the Inter-American Court and national judges operate, the different institutional interests that they pursue, or the different goals that they intend to advance.[192] Latin American courts should be seen as political actors using inter-American law and not as mechanical followers of the Court.[193]

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186. *See infra* Part V.A.

187. *See, e.g.*, Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 586 (2010) (proposing that expansionism of the Inter-American Court contributes to unity of international law).

188. The Convention states that States Parties to the Convention undertake to comply with the judgment of the Court in any case to which that state is a party. American Convention, *supra* note 3, art. 68. However, I have argued that the Convention is silent with regards to whether a decision of the Court is binding upon states who are not parties to that particular case. *See supra* paragraph accompanying note 167.

189. American Convention, *supra* note 3, art. 46(1)(b).

190. *See, e.g.*, Ariel Dulitzky, *Too Little, Too Late: The Pace of Adjudication of the Inter-American Commission on Human Rights*, 35 LOY. L.A. INT'L & COMP. L. REV. 131, 150 (2013) (finding the wait time for cases before the Inter-American Commission on Human Rights to be approximately six-and-a-half years, with the wait time becoming "even longer" when the petition is referred to the Inter-American Court).

191. *See supra* paragraph accompanying notes 38–39.

192. *Cf.* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 561–62 (2002) (noting that bodies interpreting international law "are engaged in a hegemonic struggle in which each hopes to have its special interests identified with the general interest" (emphasis omitted)).

193. *Cf.* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 518 (2011) (arguing in favor of an approach whereby the Court "forge[s] closer ties to the state institutions that matter to implementation"

B. The Court and Latin American Precedents

Beyond these real or possible contradictions, the fact is that Latin American judges are (or have the potential to be) active interpreters of the Convention. In fact, in most areas these national judges will intervene before the Court has the chance to do so.[194] Latin American judges had been using the American Convention for decades prior to *Almonacid*,[195] when the Court first introduced the concept of conventionality control, and in the past, the Court used precedents from Latin American courts on different occasions.[196] Nevertheless there is an urgent need to advance a theory on Latin American precedents informing the Court's interpretation of the Convention. The Court cannot in good faith demand that tribunals apply the Convention by exercising conventionality control and then ignore how those courts interpret the treaty and the resulting Latin American case law that emerges. As I said, there is a strong Latin American case law on the Convention.[197] Additionally, the Court already uses comparative Latin American law as an interpretative tool of the Convention.[198] If the Court quotes more domestic cases it needs to do so in a more principled manner.

Nevertheless the Court lacks proper principles to use when interpreting the Convention on issues which are new for the Court but that have been decided already by national courts or when domestic case law evolved from an original Inter-American precedent. Some of the basic questions that remain unanswered are: How should the Inter-American Court value such national interpretations? Is there some degree of deference that the Court should grant to these interpretations? Should the Inter-American Court wait for several Latin American courts in different countries to rule on the same matter before it moves forward in these areas? What is the interpretative value of Latin American precedents compared to other sources of interpretation that the Inter-American Court uses, primarily the jurisprudence of the European Court? Which should prevail, Latin American jurisprudence or European Court jurisprudence? What criteria should be used to decide these priorities? What is the value of the jurisprudence from the State that is being examined as opposed to decisions from other Latin American tribunals? How should potential conflicts among different national courts' decisions be treated? Should the Court distinguish different national judicial approaches to the same issue, and if so, how? Should the

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of the Court's orders).

194. *Cf. id.* at 514–15 (discussing how the Court has enabled Latin American judiciaries to gain power and legitimacy through applying the Convention and the Court's holdings).

195. *E.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/12/1989, "Microómnibus Barrancas de Belgrano S. A., impugnacíon," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1989-312-2490) (Arg.).

196. *E.g.*, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, para. 41 (Jan. 30, 1987) (quoting a decision of the Cámara Federal de Apelaciones en lo Criminal y Correccional of Buenos Aires, Argentina).

197. For example, see the cases cited discussing enforced disappearances *supra* note 183.

198. For instance, in *Osorio Rivera v. Peru*, the Court quotes cases from the Supreme Courts of Venezuela, Mexico, and Chile; from the Constitutional Courts of Peru and Bolivia; and from a Court of Appeal of Argentina. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 274, para. 113 n.213 (Nov. 26, 2013).

Court analyze Latin American jurisprudence that is inconsistent with its own reasoning or with the prevalent trends in the region?[199]

The Court lacks an appropriate response to these and many more questions on the value of the Latin American judicial interpretations of the Convention or of similar constitutional rights. As I mentioned, lately the Court has assumed the practice of citing domestic decisions consistent with its own interpretation of the Convention.[200] But the Court cites domestic cases that recognize the particular right in different manners and degrees.[201] The Court sometimes mentions decisions from countries that have ratified the Convention along with countries that have not ratified it and even countries outside the Americas.[202] However, the Court includes all those references as if they regulated the pertinent right in the same way, as if they were consistent with the doctrine held by the Court, and as if all jurisdictions had adopted their position because of the influence of the Convention or in order to comply with it. The Court does not conduct a serious analysis of Latin American case law to determine the existence of a regional consensus around a particular right or even to define the scope of such right.[203] Nor does it seem that the Inter-American Court is interested in analyzing the jurisprudence from various countries contrary to the position that the Court adopts.[204]

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199. For instance, in *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court omitted quoting a decision from Honduras that contradicted its own assertions. *Compare* Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164 (June 27, 2012) (citing cases and statutes from numerous jurisdiction, but not Honduras, that have complied with the Court's precedence requiring prior consultation with indigenous groups "regarding any administrative or legislative measure that directly affects them"), *with* La Corte Ley de Propiedad, Feb. 8, 2011, SENTENCIA DE LA CORTE SUPREMA EN RELACIÓN A RECURSOS INCONSTITUCIONALIDAD SOBRE LA LEY DE PROPIEDAD (Hond.) (on file with author).

200. For example, in *Sarayaku*, the Court cites national legislation and case law relating to prior, free, and informed consent by indigenous peoples from countries that had ratified the Convention (Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela), countries that had not ratified the Convention (Belize, Canada, and the United States), and even countries outside the region (New Zealand). *Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164.

201. *See, e.g., id.* (discussing the varying degrees to which nations have incorporated the rights of tribal persons as provided by the Convention).

202. *E.g., id.*

203. I doubt that it is advisable for the regional consensus to be a determining factor in the interpretation of the Convention. In a region where there are so many structural human rights problems, giving deference to the regional consensus would lower many standards of protection. It would also mean a somewhat conservative vision for the role of the Convention and of the Court, which would limit them to protecting at the regional level the rights already guaranteed domestically. I believe that the Convention and the Court play a much bigger role in the Americas. A regional consensus can be an element but should be neither the floor nor the ceiling guideline. The Court must be aware of what it is that states are doing and how tribunals are ruling in each area over which it must intervene. This will necessarily facilitate the acceptance of its jurisprudence and the understanding of the context in which such jurisprudence will operate. *But cf.* Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 123 (2008) (arguing that inattention to regional consent is problematic because it "presents a problem that may impede efforts to strengthen the system").

204. For example, in *Sarayaku*, the Court cites a lower court in Brazil that recognizes the right to consultation but omits any reference to the Brazilian Supreme Court decision that established many stringent conditions for, and strong limitations on, the scope of when prior consultation with indigenous peoples is required. *Compare Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 164 (citing a Brazilian lower court that had required prior consultation with indigenous peoples), *with* S.T.F., No. 3.388-4,

This Article will not attempt to develop the principles of the proper relationship between Latin American and Inter-American precedents. For now, it is sufficient to say that I disagree with former Judge García-Ramírez, who held that when a national court carries out a conventionality control without Inter-American precedents its decisions have only provisional value and are conditional up to the emergence of an inter-American standard developed by the Court.[205] These national decisions are not provisional. Many, if not all of them, will stand in the specific cases in which they were rendered and will never be revised by the Court.

While the Court should not feel bound by national decisions, it should grant them particular authoritative interpretative value. In the new integration model, national judges are proper interpreters, guardians, and enforcers of the Convention, just as the Court is. Thus, the Court should, at least, mention this groundbreaking national jurisprudence. In that way, the Court will show that tribunals in the region have already dealt with similar matters. The Court should also be more serious about the often-mentioned jurisprudential dialogue,[206] meaning the reciprocal influence between national courts and the Inter-American Court in the development of its jurisprudence. Currently it seems to be more of a one-way monologue or a "unidirectional pattern."[207] A truly judicial dialogue would require the Court to read and discuss national courts' jurisprudence, in open-minded-yet-critical fashion.[208] Judicial dialogue implies "reciprocal intellectual give and take,"[209] and not a recitation of national precedents without any real analysis or influence in the process of forming the Court's opinion. In so doing, the Court would have a true ongoing

Relator: Min. Carlos Britto, 19.03.2009, 181, D.J.e., 25.09.2009, 71, 77–78 (Braz.) (addressing the rights of consultation of native peoples).

205. *E.g.*, García Ramírez, *supra* note 5, at 128–29.

206. *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003) (arguing that international dialogue amongst courts will lead to greater judicial comity based on "respect owed judges by judges," not a comparison of "general national interest as balanced against the foreign nation's interest"); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1108 (2000) (arguing that conflict between the European Court of Justice (ECJ) on the one hand and national courts from Germany, Italy, and Belgium on the other is part of a "tug of war" where each is a check on the power of the other "through dialogue of incremental decisions"); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100, (1994) (discussing the "judicial dialogue" between the ECJ and national courts whereby national courts "refer cases raising European law issues to the ECJ and then use its analysis of these issues to guide their disposition of the case").

207. Víctor Bazán, *Control de convencionalidad, aperturas dialógicas e influencias jurisdiccionales recíprocas*, 18 REVISTA EUROPEA DE DERECHOS FUNDAMENTALES 63, 94 (2011); *see also* Nogueira Alcalá, *Los desafíos*, *supra* note 24, at 1180–81 (noting that domestic courts have received little input from the Inter-American Court). For example, the Court's President has said, "The highest courts of Latin America have been nourishing themselves from the Court's case law in a process that can be referred to as the 'nationalization' of international human rights law." Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, para. 33 (May 26, 2010) (García-Sayán, J., concurring). The President added, for this important process of interaction between national and international courts in the region to happen, in which the former are called to implement international human rights law and observe the provisions of the jurisprudence of the Court, it is necessary to continue encouraging the substantive dialogue which makes it possible. *Id.* In other words, Latin American courts should receive and apply inter-American precedents. But the Court's President does not mention in any way the need for the Inter-American Court to nourish, inform, and enrich itself by using and taking Latin American jurisprudence seriously.

208. *Cf.* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 66, 70 (2004) (discussing how some Justices on the United States Supreme Court have begun to cite and discuss international precedents in their opinions).

209. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 71 (2010).

conversation on matters of substance with national tribunals. This would also encourage domestic courts to use the Convention more and would provide legitimacy to those domestic courts that consistently apply the Convention and whose decisions the Court will follow. If the Court agrees with national decisions, it should recognize this agreement explicitly and explain specifically why it follows such case law. If, to the contrary, the Court departs from national jurisprudence, it should explain the reasons. This approach strengthens the position of national courts as interpreters of the Convention; it encourages national tribunals to use the Convention more and makes national tribunals substantive interlocutors of the Inter-American Court.

C. National Courts and Inter-American Precedents

On the other side of the coin, conventionality control requires national courts to apply the Convention as interpreted by the Court. Thus, it is possible to argue that, in cases where jurisprudence from the Inter-American Court exists, the degree of freedom for national courts is limited. The reason would be that national courts must implement the decisions of the Court without departing from it.[210] And, as the body was created to provide judicial intepretations of the Convention, the Court's decisions have a strong authoritiative value. Nevertheless, from a purely textual point of view, there is no legal conventional obligation to follow Court decisions beyond the specific case and only for the specific country. As I mentioned, there are policy reasons to do so, but no legal obligation.[211]

In fact, from a human rights perspective, there are several reasons that could justify national courts departing from the Inter-American precedents on certain occasions. A blind application of the decisions of the Court undermines the dynamic and evolving nature of the American Convention. As the Court has stated correctly, "[H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."[212] The conditions may have evolved since the Court's decision and may require a new inter-American interpretation that could be started by a national judge. Moreover, the Court is not infallible. It may have erred in its decision on a specific case. Why should a national judge follow a Court's decision that may be wrong or less protective than that State's constitution?[213]

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210. *E.g.*, Ruiz-Chiriboga, *supra* note 5, at 204–10; Sagüés, *El "control de convencionalidad"*, *supra* note 5, at 3.

211. *See supra* paragraph accompanying notes 112–16.

212. Sánchez v. Honduras, Interpretation of Judgment of Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 102, para. 56 (Nov. 26, 2003) (quoting The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 114 (Oct. 1, 1999)).

213. See, for instance, the Supreme Court of Argentina in *Esposito*, CSJN, 23/12/2004, "Espósito, Miguel Angel / incidente de prescripción de la acción penal," La Ley [L.L.] (2004-E-224), paras. 14, 16, in comparison to the Inter-American Court in *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, para. 162 (Sept. 18, 2003). In *Bulacio*, the Court established on a dubious conventional and jurisprudential basis the inapplicability of the statute of limitation in an isolated case of extrajudicial killing and determined that the criminal investigation should continue to punish those found guilty of the crime. Inter-Am. Ct. H.R. (ser. C) No. 100, para. 162. The Supreme Court of Argentina was then faced with the need to decide whether to annul, in clear prejudice to the accused, the decision given in the internal process, or whether to keep the domestic decision in

A mechanical application of the case law would affect the very judicial independence of Latin American judges.[214] The situation is similar to the one explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Čelebići* case when it was requested to follow a precedent set by the International Court of Justice (ICJ).[215] In rejecting the argument, the Appeals Chamber stated,

> [T]his Tribunal is an autonomous . . . judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of . . . courts, it may, after careful consideration, come to a different conclusion.[216]

The same could be said about the Inter-American Court. Although the tribunal is "an autonomous judicial institution whose purpose is the application and interpretation of the American Convention,"[217] it is not a hierarchical authority above domestic judges.[218] The European Court has explained that there is a difference between its role and purpose and that of the ICJ that provides a "compelling basis for distinguishing Convention practice from that of the International Court."[219] The same compelling reasons given the different roles of national courts and the Inter-American Court could justify departing from the Inter-American case law in a concrete case.

The jurisprudence of the Court has to have an authoritative value as an interpretive guide that domestic courts should follow as much as possible, even if they are mandatory only for the specific case. Because the Court and the Commission were created by the Convention to apply and interpret the Convention, the jurisprudence of the Court and the views of the Commission should be the starting point for Latin American judges when they apply the Convention and should be given particular deference. Following the jurisprudence of the Court and the

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defiance of the ruling of the Inter-American Court. *Espósito*, L.L. (2004-E-224), para. 14. The Supreme Court opted for the first choice, even if it "made clear that this Court does not agree with limiting the right to defense which follows from the decision of the said international court." *Id.* para. 12 (translation by author). The Argentine Court added that it was its duty "as part of the Argentine State, to comply with the Inter-American Court decision." *Id.* para. 16 (translation by author).

214. As the Inter-American Court itself said, independence of judges means that "they should not feel compelled to avoid dissenting with the reviewing body which, basically, only plays a distinct judicial role that is limited to dealing with the issues raised on appeal by a party who is dissatisfied with the original decision." Apitz Barbera v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, para. 84 (Aug. 5, 2008).

215. Prosecutor v. Delalic (Čelebići Case), Case No. IT-96-21-A, Judgement, paras. 21–24 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

216. *See, e.g.*, International Responsibility, *supra* note 23, para. 58 ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.").

217. Statute of the Inter-American Court, *supra* note 16, art. 1.

218. *See* American Convention, *supra* note 3, art. 68 (requiring States that are party to the case undertake to comply with the judgment of the Inter-American Court).

219. Loizidou v. Turkey, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) at 24 (1995) (Preliminary Objections).

views of the Commission consolidates predictability and consistency in the legal developments of the Convention, increases confidence in judicial decisions, and contributes to the real and perceived integrity of the judicial process.

Clear guidelines should be developed to allow the possibility of rejecting a jurisprudence of the Court or the Commission when compelling reasons so require and justify such departure. A national court could depart from the Court's precedents after serious consideration of the implications of that departure. Some of the weighty reasons for such a position could be that the Inter-American decision turns out to be outdated given the evolution of international human rights law and comparative law, that the departure is warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions, highly persuasive reasons demonstrating the erroneous nature of the Court's decision, or the proper appreciation of the lessons learned from experience.[220] Of course, domestic courts are bound by the Court's decisions in specific cases against their own States.

V. IMPROVING THE INTEGRATED INTER-AMERICAN MODEL

A. A Justification for the Integration Model

As already explained, the control of conventionality and the integration principle lack a strong legal foundation. And so far, there is little effort to develop a theoretical framework to support this principle. In this Part I attempt to provide

220. International and national tribunals have reconsidered earlier decisions and changed their positions. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) ("When this Court reexamines a prior holding [to determine whether to depart from a prior decision], its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of [departing from the Court's precedent.]. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." (citations omitted)); CSJN, 21/3/2006, "Barreto, Alberto Damián c. Provincia de Buenos Aires / daños y perjuicios," Fallos (2006-329-759) (Arg.) (justifying changes in its case law based on "reasons of justice, recognition of the erroneous nature of the decision, the proper appreciation of lessons learned through experience, or if changing historical circumstances have demonstrated the advantage of abandoning the established criterion" (translation by author)); Cossey v. United Kingdom, App. No. 10843/84, 184 Eur. Ct. H.R. (ser. A) para. 35 (1990) ("[Legal certainty] would not prevent the [ECHR] from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions." (citation omitted)); Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 90 (Sept. 22, 2009) (explaining the decision to "reconsider[] its previous position" taking into account the adoption of new international instruments, the practice of U.N. treaty bodies and special procedures, the consistent position of the Commission, and the legislation and case law of some countries).

some justification for a more robust integration model. My framework departs from the hierarchical, unidirectional stance that the Court takes.

The Inter-American Court does not operate in isolation. There is already a network of judicial authorities that provides a fertile ground to cement the conventionality control doctrine and the integration principle. Several Latin American courts exercised conventionality control or applied the Convention as interpreted by the Court years before the explicit requirement established in *Almonacid*.[221] After the *Almonacid* case, several Latin American tribunals embraced the conventionality control doctrine.[222] At the same time, some other high courts in Latin America have squarely rejected the decisions of the Inter-American Court either in concrete cases involving their own countries or by refusing to apply Inter-American precedents.[223] This suggests that when the Court made the conventionality

221. *See, e.g.*, CSJN, 7/7/1992, "Ekmekdjian, Miguel Angel c. Sofovich, Gerardo / recurso extraordinario," Fallos (1992-315-1492) (Arg.) (stating that the interpretation of the Convention should be guided by the case law of the Inter-American Court); Corte Constitucional [C.C.] [Constitutional Court], febrero 23, 2000, M.P: Alejandro Martinez Caballero, Sentencia C-010/00 (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/ 2000/c-010-00.htm (affirming that the Court's interpretation is a relevant hermeneutical criterion for the interpretation of the Colombian Constitution, as the American Convention has a special status in the Colombian legal order); Sentencia [S.] No. 2313, de las 4:18 p.m., 9 May 1995, SISTEMA COSTARRICENSE DE INFORMACIÓN JURÍDICA [Constitutional Court], Expediente 90-000421-0007-CO sección VII (Costa Rica) (establishing that the Inter-American Court's interpretation of the Convention has the same legal value as the Convention).

222. *E.g.*, CSJN, 31/8/2010, "Videla, Jorge Rafael y Massera, Emilio Eduardo s/recurso de casación," Fallos (2010-333-1657) (Arg.), http://www.dipublico.org/7314/videla-jorge-rafael-y-massera-emiliu-eduardo/; CSJN, 13/7/2007, "Mazzeo, Julio Lilo s/ recurso de casación e inconstitucionalidad," Fallos (2007-330-3248) (Arg.), http://www.dipublico.org/juris/mazzeo.pdf; Tribunal Constitucional Plurinacional de Bolivia [Plurinational Constitutional Tribunal of Bolivia], noviembre 7, 2011, Sentencia Constitucional 1888/2011-R, *available at* http://www.tcpbolivia.bo/tcp/sites/all /modulostcp/gaceta/resolucion24029.html; C.C., agosto 23, 2012, M.P: Jorge Iván Palacio, Sentencia T-653/12 (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2012/t-653-12.htm; Corte de Consitucionalidad [Constitutional Court], febrero 14, 2012, Expediente 3334-2011 (Guat.), *available at* http://old.congreso.gob.gt/archivos/acuerdos/2012/CCXCIII10009002933420110103 2012.pdf; Resolución dictada por el Tribunal Pleno en el expediente varios 912/2010 y Votos Particulares formulados por los Ministros Margarita Beatriz Luna Ramos, Sergio Salvador Aguirre Anguiano y Luis María Aguilar Morales; así como Votos Particulares y Concurrentes de los Ministros Arturo Zaldívar Lelo de Larrea y Jorge Mario Pardo Rebolledo, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court] (Mex.), *available at* http://dof.gob.mx/nota_detalle.php?codigo=5212527&fecha=04/10/2011; Tribunal Constitucional de Peru [Constitutional Court of Peru], augosto 8, 2012, M.P: César Humberto Tineo Cabrera, Expediente 00156-2012-PHC/TC, *available at* http://www.tc.gob.pe/ jurisprudencia/2012/00156-2012-HC.html.

223. This is particularly the case in Venezuela. *See* Tribunal Supremo de Justicia [T.S.J.] [Supreme Tribunal of Justice], Sala Constitucional deciembre 18, 2008, M.P: Arcadio Delgado Rosales, Expediente No. 08-1572 (rejecting several decisions of the Inter-American Court); *see also* CARLOS AYALA CORAO, DEL DIÁLOGO JURISPRUDENCIAL AL CONTROL DE CONVENCIONALIDAD 192–93 (2012) (discussing the T.S.J.'s rejection of the Inter-American Court's conventionality control). Two recent, highly publicized cases are the decision of the Supreme Court of Uruguay, rejecting the *Gelman* decision, and the Dominican Constitutional Court decision rejecting the *Yean and Bosico* judgment. Suprema Corte de Justicia [Supreme Court], "M. L., J. F. F. O. – Denuncia – Excepción de inconstitucionalidad arts. 1, 2 y 3 de la Ley no. 18.831," 22 febrero 2013, M.R.: Jorge O. Chediak González, IUE 2–109971/2011, Sentencia No. 20 (Uru.), *available at* http://www.stf.jus.br/repositorio/cms/portalStfInternacional/newsletter PortalInternacionalJurisprudencia/anexo/19__Suprema_Corte_de_Justica.pdf; Tribunal Constitucional [Constitutional Court], 23 septiembre 2013, Expediente TC-05-2012-0077, Sentencia TC/0168/13 (Dom. Rep.), *available at* http://tribunalconstitucional.gob.do/sites/default/files/documentos/Sentencia %20TC%200168-13%20-%20C.pdf. The Brazilian Supreme Court decision on amnesty law that took a very restrictive interpretation of the Inter-American precedents can also be added. S.T.F., 2008/148623,

control explicit, the tribunal was building upon existing, although inconsistent, Latin American practices. It could also mean that the conventionality control is not a radical departure from accepted Latin American precedents. But it also calls for the Court to recognize that Latin American tribunals had shown creativity in applying the Convention before the explicit requirement made by the Court. So the starting point should be a model that understands that the relationship of the Court with States goes beyond the executive, particularly the Ministries of Foreign Affairs. In particular, the model should reinterpet the relationship between the Court and local tribunals in order to conceive it as a strategic partnership. This partnership can help to "heighten [domestic courts'] sense of accountability, and to demonstrate the benefits of partaking in transnational judicial dialogue by deferring to, citing to, and otherwise promoting national jurisprudence that embeds the Court and its rulings in national settings."[224] Particularly, this trend should encourage a bottom up process led by domestic judges rather than a top-down approach imposed by the Court.[225]

By grounding the conventionality control in a partnership between the Court and local tribunals, the integration principle embraces the foundations of the subsidiarity principle. The subsidiarity principle stems from the idea that States have the primary responsibility to protect the rights of individuals through their domestic legal systems and practices, and in case they fail to do so, the American Convention and the organs that it creates (the Court and the Inter-American Commission) act as a complement to domestic laws and practices in redressing victims.[226] Subsidiarity is also premised on the understanding that local actors, including legislators and judges, "are in the best position to appreciate the complexity of circumstances on the ground."[227] In this alternative understanding, the integration principle embraces the idea that those local actors including domestic judges are better suited to understand what measures may be most effective for internalizing human rights norms in distinct social, economic, cultural, historical, and political contexts.[228] Nevertheless my argument does not seek to place judges as the main actors to bring social change.[229]

From this perspective, there is consensus that improvement in national Convention compliance lies more in the effective use of the Convention by judges rather than in its formal incorporation. Several studies on the effectiveness of international adjudication have demonstrated the importance of local actors, particularly judges, in the implementation of international human rights law standards.[230] Others have also highlighted that social change consistent with human

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Relator: Min. Eros Grau, 29.04.2010, 180, D.J.e., 19.09.2011, para. 42, *available at* http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adpf153.pdf.

224. Huneeus, *supra* note 193, at 496–97.

225. I thank Lucas Lixinski for this idea.

226. *E.g.*, Acevedo-Jaramillo v. Peru, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 157, para. 66 (Nov. 24, 2006).

227. Melish, *supra* note 34, at 443.

228. *Id.*

229. For Europe, see Lucas Lixinski, *Taming the Fragmentation Monster through Human Rights? International Constitutionalism, 'Pluralism Lite' and the Common Territory of the Two European Legal Orders*, *in* THE EU ACCESSION TO THE ECHR 219–33 (Vasiliki Kosta et al. eds., 2014).

230. *E.g.*, Huneeus, *supra* note 193, at 531; *cf.* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 306–07 (1998) (arguing that although studies have had mixed results, supranational tribunals generate better results when state judiciaries are

rights standards comes, not from international courts, but from local actors and how they appropriate international human rights law.[231] So the integration model proposed embraces the emergence of multiple inter-American judges at the local level. Jointly with the subsidiarity principle it reflects the idea that social change will come from local actors closer to local realities.[232]

Others have also demonstrated that national actors obey international law in part as a result of "repeated *interaction* with other actors in the transnational legal process."[233] Thus, "a first step is to empower more actors to participate" in those processes.[234] Transnational legal processes, including the relationship between the Inter-American Court and domestic tribunals do, could, and should trigger those interactions.[235] Similarly, some have explained that international human rights law is implemented by a process of socialization.[236] In other words, the way the Court can exert influence over the behavior of national decision-makers, particularly domestic courts, does not rest on its coercive power, but rather in the "the skillful use of persuasion to realign the interests and incentives of decision-makers in favour of compliance" with the Court's decisions and case law.[237]

From this perspective, the conventionality control and the integration principle facilitate and promote these socialization and transnational processes and recognize the role that domestic courts play in promoting (or hampering) social change. Domestic courts operating within this newly expanded, integrated inter-American system, and having to justify or criticize the State's official policies in terms of the inter-American human rights discourse, become essential actors in this socialization process.[238] Thus, domestic courts are influenced and strengthened by using the inter-American discourse. At the same time, they become a source of legitimacy and authority for the decisions and the jurisprudence of the Court. If national courts use the Inter-American precedents, they provide the Court with social legitimacy. Interpreted in this manner, the integration principle requires the Court to be aware that its authority and legitimacy depend, in large part, on the existence of a community of Latin American judges engaged with the Court who use the tribunal's precedents, interact with it, but also monitor and disseminate the Court's decisions

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willing to implement their precedents).

231. *See, e.g.*, James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 775 (2008) ("[R]ather than viewing local actors as forces to be deployed to increase the power of a tribunal, human rights tribunals should understand that international rights courts are more effective when their work contributes to efforts deployed *by* domestic activists as part of their broader human rights campaigns.").

232. *See supra* Part II.A.

233. Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656 (1997).

234. *Id.*

235. Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004).

236. *E.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 635–38 (2004).

237. Helfer, *supra* note 50, at 135.

238. *See, e.g.*, Par Engstrom & Andrew Hurrell, *Why the Human Rights Regime in the Americas Matters*, *in* HUMAN RIGHTS REGIMES IN THE AMERICAS 29, 39 (Mónica Serrano & Vesselin Popovski eds., 2010) (arguing that domestic judiciaries, if they harness the resources available to them, are essential political actors for the domestic protection of human rights).

and standards by applying (or sometimes rejecting) them. If national judges take into account the Court's jurisprudence in their decisions, the effectiveness of the Convention is increased as the Court's interpretation transcends the individual case.[239] Conceived in this way, the integration principle calls for a strategic partnership between the Court and Latin American judges and places both sides on equal footings, not in a hierarchical order.

Paradoxically, as the Inter-American Court pushes to expand its power and legitimacy by requiring domestic courts to apply its case law, national judges may find an incentive to protect their own spaces by using the American Convention in a more consistent way. Rather than submit to the Court's overarching presence, national judges may preclude the Inter-American Court's intervention by consistently using a pro-human rights perspective to interpret the American Convention and other international treaties. In such a way, domestic rulings, rather than the Court's, would be the final word in a specific case. By protecting human rights, national courts may be protecting their own inter-American jurisdiction. From this perspective, "assertive national courts invoking international law can effectively limit the autonomy of the international tribunals . . . ."[240]

By conceiving of Latin American judges as active participants in the creation of inter-American human rights law, my integrated model challenges the approach developed by the Court. By its vision, the Court reduces national courts "to a simple compliance mechanism for international law; in effect, not judges, but police"[241] by requiring strict adherence to its case law and by not paying enough serious and due attention to Latin American precedents. The Court's model insists on "the existence of vertical connections that require the courts of a State to enforce that State's international legal obligations"[242] in a very mechanical way. "Associated with this on/off view of the application of international law," including inter-American law, "is the assumption that international law" and inter-American law "will look much the same everywhere."[243] It is in this perspective that the Court insists that its decisions be applied in all situations and in all countries regardless of the case in which it was handed down and the particular context. Additionally, in this understanding, most of the judgments of the Court are textual repetition of previous cases without due respect to the different contexts involved. The Inter-American Court's aspiration of a strong and unified international law is misguided in its focus on notionally uniform enforcement. Such a goal ignores the complications, contradictions, complementarities, and nuances in the meaning of the American Convention that come from rulings by domestic courts that my integrated model promotes.[244]

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239. *See generally* Stone Sweet, *supra* note 77.

240. Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 68 (2009).

241. *See* Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 502–03 (2000) (arguing that when international tribunals (and scholars) view domestic courts merely as enforcement mechanisms, it diminishes those domestic tribunals' abilities to be strategic choices in litigation).

242. *Id.* at 515.

243. *Id.* at 503.

244. *See id.* at 516–17 (discussing the intricacies of implementing international law).

Because domestic judges, in contrast to the Inter-American Court, have to apply both domestic law and international human rights law, they speak to two different communities: the national and the Inter-American. My integration model understands that "domestic judges applying international law may be more conscious both of the need to translate norms from one community to another and of the relationship between that translation and the persuasiveness of their judgment to both communities."[245] Contrary to the Court's insistence on the mechanical application of its case law, an alternative interpretation of the integration principle sees that "domestic interpretation of international law is not merely the transmittal of the international, but a process of translation from international to national."[246] This understanding of the integration principle "recognize[s] the creativity, and therefore the uncertainty, involved in domestic interpretation" and use of the American Convention.[247] As such, this new vision of the integration model gives more power to domestic judges in embedding the American Convention in time and place and as part of a broader inter-American community. In other words, the integration principle as a translation process requires local judges to be both faithful to the other language (the Convention and the case law of the Court) as well as to assert their own language (the national legal system and context). In this perspective, the integration principle does not require substituting the local judgment with the Inter-American one but to promote engagement with diverse internal and Inter-American perspectives on the problem at hand.[248] The contradictions and inconsistencies between Inter-American and Latin American precedents, rather than expressing pathologies, mistakes, or unfortunate side-effects of the proliferation of inter-American interpreters, instead reflect the different political contexts in which the Inter-American Court and national judges pursue their different institutional interests or goals.[249]

In this conception, Latin American courts are seen as political actors using inter-American law rather than mechanical followers of the Court. If we conceive the Inter-American Court and national courts as political actors pursuing their own institutional goals and responding to different, although sometimes overlapping, audiences, the well-reasoned decisions of the Court will be necessary but not enough to ensure that domestic courts follow them. In other words, we need to understand that in this "dialogue," or "translation," there is no "impartial third party."[250] The Inter-American Court and the States (including their courts) "each have stakes to defend and it is their negotiating skills that determine where solutions will be found and whether they will stick in the long run."[251]

The proposed integrated model takes a pluralistic vision of inter-American interpreters using the American Convention. The model embraces the "jurisdictional tensions [that] express deviating preferences held by influential

245. *Id.* at 504.

246. *Id.* at 506.

247. Knop, *supra* note 241, at 506.

248. *See id.* at 535 (discussing the need for a more integrated form of international law so that "the authority of international law is persuasive not binding").

249. *See, e.g.*, Koskenniemi & Leino, *supra* note 192, at 561–63 (discussing that differences in interpretation among tribunals "arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic").

250. *Id.* at 578.

251. *Id.*

players in the international [and domestic] arena. Each institution (the Court and national judges) speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody."[252] The integration principle accepts that the ways of advancing human rights "should be a matter of debate and evidence, and not of abstract 'consistency,' as to which institution should be preferred in a particular situation."[253] In other words, the integration principle accepts the idea of human rights as a space for political disputes where a plurality of interested actors has many elements at stake and in which the Court and the domestic tribunals negotiate their relationships. While some domestic courts use the Inter-American Court to fortify their own independence and authority with respect to other branches of government,[254] other domestic tribunals unite with executives and legislators of their nation in a position of confrontation against the Court.[255]

The integration principle rejects the idea of an integrated whole, neatly organized according to rules of hierarchy and a clear distribution of tasks.[256] Instead, it accepts that there is a pluralistic human rights legal order where several fundamental norms (particularly the Convention and domestic constitutions) compete for authority.[257] The relationships between the constituent parts of this pluralistic system "are governed in the final analysis, not by legal rules, but by politics, including the politics of the various judiciaries involved. This results in a horizontal-heterarchical, rather than vertical-hierarchical structure . . . ."[258] In Europe it is argued that this system is "remarkably stable, mutually-respectful, and ultimately non-conflictual . . . . [T]he principal dynamic stems mainly from the status of the ECHR in national legal systems, and the role ascribed to it and to Convention jurisprudence by national courts."[259] In this vision domestic courts are at least as relevant as the Inter-American one.

My alternative integration model also acknowledges that, "[w]ithin the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone," as the Court does.[260] Additionally, national judges should have flexibility to decide cases, taking

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252. *Id.*

253. *Id.*

254. *See* C.C., febrero 26, 2010, Sentencia C-141/10 (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm (barring the possibility of a third presidential mandate citing Article 23 of the Convention).

255. *See, e.g.*, T.S.J., Sala Constitucional, deciembre 18, 2008, M.P: Arcadio Delgado Rosales, Expediente No. 08-1572 (Venez.) (rejecting the enforceability of a Court's decision and asking the Government of Venezuela to withdraw from the Convention).

256. *See supra* Part II.B.

257. *See* Greer & Wildhaber, *supra* note 147, at 681 (discussing the pluralistic conceptual framework in the context of the ECHR).

258. *Id.*

259. *Id.*

260. *See* Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT'L L.J. 359, 376 (2005) (discussing integration in the context of Europe). A concrete example is Colombia's Constitutional Court, which has expressly departed from the jurisprudence of the Inter-American Court, holding that "although it is a significant precedent . . . this decision cannot be automatically transplanted to the Colombian case in exercise of conventionality control

into consideration not only the case law of the Court but also their evolving socio-political, economic, cultural, and geographic context. For these reasons, national courts should have at least a "modicum of independent interpretative authority."[261] The integration principle recognizes that first and foremost States (including their courts) must implement the American Convention in their domestic legal orders and follow the Court's case law; but domestic courts must also do more than that. Given the different legal, social, political, economic and cultural context in which they operate, domestic courts may and must, depending on exceptional and very weighty circumstances, deviate from the Court's case law, independently strike a fair balance between opposing forces, and provide their own answers to pertinent human rights issues. Domestic courts will need to provide, in those exceptional circumstances, substantial reasons that have higher legitimacy than those given by the Court. In those circumstances, it appears the domestic court will need to make a principled case why a "primacy of national law anchored less in general theory than in empirical reality" is required.[262] The integration principle promotes a "critical loyalty" to the Court's jurisprudence.[263]

The proposed integration model rests on the relationship that the Court needs to develop with domestic courts. This relationhip may take years to fully flourish. As the historical experience in the United States and how its Supreme Court succeeded in exercising judicial review over state courts demonstrates, the Inter-American Court may need years in order to succeed in its enterprise of obtaining full acceptance from domestic courts. As Professor Mark L. Movsesian has suggested,

> [A] number of factors favored the success of Supreme Court review. The Court asserted jurisdiction over states in conformity with an express statutory grant. It asserted jurisdiction under a Constitution that established it as part of a new national government, one with significant regulatory authority. The Court asserted jurisdiction over states, finally, in the context of a relatively homogeneous society. While there were regional differences, Americans in the early nineteenth century shared much in the way of a common political and legal culture.
>
> Notwithstanding all these factors, the Court found it impossible, over a period spanning more than forty years, to establish its authority over recalcitrant States. While States accepted the Court's judgments most of the time, they did not hesitate to defy it where they believed that vital interests were at stake.[264]

That situation is quite similar to the one in Europe as I explained.[265] Additionally, in the case of the American Convention, no provision requires third

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which does not take into account the particularities of the internal legal system, especially the constitutional jurisprudence and that of the Supreme Court . . . ." C.C., mayo 25, 2011, Sentencia C-442/11, *available at* http://www.corteconstitucional.gov.co/relatoria/2011/c-442-11.htm (translation by author).

261. Helfer, *supra* note 50, at 137.

262. Greer & Wildhaber, *supra* note 147, at 682.

263. *Id.* at 683.

264. *See, e.g.*, International Responsibility, *supra* note 23, para. 58 ("[T]he promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty.").

265. *See supra* paragraph accompanying notes 99–106.

States to follow the Court's precedents or make the Convention directly enforceable domestically.[266] Unlike the U.S. Supreme Court and the European Court of Justice, the Inter-American Court does not act as part of a new government or as part of a regional organization with ample regulatory powers. Crucially, the Convention is not a constitution, but a treaty with a specific provision for withdrawal.[267] Although OAS Members, and particularly those parties to the Convention that accepted the jurisdiction of the Court, share a somewhat common culture and history, they differ in many social, economic, political and ethnic aspects. From this perspective, the more the Court engages in a strategic partnership with local judges and recognizes their full and central role in developing the inter-American system, the more it has possibilities of being successful.

B. A New Conventional Model

For several years I have pushed for reform of the Convention mainly to change the role or profile of the Inter-American Commission.[268] In this Article I suggest amendments to the Convention[269] to enhance or deepen the integration model. I accept that this is not a good time to discuss an amendment to the Convention due to the strong mobilization of a group of States attempting to weaken the inter-American human rights system.[270] But the question of timing should not prevent a discussion of an alternative model that could better reflect the way in which the Convention is part of the integrated inter-American system.

1. Facilitating and Promoting the Interaction between the Court and National Judges

I propose to amend the Convention to facilitate a more fluid interaction between Latin American judges and the Court. There should be a mechanism to allow domestic judges to consult the Court on cases pending before them. The proposed model would follow the model of preliminary rulings of the EU in which any judicial body of a Member State may apply to the CJEU to ask about the validity or proper interpretation of a decision adopted by the EU.[271] The national judge who raises this issue in the context of a process under consideration must stay the proceedings until the Court of Justice rules on it.[272] In Latin America there are

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266. *See supra* paragraph accompanying note 167.

267. *See* American Convention, *supra* note 3, art. 78 (discussing terms for denunciation of the Convention).

268. *See* sources cited *supra* note 6.

269. *Cf.* American Convention, *supra* note 3, art. 76 ("1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.").

270. *See generally* Victoria Amato, *Una mirada al proceso de reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos*, APORTES DPLF, marzo de 2012, at 4.

271. TFEU, *supra* note 86, art. 19 § 3.

272. Court of Justice of the European Union, *Recommendations to National Courts and Tribunals in*

already models of pre-judicial referral. In effect, both Articles 32 to 36 of the Treaty Creating the Judicial Tribunal of the Andean Community[273] and Article 22.k of the Statute of the Central American Court of Justice[274] both allow a pre-judicial referral.

In the inter-American context, a similar mechanism would allow judges who have doubts about the applicability or scope of the Convention to refer the case to the Court, which would then give its opinion on the matter, and that opinion would be binding. This mechanism would serve multiple purposes. First, it would preemptively avoid judges resolving cases in ways which are contrary to the Convention as interpreted by the Court.[275] Second, it would greatly facilitate the interaction between local courts and the Inter-American Court.[276] Third, it would increase the number and types of issues that the Court resolves.[277] Fourth, it could strengthen national judges, as their decisions could find a source of legitimacy in the Inter-American Court.[278]

It is possible that this proposal, rather than strengthening a horizontal dialogue between the Inter-American Court and the domestic tribunals, might reinforce a hierarchical and hegemonic vision of the Inter-American Court as the final interpreter of the Convention. However, as long as consultation is voluntary and not mandatory for the national judge, the potential for a hierarchical vision would be diminished. This would be particularly true if the Court also adopts the other proposals expressed in this article regarding a higher respect for national precedents and rulings. Particularly, the voluntary nature of preliminary referral will allow domestic judges to strategically use the Inter-American Court.[279] National judges will

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Relation to the Initiation of Preliminary Ruling Proceedings, para. 29, 2012 O.J. (C 338) 1, 4. A similar proposal was made in the European system by the Brighton Declaration, which invites the Committee of Ministers to adopt an optional protocol providing a 'preliminary reference procedure' (similar to that available in the EU context) that would enable national courts to seek, in ongoing litigation, a non-binding advisory opinion from the ECHR. High Level Conference on the Future of the European Court of Human Rights, para. 12(d), Apr. 19–20, 2012, Brighton Declaration (April 20), *available at* http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ ENG.pdf.

273. Tratado de Creacion del Tribunal de Justicia de la Comunidad Andina [Treaty Creating the Judicial Tribunal of the Andean Community] arts. 32–36, Mar. 10, 1996, *available at* http://www10.iadb.org/int/intradebid/DocsPdf/Acuerdos/CANDINA%20-%20472.pdf; *accord* Jânia Maria Lopes Saldanha & Lucas Pacheco Vieira, *Controle jurisdicional de convencionalidade e reenvio prejudicial interamericano: Um diálogo de ferramentas processuais em favor da efetivação do direito internacional dos direitos humanos*, *in* ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2013, *supra* note 56, at 435, 449.

274. Convention on the Statnte of the Central American Conrt of Justice art. 22(k), Dec. 10, 1992, 1821 U.N.T.S. 279; *accord* Lopes Saldanha & Pacheco Vieira, *supra* note 273, at 452. [Editor's note: The spelling errors by which the letter "u" is twice turned upside down into an "n" are part of the official English-language title of the treaty in the U.N. Treaty Series].

275. For a discussion of the various ways domestic judges interpret and can interpret the Convention, see *supra* Part IV.A.

276. For a discussion about the need for a greater dialogue between domestic courts and the Inter-American Court, see *supra* paragraph accompanying notes 206–209.

277. For a discussion about gaps in the Court's jurisprudence interpreting the Convention, see *supra* paragraph accompanying note 174.

278. For a discussion of the powers of domestic judges within their states and their legitimacy, see *supra* paragraph accompanying notes 238–240.

279. In Europe, constitutional or supreme courts have a mixed use of the preliminary referral. Currently, it appears that there is a move from a situation characterized by the reluctance by European Constitutional Courts to raise preliminary references to the CJEU to a context where Constitutional Courts accept the mechanism, mentioning the cases of the constitutional courts of Austria, Belgium,

have the discretion to decide when and what type of consultation they will refer to the Inter-American Court. As I promote a deliberate partnership between the Court and domestic judges, the amendment will allow for a very strategic use of the Court's jurisdiction by national judges.

2. Expanding the Standing to Request Advisory Opinions

Another proposed amendment to the Convention expands the number of institutions and organs with standing to seek advisory opinions from the Court. Supreme or constitutional courts should be authorized to request advisory opinions from the Inter-American Court, particularly invoking the second paragraph of Article 64 concerning the compatibility of any of the internal laws of the State with international human rights instruments.[280] And those same justices from the highest national tribunals should be invited to submit briefs in Advisory Opinion procedings. This would bring to the system more interaction with key state actors dealing with human rights issues. It is clear that multiple state officials beyond the bureaucracy of foreign relations or justice ministries design, implement, supervise, promote, and evaluate public policies regarding human rights issues.[281] As such, those officials, and particularly justices from the hightest domestic tribunals, need to have the opportunity to approach the Court even against the will of the executive. Allowing justices to access the Court could also help unlock domestic political processes in which a state entity promotes the adoption of policies compatible with human rights while other sectors or officials within the government or the State oppose or resist such policies. Particularly, it will enhance the conventionality control as the Court will have more opportunities to analyze the compatibility of domestic laws with the Convention. Again, the idea is to strengthen the partnership between the Court and domestic judges in a very strategic way. It does not pretend to reinforce the idea of the Court as the single authoritative interpreter of the Convention.

I am not proposing the use of advisory opinions as a way to address concerns about the fragmentation of international law or to challenge the welcome emergence of multiple inter-American judicial interpretations.[282] Nor do I propose the request of advisory opinions as a way to consolidate the status of the Court as a final

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Lithuania, and, lastly, Italy. Giuseppe Martinico, *Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?* 3 (Tilburg Inst. of Comp. & Transnat'l L., Working Paper No. 2009/10, 2009), *available at* http://ssrn.com/abstract=1483664. Other courts, such as the German and Spanish Constitutional Courts, so far have refused to do so. *Id.* at 4.

280. *Cf.* American Convention, *supra* note 3, art. 64(2) ("The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.").

281. *See, e.g.*, Helfer & Slaughter, *supra* note 230, at 288–89 (addressing the multitude of players domestically that impact human rights within states).

282. As did the former President of the International Court of Justice, Judge Stephen Schwebel. *See* Press Release, Int'l Court of Justice, Failure by Member States of the United Nations to Pay Their Dues Transgresses Principles of International Law, President Schwebel Tells United Nations General Assembly (Oct. 26, 1999), http://www.icj-cij.org/presscom/index.php?pr=133&pt=&p1=6&p2=1 ("In order to minimize . . . significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the [ICJ] on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law . . . ." (omission in original)).

arbitrator of inter-American law. My proposal pursues to expand the activities and interactions between relevant domestic state actors and the Court. The more political actors there are that can address the Court, the more possibilities there will be for the Court to intervene in current situations and the more possibilities there will be for enhancing the status of domestic actors, especially courts, pushing for a human rights agenda.

C. A New Procedural Model

The Court, for its part, should review its procedures to encourage participation and recognize the central role that domestic judges play in this integrated model as required by the conventionality control doctrine. To this end, I propose that the Court establish formal channels of interaction with national courts of all States and not just those of the State in a particular case. Upon receiving a new case, the Court should immediately notify all the high courts or constitutional courts of the States Party to the Convention and invite them to intervene in the case. This intervention could take different forms. For instance, the Court could request information from each high court and constitutional court on its jurisprudence on the subject matter discussed in the case.

D. Improving the Quality of the Court's Legal Reasoning

If the conventionality control is going to be successful it will require that domestic judges be very familiar with the Inter-American case law and that those judges can easily access and understand the rulings of the Court. For this to happen, the reading of the decisions of the Court must be facilitated as much as possible. Rulings longer than one hundred pages[283] are not easy to read, and courts find them difficult to use.

More importantly than reducing the length of its decisions, the Court needs to be much more explicit, precise, rigorous, and serious in the reasoning used to decide each case. Many times, it is extremely difficult to determine the holding of a case or the main reasoning the tribunal used to decide whether there was a violation of the Convention.[284] Sometimes the Court's decisions make it is impossible to understand what the applicable principles are and how any local court should apply them.

Several authors have noted that the successful control of conventionality depends on whether the Court's judgments are well reasoned and based on firmly established legal ground.[285] Similar claims were argued in relation to the effectiveness of transnational adjudication in general.[286] The interpretation offered should be clear and practical, coherent, and context-sensitive.[287] As John Tobin notes,

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283. For example, 133 pages in *Artavia Murillo v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012), and 108 pages in *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

284. *See* Sagüés, *El "control de convencionalidad"*, *supra* note 5, at 2 (noting that the criteria the Court applies is not always uniform or linear).

285. *E.g.*, Binder, *supra* note 94, at 1228; Sagüés, *El "control de convencionalidad"*, *supra* note 5, at 2.

286. *E.g.*, Helfer & Slaughter, *supra* note 230, at 318–23.

287. *See* John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty*

> "The requirement of coherence in reasoning demands that the views of those with relevant expertise must be considered and assessed in order to develop a common understanding as to the meaning of a human right. The requirement of system coherence recognizes that there is a broader system of law within which the understanding of a specific human right must be located."[288]

The Court needs to pay closer attention so that domestically, the Convention operates with other norms, including constitutions. "[F]inally, the requirement for a context-sensitive interpretation accepts the reality that the successful implementation of a human right must occur within both a local and global socio-political context in which the power of States and their legitimate interests cannot be dismissed."[289] The Court must be very careful to distinguish one case from another and should pay particular attention to the specifics of each case and the context in which it developed.[290]

The integration principle creates an interpretative community[291] of inter-American judges. Thus, the Court should revalue the role of Latin American judges in developing conventional standards. The Court must take Latin American jurisprudence more seriously and explain its value in its interpretation of the Convention. It must analyze in detail the national cases it cites and explain why it cites them, how they are selected, and why any contradictory jurisprudence is incorrect according to the Convention and Inter-American case law. Recognizing that Latin American judges are part of the inter-American interpretative community should move the Court to "identify, engage with, and consider" their decisions when offering a meaning for a particular provision of the Convention.[292] This does not mean that the Court must always accommodate or reconcile those local precedents with its own decisions. However, a careful consideration of local views, to the extent that they can be identified, contributes to a deeper and more rigorous analysis. This demands that the Court engage in robust dialogue throughout the interpretative process. By substantially engaging and not purely reciting Latin American decisions, the Court contributes to an interpretation of the Convention grounded in local realities.

CONCLUSION

Despite the shortcomings of the Inter-American Court's analysis and use of the conventionality control, I firmly believe in the need for an integrated inter-American model that merges Latin American constitutional law and Inter-American law. I

Interpretation, 23 HARV. HUM. RTS. J. 1, 15 (2010) (addressing what a supranational body should consider while interpreting a text).

288. *Id.* at 50.

289. *Id.*

290. *See generally* Cavallaro & Brewer, supra note 231.

291. For the concept and idea of interpretative community, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES 14 (1980). For a more recent discussion, see William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 641–59 (2001).

292. Tobin, *supra* note 287, at 10–11.

argue that the Court should develop this integrated model in a serious, consistent, coherent, and systematic way.[293] My basic proposition is that the Court must assume that Latin American judges are essential and central actors in this new framework. National judges are not merely robotic users of the Convention as interpreted by the Court.[294] To the contrary, domestic judges are at the forefront of developing the scope and content of the American Convention.[295] In most areas and in most situations, national judges will be the first to interpret the Convention.[296] In many instances, in fact, there will be strong and firmly developed case law prior to the Court's intervention.

In order to succeed in the Convention's domestication process, the Court must recognize the important political role that judges play. As the judges are the ones deciding the content of constitutional and conventional rights, the prospect of success for the Court relies heavily on how those judicial authorities follow its determination. As such, the Court needs to become an ally of judicial authorities at the national level and also transform them into its own allies.[297] The first step in this direction will be to take seriously what judges are saying and deciding in similar situations. It requires the Court to engage in a substantive bidirectional dialogue with national judges and to involve them as much as possible in the procedure of the tribunal.

In fact, the control of conventionality shows that at present the inter-American system is not autonomous and self-sufficient (if it ever were), operating by itself in its own sphere of action.[298] When talking about the inter-American human rights system we must think more broadly than just in the Commission and the Court.[299] Particularly, States should be a primary focus of understanding the inter-American system. But it must be recognized that States are multifaceted rather than monolithic; they have multiple actors who have different agendas, responsibilities, and visions ranging from the ministries of foreign affairs to the legislative branch, the ombudspersons, prosecutors, and public defenders, through multiple authorities at national, provincial, and municipal levels, all of which, within their respective areas, have responsibilities for human rights.

From this perspective, the conventionality control shows that judges are inter-American actors of central importance. It shows in particular that the State can no longer be considered a unitary fiction and should be analyzed in its components to understand the particular role that judges are called upon to perform in the use and interpretation of the Convention.

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293. For proposals in Europe on how to further integrate the European Convention and the European Court of States Parties, see Helfer, *supra* note 50, at 149–58.

294. *See, e.g.*, Nogueira Alcalá, *Diálogo*, *supra* note 176, at 531 (arguing that domestic judges may interpret the Convention in different ways than the Court, including in a more extensive and protective manner).

295. *See supra* Part IV.A.

296. *See supra* paragraph accompanying note 174 and accompanying text.

297. *See, e.g.*, Huneeus, *supra* note 193, at 496–97 (arguing that the Court should "establish[] a link between the Court and particular state actors" so as to better "embed[] the Court and its rulings in national settings").

298. For a similar argument about the European system, see Stone Sweet, *supra* note 77, at 8.

299. *See, e.g.*, Dulitzky, *Time for Changes*, *supra* note 6, at 162–63 (arguing for more participation by the most relevant institutions and ministries for coordinating and implementing the decisions of the Inter-American system).

Conventionality control shows that neither the Court nor the States, represented by their foreign ministries, own or exclusively control the inter-American system. In fact, the conventionality control, by strengthening the judiciary vis-à-vis other branches, produces two effects: local courts become more relevant inter-American players, and the other branches lose part of the control in the relations between the country and the American Convention and Inter-American Court.

Seeing Gray in a Black-and-White Legal World: Financial Repression, Adaptive Efficiency, and Shadow Banking in China

SIMIN GAO*

[I]t is more than likely that, economically speaking, the people directly involved in these activities (as well as society in general) are better off when they violate the laws than when they respect them. We can say that informal activities burgeon when the legal system imposes rules which exceed the socially accepted legal framework—does not honor the expectations, choices, and preferences of those whom it does not admit within its framework—and when the state does not have sufficient coercive authority.

-Hernando de Soto, *The Other Path*, 1989[1]

SUMMARY

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1. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 11–12 (June Abbott trans.) (1989).

INTRODUCTION

The world as defined by law draws a distinct line between black and white, but the real world has many gray areas. Shadow banking is one such gray area. A shadow banking system is a collection of financial actors and entities that engage in bank-like transactions with light regulation or with no regulation at all.[2]

The Chinese banking system is very complex. It encompasses both institutional activities and individual activities. The institutional activities have three levels. Participants at the first level are commercial banks and investment banks, which are lawful players in the financial market.[3] Parties at the second level are quasi-legal institutions such as micro-loan companies, financing guarantee companies, and pawnshops.[4] Parties at the third level are illegal financial institutions such as money houses and rotating savings and credit associations.[5]

In this paper, I discuss the quasi-legal and illegal shadow banking activities that take place at the second and the third levels. Shadow banking activities in China also include direct financing by individuals or firms without the involvement of an intermediary. Such activities are similar to "alternative financial services" or "fringe banking" in the United States, where they are "a major source of traditional banking services for low-income and working poor consumers, residents of minority neighborhoods, and people with blemished credit histories."[6] In the United States, the majority of customers of alternative financial services are individual consumers.[7] By contrast, the majority of such customers in China are privately owned businesses.[8]

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2. FIN. CRISIS INQUIRY COMM'N, PRELIMINARY STAFF REPORT: SHADOW BANKING AND THE FINANCIAL CRISIS 4 (2010), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/2010-0505-Shadow-Banking.pdf ("Shadow banking refers to bank-like financial activities that are conducted outside the traditional commercial banking system, many of which are unregulated or lightly regulated.").

3. *See* Chun-Yu Ho, *Market Structure, Welfare and Banking Reform in China* 7 (Boston Univ., Working Paper, 2008) (listing the types of lawful financial institutions in China, including both commercial banks and "non-bank financial institutions").

4. *See* discussion *infra* Part II.C.2 (exploring the nature and status of various quasi-legal institutions in the Chinese financial system).

5. *See* discussion *infra* Part II.C.3. The institutions of the second level are legally recognized institutions and can do business within the narrow scope allowed by law. Chinese law does not, however, treat them as financial institutions but instead as ordinary commercial institutions. They are not subject to financial regulation and monitoring. Of course, such institutions may use certain strategies to go beyond their permitted scope; hence, I call them "quasi-legal" institutions. The institutions of the third level are illegal. Both their overall status and their business dealings are illegal according to current Chinese law. For this reason, I refer to them as illegal institutions. *See* discussion *infra* Part II.

6. Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge To Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 591 (2000).

7. *See* Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 487 (2013) (describing fringe banking as "the market's answer to banking for the poor").

8. *See, e.g.*, Zhao Yidi et al., *Pawn Shops Lead China Small-Business Loans as Bank Credit Wanes*, BLOOMBERG (Dec. 23, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayhFOLUZl4D8.

Shadow banking provides access to finance—chiefly loans—that private businesses, especially small firms, cannot access through mainstream financial institutions.[9]

This Article focuses on lending to private businesses. Besides lending, shadow banking firms also engage in bank-like deposit taking, even though they are prohibited from doing so by Chinese law.[10] Shadow banking has become a rival of the formal banking sector by offering more favorable interest rates for depositors[11] and more accessibility for borrowers.[12] The estimated size of the shadow banking system in China is extraordinarily large: about 4 trillion yuan.[13]

Shadow banking is so large because both savers and borrowers turn to it for their economic needs. As for the savers, they cannot get a reasonable rate of return from depositing their money into regulated institutions because interest rates are maintained by the government at an artificially low level.[14] To get a higher return, some savers turn to the shadow banking system outside of state control.[15] As for the borrowers, private enterprises have difficulty getting loans through mainstream financial institutions controlled by the state.[16] As the most energetic part of the Chinese economy,[17] the private sector drives the growth of shadow banking, which meets private enterprise's demand for capital.[18] Shadow banking is an economic phenomenon of adaptive efficiency that resists the suppression of existing legal institutions. Shadow banking may be the last resort for a small private firm looking for funds. It may be Aladdin's magical lamp for savers looking to grow their money.

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9. *See, e.g.*, Int'l Monetary Fund [IMF], *Shadow Banking Around the Globe: How Large, and How Risky?*, GLOBAL FIN. STABILITY REP., Oct. 2014, at 65, 66, *available at* https://www.nte.org/external/pubs/ft/gfsr/2014/02/pdf/c2.pdf (noting that such shadow banking institutions as finance companies and microcredit lenders can provide credit to low-ranked firms in developing economies).

10. Shangyeyinhang Fa (中华人民共和国商业银行法) [Law of the People's Republic of China on Commercial Banks] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995) (Lawinfochina), art. 11.

11. Satyajit Das, *China's Shadow Banking System*, ECONOMONITOR (Apr. 16, 2014), http://www.economonitor.com/blog/2014/04/chinas-shadow-banking-system.

12. *See* discussion *infra* Part II.B.1.

13. *China Signals Intent to Curtail Shadow Banking, Barclays Says*, BLOOMBERG (Jan. 8, 2012), http://www.bloomberg.com/news/2012-01-09/china-signals-intent-to-curtail-shadow-banking-barclays-says.html ("China's informal lending market, which may have expanded to almost 4 trillion yuan ($633 billion), is the most immediate 'time bomb' facing the economy . . . ."); *see also* YI HU & DEVENDRAN MAHENDRAN, HSBC GLOBAL RESEARCH, CHINA BANKS: SHADOW BANKING CONUNDRUM (2011) (discussing the extremely rapid growth of China's shadow banking system).

14. *See* Susan Feng Lu & Yang Yao, *The Effectiveness of Law, Financial Development, and Economic Growth in an Economy of Financial Repression: Evidence from China*, 37 WORLD DEV. 763, 764–65 (2009) (citing artificially low interest rates prevailing in the formal banking system, reaching down to half of the rate available in shadow institutions).

15. Das, *supra* note 11.

16. *See* discussion *infra* Part II.B.1.

17. *See* Feng Lu & Yao, *supra* note 14, at 763 ("[T]he private sector has been China's growth engine in the last 15 years . . . .").

18. *See* Cindy Tse, *Shadow Banking Poses Hidden Risks to China's Financial Sector*, CHINA BRIEFING (Dec. 1, 2011), http://www.china-briefing.com/news/2011/12/01/shadow-banking-poses-hidden-risks-to-chinas-financial-sector.html (explaining that formal banks' preferential loan policies have forced private enterprises to turn to shadow banking).

But shadow banking may also be a thorn in the side of those interested in financial repression because it weakens financial repression, creates competition for mainstream finance, and has many side effects.[19] Especially when there is no appropriate regulation of shadow banking, the shadow banking system may collude with organized banking and cause systemic risks to the economy.[20] Suppression cannot cure the problems of shadow banking; to organize it is the better course.[21]

To find the right solution for shadow banking in China, we first need to know what its problems are and what caused them. There are some essential causes rooted in legislation and regulation that cannot be ignored. Shadow banking truly originates in financially repressive policies. Direct lending from banks is the most important source of funding for Chinese enterprises because capital markets in China are not well developed.[22] The state knows well the importance of banking and enforces these financially repressive policies in the banking system while extracting immeasurable wealth from society in the process. These financially repressive laws and policies in China's banking sector[23] have had significant negative consequences for society and have prompted the birth and boom of shadow banking.

To enforce financial repression, the state has to coerce and suppress shadow banking, but in truth, the state does not have sufficient coercive authority over shadow banking because it is simply too rampant in China. Facing the problem of proliferation, the Chinese government has pursued a strategy that prohibits shadow banks from participating in the formal financial system supervised by the Chinese Banking Regulatory Committee (CBRC) and promulgated laws declaring shadow banking entities illegal or quasi-legal.[24] Since shadow banking is excluded from the

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19. *See* EDWARD S. SHAW, FINANCIAL DEEPENING IN ECONOMIC DEVELOPMENT 135 (1973) ("The rampancy of various private moneylending agencies not only puts credit order in confusion but inflicts harm on the public, especially small business men. Also, there exists the possibility of competition with banks in some financial activities. Since the private money market indulges in covert financial activities, it is apt to impose restrictions on the operation of monetary policy by the government.").

20. *See infra* Part II.D.1.

21. SHAW, *supra* note 19, at 136 ("[I]f they cannot be suppressed, they too should be 'organized.'").

22. *See* THE WORLD BANK DEV. RESEARCH CTR. OF THE STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA, CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND CREATIVE SOCIETY, at 116 (2013), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/03/27/000350881_20130327163105/Rendered/PDF/762990PUB0china0Box374372B00PUBLIC0.pdf [hereinafter CHINA 2030] ("[B]ank credit still accounts for close to 90 percent of funds raised by the corporate sector."); Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat: China*, IV.6, WT/TPR/S/230 (Apr. 26, 2010) (discussing the concept that in China, the capital market is not fully developed and "remains heavily dependent on loans provided by state-owned banks, which have lent mainly to SOEs [State Owned Enterprises].").

23. Repressive laws and policies in China include artificially suppressed interest rates, a monopoly in the banking sector, and barriers prohibiting private businesses from entering the banking sector, among others. *See infra* Part II.

24. *See, e.g.*, Zhongguo Yinhang Jiandu Guanli Weiyuanhui Zhongguo Renmin Yinhang Guanyu Xiaoe Daikuan Gongsi Shidian de Zhidao Yijian (中国银行业监督管理委员会、中国人民银行关于小额贷款公司试点的指导意见) [Guiding Opinions of China Banking Regulatory Commission and the People's Bank of China on the Pilot Operation of Small-sum Loan Companies] (promulgated by the Chinese Banking Reg. Comm'n & the People's Bank of China, May 4, 2008, effective May 4, 2008) (Lawinfochina), § 1 (discussing the rules and regulations for small-sum loan companies). The Chinese government allows some institutions to exist, like pawnshops, micro-loan companies, and guarantee companies. But those

banking regulatory system, there are no everyday regulators of shadow banking activities to deter participants from turning a minor offense into a major one. The Chinese government instead relies on courts to curb violations by shadow banks through excessive punishment of harmless or slightly harmful actions.[25] People have been sentenced to death for violating financial laws.[26] Such excessive criminal punishment would not be not necessary if there were proper administrative regulations in place.[27]

This paper proposes solutions to the problems caused by shadow banking in China. Part I points to financially repressive policies as the legal impetus behind China's burgeoning shadow banking system. Part II examines shadow banking as a manifestation of adaptive efficiency in the face of financial repression in the formal banking sector. It also discusses the side effects of shadow banking and the unsuccessful legal repression of shadow banking. Part III addresses possible solutions to the shadow banking problem.

I. THE LEGAL ORIGINS OF SHADOW BANKING: FINANCIAL REPRESSION IN CHINA

A. Financial Repression and the Emergence of Shadow Banking

As an alternative to formal banking, "shadow banking can dramatically expand (or contract) the effective supply of money in the economy."[28] Shadow banking provides significant benefits to society that enable lenders to reach borrowers "beyond the profitable reach of the formal sector, and to reduce transaction costs usually below those in the formal sector."[29] Shadow banking emerges when law

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institutions are not treated as financial institutions and have a very limited scope of business. In practice, many institutions transgress the boundary set by law because it is hard for them to make enough profit when they abide by it. *See* discussion *infra* Part II.C.2.

25. *See* Feng Lu & Yao, *supra* note 14, at 764 (noting China's "notorious" enforcement of court rulings concerning the financial sector); *cf.* Chenggang Xu & Katharina Pistor, *Law Enforcement Under Incomplete Law: Theory And Evidence From Financial Market Regulation* 2 (Suntory & Toyota Int'l Ctrs for Econ. & Related Disciplines, Discussion Paper No. TE/02/442, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1160987 (arguing that excessive punishment of harmless actions may result from incomplete legislation).

26. *See, e.g.*, *Supreme Court Disapproves Death Penalty for Wu Ying*, XINHUA (Apr. 20, 2012), http://news.xinhuanet.com/english/china/2012-04/20/c_131541052.htm (explaining that the defendant in an illegal fundraising case was originally sentenced to death).

27. I am not opposed to the use of criminal law to punish those who are guilty of financial violations. Criminal punishment is necessary to deter serious violations of this kind. But for less harmful violations, it is not necessary to use criminal law; instead, a civil penalty or an administrative fine will suffice. In China, punishment for financial wrongdoing has on occasion been unreasonable and extreme given the offender's arguable lack of intent. *See, e.g.*, Tang Xiang Yang & Ruoji Tang, *Considered Opinion: The Wu Ying Case*, ECON. OBSERVER (April 19, 2011), http://www.eeo.com.cn/ens/Politics/2011/04/19/199377.shtml (casting suspicion on culpability of Chinese defendant sentenced to death for financial crimes).

28. Erik F. Gerding, The Shadow Banking System and Its Legal Origins 8 (Aug. 23, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstractid=1990816.

29. Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217, 1229 (2004) (quoting

subverts the expectations, choices, and preferences of society by engaging in financial repression.[30]

The term "financial repression" was coined in the 1970s by Professors Edward Shaw and Ronald I. McKinnon.[31] Financial repression refers to laws and policies instituted in lagging economies to control financial systems by preventing them from functioning at their full capacity.[32] Financial repression can often be found in countries where "capital is scarce" and "free-market rates of interest seem ominously high."[33] In these countries, the state may manipulate interest rates to subsidize investment at the expense of some savers.[34] In a repressed financial system, savers cannot choose a deposit rate freely, and they cannot get the risk premium, as the deposit rate is held at a low level by the government.[35] Therefore, savers will look to self-finance or lend their money to a shadow financial system where interest rates are subject to the market.[36] Since the real deposit rate is negative, savings will tend to flow out of banks.[37] To increase savings, lagging economies may enact liquidity constraints, which usually appear in some provisions of the internal revenue law, employment law, or foreign exchange law.[38]

A market-based interest rate is an effective mechanism for promoting efficiency.[39] If interest rates are set by market valuation, the savings level will increase, and the gap between investment demand and actual investment will decrease correspondingly. Market-based interest "rations out all those low yielding investments .... Hence, the average efficiency of investment increases."[40] Unfortunately, a repressed lending rate in a controlled market cannot function to sort out the demand for loans; the rationing is left to the banks or even the administrators. Financial repression may also take the form of government directing banks to allocate credit to certain firms or industries in order to fulfill an industrial

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PRABHU GHATE ET AL., INFORMAL FINANCE: SOME FINDINGS FROM ASIA 6 (1992)).

30. DE SOTO, *supra* note 1, at 12.

31. *See generally* SHAW, *supra* note 19; RONALD I. MCKINNON, MONEY AND CAPITAL IN ECONOMIC DEVELOPMENT (1973).

32. Alberto Giovannini & Martha de Melo, *Government Revenue from Financial Repression* 1 (The World Bank, Working Paper No. 533, 1990).

33. SHAW, *supra* note 19, at 80.

34. *Id.*

35. *See* Feng Lu & Yao, *supra* note 14, at 764 (citing the artificially low interest rates prevailing in the formal banking system, which can fall to half of the market-based rates prevailing in the informal sector).

36. *Cf.* SHAW, *supra* note 19, at 84 (describing how savers in repressed economies look to foreign investments with more market-based interest rates).

37. *See* Rich Toscano, *The Impact of Negative Real Interest Rates*, PAC. CAPITAL ASSOCIATES (Aug. 15, 2008), http://www.pcasd.com/the_impact_of_negative_real_interest_rates (stating that negative real interest rates discourage savings).

38. *See* SHAW, *supra* note 19, at 81–85 (describing the types of controls imposed to stimulate lagging economies).

39. *See* Zhou Xiaochuan, *Road Map for Financial Reform*, CHINA DAILY, Dec. 18, 2013, at 8, *available at* http://www.chinadaily.com.cn/china/2014npcandcppcc/2013-12/18/content_17306403.htm (promoting market-based interest as a way of helping China to "optimize and raise the efficiency of its distribution of funds").

40. Maxwell J. Fry, *Money and Capital or Financial Deepening in Economic Development?*, 10 J. MONEY, CREDIT & BANKING 464, 465–66 (1978).

policy.[41] Credit is allocated at government-controlled interest rates, which are actually subsidized interest rates (lower than the equilibrium rate in an unofficial "curb" market).[42] A government faced with a lagging economy may also pass laws that give priority of lending to certain industries under the guise of promoting "economic development."[43]

The direct consequence of setting repressed deposit and loan rates in an organized market is the growth of a shadow market. The primary function of shadow banking is to meet demands for money outside of government control.[44] The depositors get much higher deposit rates from shadow bankers than what they would get from the organized banking system. Also, borrowers denied by organized finance can borrow from shadow banks even though they have to pay extremely high interest rates (in the view of organized finance).[45] The shadow banking system competes with the organized banking system. Although interest rates in shadow banking are high, they are not monopolistic rates since there are no entry barriers to the shadow banking market like those in the organized market.[46] Because lenders do not have a monopoly power to influence the level of interest rates, the rates are market driven, reflecting the scarcity of financial resources, the risks, and also the costs of violating laws and regulations imposed by the government on the shadow banking system.[47]

B. Financial Repression in China

All of the aforementioned mechanisms of financial repression are manifest in China's economy. These include rigged interest rates, a monopoly in the banking sector, and barriers for private entry into the banking industry. The major consequence of this financial repression is an imbalance of credit distribution, including preferred lending to a privileged sector and concentrated capital in a protected sphere. Financial repression in China creates "a privileged sector and an

41. *See generally* Dimitri Vittas & Yoon Je Cho, *Credit Policies: Lessons from Japan and Korea*, 11 World Bank Res. Observer 277 (1996).

42. *See* Jeffrey D. Lewis, *Financial Repression and Liberalization in a General Equilibrium Model with Financial Markets*, 14 J. Pol'y Modeling 135, 146 (1992) ("To obtain this desired financing, firms turn first to credit available from the banking system at rates fixed by the government. While borrowers in certain sectors or preferred groups (e.g., exporters, agricultural producers, state enterprises) may have virtually unlimited access to credit at regulated (and highly subsidized) rates, other groups must obtain large portions of their credit needs from banks at competitive rates, or from an unofficial 'curb' market. This access to credit at preferential rates represents an important subsidy controlled by government policymakers.").

43. *See, e.g.*, Jaynal Ud-din Ahmed, *Priority Sector Lending by Commercial Banks in India: A Case of Barak Valley*, 2 ASIAN J. OF FIN. & ACCT. 92, 92–94 (2010) (discussing how an industrializing government encourages economic growth through priority-sector lending).

44. *See* Michael Collins, *Is China Headed for a Financial Crash?*, MORNINGSTAR (June 18, 2013), http://www.morningstar.co.nz/kiwisaver/article/china-financial-crash/5996?q=printme (noting that alternative financing vehicles meet the demand for credit created by artificially depressed lending rates).

45. SHAW, *supra* note 19, at 89.

46. *Id.*

47. *Id.*

unprivileged sector[,] with the former having access to cheap credit[] and the latter being rationed out."[48]

1. Monopoly in the Chinese Banking Sector

When the state is a large stakeholder or majority owner in the banking sector, it has considerable leverage to repress the economy. China is an example of such repression. According to World Bank statistics, "[t]he levels of state ownership in the banking sector [in China] and government intervention in the financial system are much higher than in other countries at a similar stage of economic development that later achieved high-income status."[49] Although the state-owned banks finished going public in 2010, "the government continues to dominate in the financial sector" by intervening in the business affairs of the Big Five Banks.[50] Foreign banks have been allowed to lend and accept deposits in *renminbi* (RMB, or yuan) since 2006.[51] This development has increased competition in the banking sector to some extent.[52] However, it has not had any significant effect in ameliorating state-owned banks' monopoly in China.[53] The close connection between state-owned banks and government strengthens the banks' monopoly status; together, they reported 48.99 trillion yuan in assets in July 2011, accounting for nearly 50% of all reported banking assets.[54] Besides the state-owned banks, the state also controlled many joint-stock banks,[55] which amounted to 17% of all reported banking assets in 2012.[56]

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48. Feng Lu & Yao, *supra* note 14, at 763.

49. CHINA 2030, *supra* note 22, at 115.

50. *Id.* at 115–16.

51. KPMG, OPENING DOORS IN CHINA: INCORPORATION OF FOREIGN BANKS 1 (2007), *available at* https://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/opening-doors-china-0701.pdf.

52. *See* SWIFT, RMB INTERNATIONALISATION: IMPLICATIONS FOR THE GLOBAL FINANCIAL INDUSTRY 9 Annex 2 (2011), http://www.swift.com/resources/documents/RMB_White_paper_internationalisation.pdf (noting the "fierce competition in this space among peer banks in China" resulting from China opening the RMB market to foreign banks).

53. China committed to gradually removing the entry barriers for foreign banks (foreign capital) based on a World Trade Organization agreement. M.K. Leung & Ricky Y.K. Chan, *Are Foreign Banks Sure Winners in Post-WTO China?*, 49 BUS. HORIZONS 221, 221–22 (2006). The entry of foreign banks did bring some change to the ecosystem of the Chinese banking market by diversifying ownership and reducing the market share of the state-owned banks. However, it has not had any significant effect on the shadow banking problem because the foreign banks control less than 2% of assets in the Chinese banking sector, which is "lower than in any other major emerging market." Simon Rabinovitch, *China Raises Hurdles for Foreign Banks*, FIN. TIMES, Oct. 9, 2013, *available at* http://www.ft.com/cms/s/0/97ee193e-30b7-11e3-b991-00144feab7de.html; *cf.* Evan Oxhorn, *Consumer Finance and Financial Repression in China*, 7 E. ASIA L. REV. 397, 412 (2012) ("Foreign banks will not exert significant pressure to pursue financial liberalization.").

54. *China's Top Five Banks' Total Assets Down*, CHINA DAILY (Aug. 26, 2011), http://www.chinadaily.com.cn/business/2011-08/26/content_13195229.htm.

55. For example, the local government and state-owned enterprises of Fujian Province are the majority shareholders of Industrial Bank. INDUS. BANK, THE ANNUAL REPORT OF INDUSTRIAL BANK IN 2012, at 65 (2013), *available at* http://www.cib.com.cn/netbank/cn/Investor_Relations/. The state-owned enterprises are also the majority shareholders of Huaxia Bank. *See* HUAXIA BANK, THE ANNUAL REPORT OF HUAXIA BANK 2012, at 2 (2013), *available at* http://res.hxb.com.cn/resource/830/1147/1164/217260/217668/217797/364716/1394687498751292567 36.pdf.

2. Legal Barriers to Private Enterprise Entering the Banking Sector

The state helps to maintain the existing monopoly in the banking system by preventing the entry of newcomers. In China, commercial banks are not freely established.[57] Instead, they are "subject to the examination and approval of the banking regulatory organ of the State Council."[58] To establish a commercial bank, an entity must satisfy the requirements set by Article 12 of Chinese Banking Law,[59] which may seem fair on their face but which leave great latitude to the administration interpreting them to reject an applicant even if that applicant satisfies all five requirements. The room for interpretive latitude comes from this clause: "Other sound conditions shall also be met for the establishment of a commercial bank."[60] What are these "other sound conditions"? Chinese banking law does not clarify the matter, and neither do the regulators. No one knows what "sound conditions" are; such conditions are only known to, and exist only in the minds of the regulators. Not meeting "sound conditions" is a blanket reason to reject private business applicants. Since the requirement is opaque, private entities need to get help from other government agencies to negotiate with the CBRC.[61] Without the support of government, no private institution successfully gets approval by the CBRC to enter the banking market.[62]

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56. Silvia Iorgova & Yinqiu Lu, *Structure of the Banking Sector and Implications for Financial Stability*, *in* CHINA'S ROAD TO GREATER FINANCIAL STABILITY: SOME POLICY PERSPECTIVES 123, 125 (Udaibir S. Das et al. eds, 2013).

57. Commercial banks are referred to as "those enterprise legal persons which are established to absorb public deposits, make loans, arrange settlement of accounts and engage in other businesses in accordance with this law and the 'Company Law of the People's Republic of China.'" Shangyeyinhang Fa (中华人民共和国商业银行法) [Law of the People's Republic of China on Commercial Banks] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995) (Lawinfochina), art. 2. The following characteristics are associated with commercial banks: First, they must be legal persons, which are entities that can engage in commercial business; second, the main purpose of establishing such an entity must be to absorb public deposits, make loans, arrange settlement of accounts, and engage in other transactions; third, they should be legal. *Id.*; *see also* Zhonghua Renmin Gongheguo Minfa Tongze (民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) (Lawinfochina), art. 36 ("A legal person shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations in accordance with the law.").

58. Shangyeyinhang Fa (中华人民共和国商业银行法) [Law of the People's Republic of China on Commercial Banks] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995) (Lawinfochina), art. 11.

59. *Id.* art. 12 ("1. Having Articles of Association in accord with this Law and the provisions of the Company Law of the People's Republic of China; 2. Having a registered capital that meets the minimum amount in accordance with the provisions of this Law; 3. Having directors and senior management personnel with professional knowledge for holding the post and work experiences; 4. Having perfect organizations and management systems; and 5. Having a place of business accompanied with safeguard measures meeting the requirements and other facilities in relation to the business. Other sound conditions shall also be met for the establishment of a commercial bank.").

60. *Id.*

61. *Jiujing Shenme Shi Minying Yinhang?* (*究竟什么是民营银行?*) [*What Are Private Banks Indeed?*], SINA (July 28, 2004), http://finance.sina.com.cn/financecomment/20040728/1607908159.shtml.

62. In 2003, some economists attempted to get five private banks approved by the CBRC, but ultimately failed to do so. *See* Zhang Chunyan & Yang Lei (张春燕 & 杨磊), *Minying Yinhang*

3. Artificially Low Interest Rates

At present, inter-bank interest rates in China are based on the market, but "deposit and lending rates are still directly controlled by the central bank, basically the same as during the planned economy period."[63] The People's Bank abolished the ceiling on lending rates for commercial banks and the floor on deposit rates for all financial institutions in 2004.[64] But the floor on lending rates and the ceiling on deposit rates still exist. The People's Bank is the authority that sets the deposit rate and lending rate.[65] The interest rate set by the People's Bank has binding power not only for the commercial banks but also for any institutions or individuals involved in deposit taking or lending.[66] Institutions that do not comply with the interest rate set by the People's Bank are penalized.[67]

According to the International Monetary Fund, controlling the interest rate brings about three significant effects on the Chinese economy: First, the Chinese people are not fully compensated for their savings; their "financial income as share of total income remains one of the lowest in the world."[68] Second, the artificial interest rate set by the central bank leads to inefficient resource allocation in the banking sector.[69] Third, since the interest rate does not reflect the balancing influences of risk

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Qiantuweibu, Yinjianhuicheng Yanjiuhoubiaotai (*民营银行前途未卜, 银监会称研究后表态*) [*The Uncertain Future of Private Banks: The Commission of Banking Regulation Claims that They Need Further Research to Provide Answers*], SOUTHCN (July 29, 2003), http://www.southcn.com/finance/cjzt/zgmyyhh/myyhbd/200307290883.htm.

63. Wei Qian & Li Tong, *China's Financial Reform Should Focus on Interest Rate Liberalization*, PEOPLE'S DAILY ONLINE (Apr. 5, 2012), http://english.people.com.cn/90778/7778507.html.

64. Zhongguo Renminyinhang Guanyu Tiaozheng Jinrongjigou Cundaililv De Tongzhi (中国人民银行关于调整金融机构存贷利率的通知) [Notice on Adjustment of the Deposit Rate and Loan Rate of Financial Institutions] (promulgated by the People's Bank of China, Oct. 28, 2004, effective Oct. 29, 2004), art. 2, *available at* http://www.adcommission.gov.au/cases/documents/141-AttachmentstoPreliminaryReportonExistenceofCVSubsisides-GovofthePeoplesRepublicofChina-N.pdf ("Relaxing the floating zone of loan interest of financial institutions and relaxing the floor of deposit rates: (1) remove the roof on loan rates of financial institutions (except the city and rural credit cooperative associations) . . . Keep the roof on loan rates of city and rural credit cooperative associations, which cannot exceed 2.3 times the basic loan rate. . . (2) establishing the floor of the floating deposit rate of RMB. The roof on deposit rates in the commercial banks is set by the People's Bank and the floor is floating. In other words, the deposit rate can be 0 and the roof is at a different level from the basic deposit rate." (translation by author)).

65. Renminbi Lilü Guanli Guiding (中国人民银行关于印发《人民币利率管理规定》的通知) [Notice on Issuing the Administrative Provisions on RMB Interest Rates] (promulgated by the People's Bank of China, Mar. 2, 1999, effective Apr. 1, 1999) (Lawinfochina), art. 5 ("The PBC shall have the power to set down and adjust the following interest rates: 1. the deposit rate, loan rate and rediscount rate offered by the PBC to financial institutions; 2. the deposit rate and loan rate for financial institutions; 3. the preferential loan rate; 4. the penalty interest rate; 5. the inter-bank deposit rate; 6. the floating range of interest rates; and 7. others.").

66. *Id.* art. 2 ("All financial institutions, postal savings departments, other legal persons, natural persons and other organizations that operate the RMB deposit and loan businesses within the territory of the People's Republic of China (excluding Hong Kong, Macao and Taiwan) shall observe these Provisions.").

67. *Id.* art. 4 ("All interest rates set down by the [People's Bank of China] shall be the official interest rates which have legal force, and no other entity or individual shall have the power to change them.").

68. Tarhan Feyzioğlu et al., *Interest Rate Liberalization in China* 3 (IMF, Working Paper No. 09/171, 2009), *available at* http://www.imf.org/external/pubs/ft/wp/2009/wp09171.pdf.

69. *Id.*

and return, "banks channel funds to large and well-connected enterprises, away from small- and medium-sized enterprises and households."[70]

4. Preferred Lending to Privileged Sectors

An important reason for the preferred lending to state-owned enterprises is the intervention by government in the operations of commercial banks, which distorts their business strategy and prevents them from becoming commercially independent in making their business policy.[71] Banks are useful for extracting and transferring profits for governments. Chinese banks had more than 80 billion RMB (almost 13 billion USD) on deposit at the end of 2011,[72] of which almost 40 billion RMB (about 6 billion USD) was held by the four largest state-owned nationwide commercial banks.[73] These deposits are overwhelmingly loaned out to state-owned enterprises and local government-backed investment units at very low cost.[74] According to statistics, the private economy contributed 65% of China's GDP in 2008, provided 75% of national employment, and accounted for around half of the country's tax revenue.[75] However, influenced by state policy, banks are reluctant to grant loans to small private companies.[76] In 2013, 62.1% of small private companies lacked access to bank loans.[77] Lacking access to bank resources and also to capital markets,[78] private companies, especially small ones, continue to rely heavily on retained earnings, funds raised from family and friends, or shadow banking.[79]

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70. *Id.*

71. *See* CHINA 2030, *supra* note 22, at 115–16 ("Continued protection and intervention in the business decisions of financial institutions make them convenient policy instruments, the use of which prolongs the bureaucratic culture and distorted incentives that have prevented banks from full commercialization and from allocation of financial resources to the most productive uses.").

72. *Summary of Sources and Uses of Credit Funds of Financial Institutions*, PEOPLE'S BANK OF CHINA (last visited Nov. 25, 2014), http://www.pbc.gov.cn/publish/html/2011s03.htm (examining sources of funds for People's Bank of China, all commercial banks, all trust companies, all investing companies, and financing companies).

73. *Id.*

74. *See* Meghana Ayyagari et al., *Formal versus Informal Finance: Evidence from China*, 23 REV. FIN. STUD. 3048, 3052 (2010) ("Historically, a large share of bank funding has gone to state-controlled companies, leaving companies in the private sector to rely more heavily on alternative financing channels.").

75. Xiong Qu, *Private Economy's Rapid Growth in China*, CCTV.COM (Sept. 27, 2009), http://english.cctv.com/program/bizchina/20090927/101438.shtml.

76. *See* Xiaoqiang Cheng & Hans Degryse, *The Impact of Bank and Non-Bank Financial Institutions on Local Economic Growth in China*, 37 J. FIN. SERVICES RES. 179, 182 (2010) (indicating that over the period spanning 1995 to 2003, Chinese banks extended most of their loans to large and medium-sized firms).

77. Zheng Yangpeng, *SMEs Hungry for Long-Term Loans* (CHINA DAILY), Apr. 7, 2013, http://www.chinadaily.com.cn/business/2013-04/07/content_16379440.htm.

78. It is difficult for small and medium-sized enterprises to qualify to go public under the Chinese Securities Law, which requires the registered equity of listing companies be no less than 30 million RMB. Zhengquan Fa (中华人民共和国证券法) [Securities Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1998, effective July 1, 1999) (Lawinfochina), art. 50.

79. *See* Trade Policy Review Body, *supra* note 22, at IV.6 (noting that due to lack of access to capital markets, small companies must "rely[] heavily on retained earnings (or funds raised from family and friends)"); Das, *supra* note 11 (observing that small companies in China must increasingly rely on shadow

In sum, the Chinese government's policy of financial repression has brought huge benefits to the government. The policy may be necessary, because of China's underdevelopment, to centralize all social resources for industry sectors most in need of funding. However, the side effects of the policy are significant, as I have discussed. Financial repression is a critical reason why private finance must play in the shadows, squelching its vitality. However, as the most energetic part of the Chinese economy, private enterprise has created a new regime, the shadow banking system, as an adaptive response to top-down control.

The shadow banking problem in China can be summarized as follows: Shadow banking has emerged because the law does not honor the expectations, choices, and preferences of society. On the demand side, private enterprises cannot access the financial resources of formal banks because most of those resources go to state-owned entities under current policies. Private enterprises thus pay high risk premiums to obtain funds from the shadow banking system, which drives the growth of shadow banking. For a more reasonable return, some savers turn to the alternative banking system, outside of the state's control.[80] In the next Part, I discuss the economic phenomenon of adaptive efficiency as it applies to shadow banking activities in China contra legal repression.

II. SHADOW BANKING AS ADAPTIVE EFFICIENCY AGAINST LEGAL REPRESSION IN CHINA

In China, the government clings to financial repression in the name of maintaining a stable financial system. It has created a great wall of arbitrary law to prevent private finance from entering the banking sector to become new competition. However, private finance has created its own realm for financing. Chinese shadow banking emerged in response to financial repression. This response, what Professor Douglass North calls "adaptive efficiency,"[81] serves to limit the negative effects of ossified institutions. In this Part, I will discuss the theory of adaptive efficiency and consider Chinese shadow banking as a form of adaptive efficiency, devised in response to financial repression.

A. Theory of Adaptive Efficiency

An institution is "collective action in control, liberation and expansion of individual action."[82] Institutions are "the rules of the game in a society; more formally, they are the humanly devised constraints that shape human interaction."[83]

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banking for their financing needs).

80. The middle class in China has very few options for safe investment. The stock markets in China "more resemble a casino than a true market." Oxhorn, *supra* note 53, at 403–04.

81. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 80–81 (1990) [hereinafter NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE].

82. John R. Commons, *Institutional Economics*, 21 AM. ECON. REV. 648, 648 (1931).

83. Douglass C. North, *Institutions, Ideology, and Economic Performance*, 11 CATO J. 477, 477 (1992).

Institutions may be "composed of formal rules [or] informal constraints."[84] Formal institutions are constraints enforced by legal institutions.[85] Informal institutions can be defined as "private constraints stemming from norms, culture, and customs that emerge spontaneously."[86] Law is the classic example of a formal institution that structures people's behavior and reduces transaction costs by reducing uncertainty.[87] Theoretically, law, as a social constraint, should evolve with a dynamic economic environment to achieve efficiency in allocation.[88] However, institutional reaction in reality may not be so highly efficient due to path dependence and resistance by vested interests.[89] Ossified institutions hinder allocative efficiency,[90] the maximization of possible wealth through the allocation of given resources by institutions.[91]

Fortunately, the economy is not a passive product of these institutions, but reacts with them to achieve efficiency. "Institutions form the incentive structure of a society, and the political and economic institutions, in consequence, are the underlying determinants of economic performance."[92] Professor North claims that the economy reacts with institutions to achieve efficiency.[93] The demand for economic development and the social willingness to accept new knowledge and innovation are two main driving forces behind adaptive efficiency.[94] Adaptive

84. *Id.*

85. Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 PUB. CHOICE 371, 372 (2009).

86. *Id.*

87. *See* NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 81, at 3–6 (explaining that the law and other institutions impose constraints on individual choices but serve to "reduce uncertainty by establishing a stable . . . structure to human interaction").

88. *See* Curtis J. Milhaupt, *The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate*, 91 NW. U. L. REV. 865, 873 (1997) (stating that governance systems should enhance organizations' ability to "respond quickly to changes in the competitive environment").

89. *See id.* at 874 (noting that path dependence may compromise institutions' success in encouraging adaptive efficiency).

90. *Cf.* Marcela Eslava et al., *Market Reforms, Factor Reallocation, and Productivity Growth in Latin America*, *in* BUSINESS REGULATION AND ECONOMIC PERFORMANCE 257–58 (Norman V. Loayza & Luis Servén eds., 2010) (crediting market reforms associated with flexible institutions with improving allocative efficiency).

91. *See* Ying Ma & Abdul Jalil, *Financial Development, Economic Growth and Adaptive Efficiency: A Comparison Between China and Pakistan*, 16 CHINA & WORLD ECON. 97, 98 n.1 (2008) (citing NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 81) (defining allocative efficiency as a type of competitive efficiency that "ensures the maximization of possible wealth through the allocation of given resources and constraints").

92. Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 359 (1994) [hereinafter North, *Economic Performance Through Time*].

93. *See* NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 81, at 81 ("[T]he overall institutional structure plays the key role in the degree that the society and the economy will encourage the trials, experiments, and innovations that we can characterize as adaptively efficient); *see also* North, *Economic Performance Through Time*, *supra* note 92, at 359 (arguing that institutions are the underlying determinants of economic performance).

94. North states,

> Adaptive efficiency . . . is concerned with the kinds of rules that shape the way an economy evolves through time. It is also concerned with the willingness of a

efficiency is meaningful to a society in that it "provides the incentives to encourage the development of decentralized decision-making processes that will allow societies to maximize the efforts required to explore alternative ways of solving problems."[95]

Adaptive efficiency varies in different settings depending on the existing institutions because "the overall institutional structure plays the key role in the degree that the society and the economy will encourage the trials, experiments, and innovations that we can characterize as adaptively efficient."[96] Different institutions may not equally encourage adaptive efficiency.[97] Path dependence may induce commitment on the part of society to existing institutions.[98] Moreover, the spontaneous order emerging from efforts to achieve adaptive efficiency may compete with formal institutions and challenge their authority. Therefore, the emerging spontaneous order may be repressed by the existing institutions.

B. Shadow Banking in China as a Form of Adaptive Efficiency

Adaptive efficiency is a significant economic phenomenon in China. Since there are still too many constraints placed by government on economic activities, the economy—especially the private economy—must create its own institutions to overcome the ossification of official institutions. Shadow banking has emerged as a form of adaptive efficiency against these repressive institutions.

There is an old saying in China that whenever there are policies from the top, the bottom produces counterstrategies (*shangyou zhengce, xiayou duice*). Private firms are the most energetic and innovative force in China. They are not passive victims of unreasonable laws or policies. On the contrary, they use all the resources not under state control to foster a new sphere of operation: shadow banking. In contrast with formal banks, "shadow banks do not have lavish financial buildings, numerous branches or colorful advertising."[99] They may lack any established place of business at all and instead conduct business in cafés and other public areas.[100] Some parties engaged in shadow banking may be "individuals, while others may be small associations with informal and loose structures."[101]

The rationale for shadow banking in China is similar to that of fringe banking in the United States (the so-called alternative financial sector), which is to provide

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> society to acquire knowledge and learning, to induce innovation, to undertake risk and creative activity of all sorts, as well as to resolve problems and bottlenecks of the society through time.
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> NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 81, at 80.

95. *Id.* at 81.

96. *Id.*

97. Milhaupt, *supra* note 88, at 874 (arguing that because of path dependence, different governance systems may not be equally successful at encouraging adaptive efficiency).

98. *See id.* (observing that certain governance systems "involve a tradeoff between credible commitment to stability on the one hand and adaptability on the other").

99. SHAW, *supra* note 19, at 135.

100. *Id.*

101. *Id.*

credit for groups excluded from mainstream financial services.[102] The only difference may be that shadow banking in China is mainly for small businesses[103] while the majority of clients of fringe banking in the United States are consumers with low incomes or poor credit scores.[104] Chinese shadow banking includes pawnshops and micro-loan companies (similar to payday loan companies in United States).[105] Besides these two categories, there are others in China that occupy a gray zone of legality: guarantee companies, rotating savings and credit associations (ROSCAs),[106] and money houses.[107] Currently, pawnshops, guarantee companies, and micro-loan companies can obtain licenses from the government, while money houses and ROSCAs remain illegal.[108]

However simple their organizational structures may be, these outfits may engage in bank-like activities—taking deposits and making loans—like organized banks do.[109] In doing so, they rival the organized banks by offering higher return rates for savings and being more accessible to borrowers.[110] The estimated size of shadow banking in China is extraordinarily large, about 4 trillion yuan.[111]

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102. JOHN P. CASKEY, FRINGE BANKING: CHECK CASHING OUTLETS, PAWNSHOPS, AND THE POOR 6–7, 70–71, 90–97 (1994) (summarizing the reasons why Americans tend to turn to non-bank sources of financing, including unwillingness of banks to lend, family and economic emergencies, and lack of geographic access to banks).

103. *See* Das, *supra* note 11 (noting that small and medium-sized enterprises are especially reliant on the shadow banking system).

104. *See* Drysdale & Keest, *supra* note 6, at 591 (stating that the fringe banking sector in the United States has "become a major source of traditional banking services for low-income and working poor consumers, residents of minority neighborhoods, and people with blemished credit histories").

105. *Compare* discussion *infra* Part II.C.2.a. (discussing pawn shops as a quasi-legal shadow banking industry), *and* discussion *infra* Part II.C.2.c. (discussing micro-loan companies as a quasi-legal shadow banking industry), *with* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 8 (2002) ("Payday lenders are central figures in the [American] fringe banking industry . . . .").

106. Rotating savings and credit associations (ROSCAs) are generally "informal association[s] of participants who make regular contributions to a common fund which is given in whole or in part to each contributor in turn." JI-YEUNE RIM & JOHN ROUSE, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE GROUP SAVINGS RESOURCE BOOK: A PRACTICAL GUIDE TO HELP GROUPS MOBILIZE AND MANAGE THEIR SAVINGS 30–31 (2002).

107. A money house (*qianzhuang*) is an institution or a semi-institution that takes deposits and also makes loans. *See, e.g.*, Jason Blatt, *Recent Trends in the Smuggling of Chinese into the United States*, 15 WILLAMETTE J. INT'L L. & DISP. RESOL. 227, 259 n.204 (2007) (describing money houses as "underground"). Currently, taking deposits is illegal for any institution or individual except commercial banks in China. *See* discussion *infra* Part II.C.1.a.

108. Ayyagari et al., *supra* note 74, at 3054 (distinguishing Chinese ROSCAs and money houses, which operate outside of legal channels, from other, legal types of money lenders).

109. *See Shadow Banking in China: Battling the Darkness*, ECONOMIST, May 10, 2014, http://www.economist.com/news/finance-and-economics/21601872-every-time-regulators-curb-one-form-non-bank-lending-another-begins (describing how Chinese shadow banks receive deposits and provide loans to customers unwilling or unable to deposit money in or borrow money from ordinary banks).

110. *See, e.g.*, Das, *supra* note 11 (stating that investors are attracted to shadow banks because they provide around 9–12% per annum returns compared to the low single-digit returns that organized banks provide).

111. This figure is based on an estimate by Societe Generale analyst Wei Yao. Mamta Badkar, *China Orders Banks to Increase Lending in City Overrun by Blackmarket Loans*, BUSINESS INSIDER (Oct. 11, 2011), http://www.businessinsider.com/china-underground-banking-wenzhou-2011-10.

Professor Tsai has commented that "[t]he stubborn persistence of informal interactions and informal finance is how China's economic miracle has been financed."[112] Notwithstanding its many merits for small businesses, shadow banking has been disparagingly called "back-alley banking."[113] Whatever they may lack in formality or legal status, shadow banking operators do offer some unmistakable advantages for their clientele, such as the following:

1. Accessibility

In 2013, 62.1% of small-to-medium-sized companies were not able to obtain bank loans, although most of these firms considered such loans preferable to shadow financing.[114] Private enterprises lack access to bank resources and also to capital markets.[115] Despite this, private firms can still thrive, owing to thousands of underground banks that supply them with the necessary capital, with more convenience than formal banks. Although shadow banks charge much higher interest rates on their loans than the formal banks charge, shadow banks provide a fair financial channel for private enterprises based on the prices (interest rates) they offer. In this way, the shadow banking system is more market-oriented than the formal banking system.

2. Meeting the Needs of Small Enterprises

Small enterprises behave differently in financial matters from the big firms. A survey of small enterprises in 36 cities in China found that the typical loan amount needed by small enterprises is quite small: Sixty-four percent of these enterprises needed no more than 100,000 RMB (about 16,000 USD) in loan money, and 94% of these enterprises needed no more than 500,000 RMB (about 80,000 USD) in loan money.[116] Big banks have no interest in making such small loans. The minimum loan by state-owned banks or joint-stock banks is 50,000 RMB (about 8,000 USD),[117] and the minimum for loans to businesses should be higher than 50,000 RMB (about 8,000 USD), which is more than what 64% of small enterprises need. Shadow banking provides more flexible loans. Some lenders even make very small loans, reaching as

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112. KELLEE S. TSAI, BACK-ALLEY BANKING: PRIVATE ENTREPRENEURS IN CHINA 23 (2002) [hereinafter TSAI, BACK-ALLEY BANKING].

113. *E.g.*, TSAI, BACK-ALLEY BANKING, *supra* note 112 (book on shadow banking titled "Back-Alley Banking").

114. Yangpeng, *supra* note 77.

115. Trade Policy Review Body, *supra* note 22, IV.6; Chong-En Bai et al., *Property Rights Protection and Access to Bank Loans: Evidence from Private Enterprises in China*, 14 ECON. TRANSITION 611, 613 (2006).

116. YIXIN GONGSI (宜信公司), [CREDITEASE], SANSHILIU CHENGSHI XIAOWEIQIYE JINGYING YURONGZI DIAOYANBAOGAO (三十六城市小微企业经营与融资调研报告) [Research Report on Small and Micro Enterprises in Thirty-Six Cities] 3 (2013) *available at* http://doc.mbalib.com/view/66a1f66ce15e80e6b84e98ed1b144cc9.html [hereinafter RESEARCH REPORT ON SMALL AND MICRO ENTERPRISES].

117. Cai Shuang et al., Xiaozhiye Daikuan Shiwanyuanqi (小企业贷款 10 万元起) [*The Loan for Small firm Started with 10,000 Yuan*], WUHAN MORNING POST (Dec. 3, 2010), http://news.163.com/10/1203/03/6MUT3CB000014AED.html.

low as 10 RMB.[118] Of course, they can also make huge loans of 30,000,000 RMB (4,800,000 USD).[119] Such flexibility fits small enterprises' varying needs.

3. High Efficiency

Shadow banking provides highly efficient financial channels for small enterprises. Usually, small enterprises need fast approval for a loan, often within ten days.[120] Their need for rapid capital cannot be satisfied by less efficient state-controlled banks, joint-stock banks or city/rural banks because these entities require at least two weeks for loan approval.[121] Commercial banks use a three-level approval process: Risk management investigates the prospective loan and then reports to an upper-level credit committee for further investigation before final approval.[122] The credit committee typically makes the final decision.[123] But for loans of more than 10,000,000 RMB (about 1,600,000 USD), the committee may need approval from a board of directors.[124] "Thus, it typically takes two to three months for a business to secure a loan from a commercial bank, a time frame that does not meet the fast processing demands of a small enterprise."[125]

C. Legal Repression of Shadow Banking in China

In China, there are many restrictions on lending for non-financial institutions and individuals so as to prevent them from competing with banks. Chinese law prohibits any deposit-taking activities by non-banks.[126] It also prohibits lending with

118. *Zhang Linlin, Fatie Jieqian Xianshen Shenyang Wushibu Qianshao (发帖借钱现身沈阳50元不嫌少) [Lending by Posting in Intent Appeared in Shenyang and (Minimum Lending) of Fifty Yuan is Possible (to be Accepted by Lenders)]*, HUASHANG MORNING POST (Mar. 19, 2012), http://news.liao1.com/newspage/2012/03/4581711.html.

119. *Zhejiang Minjian Jiedai Ruogan Wenti (浅析民间借贷若干问题) [Issues of Private Lending in Zhejiang]*, HANGZHOU MINJIAN JIEDAI LÜSHI ZIXUNQUN (杭州民间借贷律师咨询 群) [HANGZHOU PRIVATE LENDING LAWYERS ADVISORY GROUP] (July 13, 2012), http://blog.sina.com.cn/s/blog_628572ea01016qxu.htm.

120. RESEARCH REPORT ON SMALL AND MICRO ENTERPRISES, *supra* note 116, at 3.

121. Qin Qingdao Yiyou 35 Jia Xiaoe Daikuangongsiyunying Jinjian Choujian 11 Jia (*青岛已有35家小额贷款公司运营今年筹建11家*) [*Qingdao Has Thirty-Five Operational Small-scale Loan Institutions, Will Add Eleven More This Year*], Bandaowang Xinwen (半岛网新闻) [PENINSULA INTERNET NEWS] (Mar. 13, 2014), http://news.bandao.cn/news_html/201403/20140313/news_20140313_2383428.shtml.

122. Wang Guoqing (王国庆), Gufenzhi Shangyeyinhang Faren Shouxin Shenpi Liucheng Youhua Yu Chuangxinyanjiu (股份制商业银行法人授信审批流程优化与创新研究) [Study on Optimizing and Innovation for the Ratification of Corporate Credit Conferring of the Joint-stock Commercial Banks] 10 (Apr. 2006) (unpublished Ph.D. dissertation, Tianjin University College of Management and Economics) (on file with author).

123. *Id.*

124. Lin Diqiu (林荻秋), Shangyeyinhang Zhongxiaoqiye Shouxin Shenpi Kongzhibiaozhun Yanjiu — Yi Zhongguoyinhang Weili (商业银行中小企业授信审批控制标准研究— 以中国银行为例) [A study to Small and Medium-sized Enterprise Credit Approval Control Standards in Commercial Banks — Taking the Bank of China as An Example] 11 (May 20, 2014) (unpublished Master's dissertation, Xiamen University) (on file with author).

125. Wang, *supra* note 122, at 29.

126. Shangyeyinhang Fa (中华人民共和国商业银行法) [Law of the People's Republic of China on

interest rates significantly higher than those set by banks,[127] although such interest rates for voluntary trading reflect the real value of capital.[128] Chinese law strictly restricts the number of participants involved in the shadow banking trade, which includes the individual model of credit lending and the institutional model of shadow banking activities. Under the individual model of credit lending, loans are given directly to the borrower without intermediaries. The institutional model of shadow banking activities involves financial intermediaries. Compared with the individual model of credit lending, shadow financial intermediaries are absolutely prohibited by Chinese law. Commercial banks are the only institutions that can both take deposits and make loans.[129] Taking deposits is illegal for all other institutions or individuals.[130]

1. Individual Model of Credit Lending

The individual model of credit lending may involve individuals and institutions. Theoretically, direct lending involves a contract between parties and is thus protected by freedom of contract against government intervention under Chinese contract law.[131] Of course, as in most countries, there is an exception for government intervention in individual lending—namely, for predatory lending.[132] Predatory lending is defined as "exploitative high-cost loans to naive borrowers."[133] What qualifies as a "high-cost loan," however, may depend on the perspective of the parties involved. Blackstone observed that "when money is lent on a contract to receive not only the principal sum again, but also an increase by way of

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Commercial Banks] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995) (Lawinfochina), art. 81.

127. *See* Guanyurenminfayuanshenli Jiedaianjian De Ruogan Yijian (关于人民法院审理借贷案件的若干意见) [Some Advice of the People's Supreme Court on the Trial of Lending Disputes] (promulgated by the Sup. People's Ct., July 2, 1991, effective Aug. 13, 1991) (Lawinfochina), art. 6 (establishing the judicial rule that while private lenders may charge interest rates beyond the cap imposed on commercial banks, they may not charge a rate that exceeds four times that cap).

128. *See* Richard Silk & Grace Zhu, *China Steps Toward Market-Based Interest Rates*, WALL ST. J. (Dec. 8, 2013), http://online.wsj.com/news/articles/SB10001424052702304744304579245692059412548 (implying that interest rates on voluntary, negotiable certificates of deposit reflect the market value of capital because they are not subject to the interest-rate ceilings the Chinese government imposes on interest rates on ordinary bank deposits).

129. Shangyeyinhang Fa (中华人民共和国商业银行法) [Law of the People's Republic of China on Commercial Banks] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995) (Lawinfochina), art. 11.

130. *See id.* ("No entity or individual may engage in absorbing public deposits . . . without the approval of the banking regulatory organ of the State Council." (translation by author)).

131. *See* Zhonghua Renmin Gongheguo He Tong Fa (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 4 ("The parties have the right to lawfully enter into a contract of their own free will in accordance with the law, and no unit or individual may illegally interfere therewith.").

132. Rudolph C. Blitz & Millard F. Long, *The Economics of Usury Regulation*, 73 J. POL. ECON. 608, 608 (1965) ("Laws and moral codes regulating interest charges can be traced from the Babylonian code of Hammurabi of 1800 B.C., from Deuteronomy of the Old Testament through the Roman Law, through the variety of medieval prohibitions, through the rules of the Koran to the modern world . . . . [S]uch legislation is a commonplace in the world today.").

133. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1257 (2002).

compensation for the use," this compensation "is called *interest* by those who think it lawful, and *usury* by those who do not [think] so."[134]

Any return for lenders may be regarded as interest or usury, since the boundary between them is blurry. The purpose of usury law is a noble one, aiming to protect the consumer against fraud and to redistribute wealth.[135] A ceiling on interest rates, however, can be quite subjective and arbitrary, depending on what legislators think is immoral and unfair. Chinese law does not clearly define parameters for predatory lending.[136] Since there is no explicit law of usury, administrative agencies and courts make their own rules to deal with usury problems. Such variable and conflicting rules repress interest rates. Also, the Chinese government has placed stringent restrictions on the status of participants in lending for the purpose of curtailing the growth of informal financial institutions.

a. Rules for Usury Rates

In a repressed economy, savers who have no taste for negative interest rates tend toward self-financing or the shadow financial system.[137] Chinese law cannot prevent lending with interest outside the banking system. However, the state discourages such lending by restricting lending rates. The National People's Congress has not enacted any formal usury law. Intervention into usury comes from the regulations of central banks and judicial interpretation. The Supreme People's Court issued a judicial interpretation in 1991 holding lending contracts unenforceable when their interest rates exceed four times the benchmark set by the People's Bank of China.[138] Also, a compounded interest rate can be used in lending by banks, but all other lending with a compounded interest rate is invalid according to the 1991 judicial interpretation.[139] The People's Bank adopted its own rule on lending outside the banking system and set the scope of the floating interest, which must not go

134. 2 WILLIAM BLACKSTONE, COMMENTARIES *454.

135. *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 283–84 (1995) (explaining that a popular policy goal is to protect "poor debtors" by redistributing wealth through decisions not to enforce particularly burdensome contracts).

136. *See generally, e.g.*, Shangyeyinhang Fa (中华人民共和国商业银行法) [Law of the People's Republic of China on Commercial Banks] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995) (Lawinfochina) (failing to set parameters for predatory lending).

137. SHAW, *supra* note 19, at 19 ("In the repressed economy savings flow mainly to the saver's own investments: self-finance prevails."); Das, *supra* note 11 ("Negative returns . . . have led savers to seek higher available rates in the shadow banking system.").

138. Guanyurenminfayuanshenli Jiedaianjian De Ruogan Yijian (关于人民法院审理借贷案件的若干意见) [Some Advice of the People's Supreme Court on the Trial of Lending Disputes] (promulgated by the Sup. People's Court, July 2, 1991, effective Aug. 13, 1991), art. 6 ("The interest rate of private lending can be somewhat higher than the rate of banking . . . but the maximum should not exceed four times the rate in banking. An amount exceeding this limitation should not be protected [by law]." (translation by author)).

139. *See id.* art. 7 ("The lender should not count the interest into the principal to get high profits." (translation by author)).

beyond the floor and ceiling set by the People's Bank.[140] Two kinds of critiques can be made about these usury rules.

First, such rules do not have a legitimate basis in law. In China, the Supreme People's Court does not have the authority to make law where no statute exists.[141] The only authority the Supreme Court has is to interpret existing statutes.[142] Since there is no statute on usury, the judicial interpretation of 1991 is beyond the legitimate authority of the Supreme Court. It is also doubtful whether the People's Bank has the authority to make rules about usury. The People's Bank does have the authority to make administrative rules, but law passed by the People's Congress requires that administrative agencies make rules "in accordance with the laws as well as the administrative regulations, decisions and orders of the State Council."[143] Also, lawmaking authority on financial issues is reserved by the People's Congress.[144]

Second, regardless of their rule-making authority, the Supreme Court and the People's Bank's rules are conflicting. The Supreme Court rules limit interest rates to no more than four times the benchmark set by the People's Bank, while the People's Bank's rule does not allow interest to exceed the benchmark at all. Different agencies of the state issue conflicting regulations affecting lenders, which introduces uncertainty and confusion into the shadow banking market with respect to understanding which of their contracts will be enforced in a dispute.

b. Rules for Participants in Credit Lending

Although usury rates are widely restricted throughout the world, restrictions on participation in lending are rather rare. China has strict restrictions on the status of participants in credit lending, with the purpose of limiting the amount of lending that occurs outside the organized financial system.

Lending between individuals is generally allowed by Chinese law if the interest rate does not violate usury rules.[145] The number of individuals involved cannot be

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140. Daikuan Tongze (贷款通则) [General Rules for Loans] (promulgated by the People's Bank of China, June 28, 1996, effective Aug. 1, 1996) (Lawinfochina), art. 13 ("A lender shall determine the interest rate for each loan according to the upper and lower limits of interest rate prescribed by the PBC and expressly state it in the loan contract.").

141. *See* Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [Organic Law of People's Court of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980) (Lawinfochina), art. 33 (limiting the Supreme People's Court's authority to issue interpretations to "questions concerning specific application of laws and decrees in judicial proceeding[s].").

142. *See id.*

143. Lifa Fa (立法法) [The Law on Legislation] (promulgated by Order No. 31 of the President of the People's Republic of China, Mar. 15, 2000, effective July 1, 2000) (Lawinfochina), art. 71

144. *See id.* art. 8.8 (including "basic economic system and basic systems of finance, taxation, customs, banking and foreign trade" in the list of "affairs [that] shall only be governed by" legislation (translation by author)).

145. *See* Daikuan Tongze (贷款通则) [General Rules for Loans] (promulgated by the People's Bank of China, June 28, 1996, effective Aug. 1, 1996) (Lawinfochina), art. 13 [hereinafter Daikuan Tongze [General Rules for Loans]] (requiring all lenders to include in loan contracts the "interest rate prescribed by the PBC"); Zuigaorenminfayuan Guanyu Shenli Feifa Jizi Xingshi Anjian Juti Shiyong Falv Ruogan

large enough to be regarded as a "public."[146] There are, however, no laws or regulations that clarify how many people qualify as a "public." In juridical practice, courts have used the standard set by the Supreme People's Court that "public" refers to more than thirty people if the violator is an individual, or 150 people if the violator is an organization.[147] Any individual or organization violating the law for borrowing or lending to a public will be regarded as illegally absorbing funds and be punished by the criminal law.[148] The only enterprises that can engage in both lending and borrowing where the public is concerned are commercial banks.[149] Lending by non-financial enterprises to other firms is generally prohibited by the People's Bank of China.[150] A lending contract between non-financial firms[151] will be regarded as invalid by the court.[152] Two kinds of non-bank financial institutions[153] can lend to other firms or individuals, as long as it is not conducted on a public scale: pawnshops and micro-loan companies.[154] Also, guarantee companies are allowed to make guarantees for loans.[155] But these entities are not regarded as financial institutions by Chinese law.[156]

Wenti de Jieshi (最高人民法院关于审理非法集资刑事案件具体应用法律若干问题的解释) [Interpretations of the Supreme People's Court on the Specific Application of Laws in the Trial of Criminal Cases of Illegal Fundraising] (promulgated by the Sup. People's Ct., Dec. 13, 2010, effective Jan. 4, 2011), (Lawinfochina) art. 1 [hereinafter Zuigaorenminfayuan [Interpretations for Trial of Illegal Fundraising]] (exempting a person who "absorbs funds from his relatives, friends or specific person[s] within an entity without publicity" from the prohibition on "absorbing public savings illegally or in disguised form").

146. Zuigaoarenminfayuan [Interpretations for Trial of Illegal Fundraising], *supra* note 145, arts. 1, 3 (organizing severity of penalties based on number of depositors size of deposits, but also on vague descriptions of "bad social impact").

147. *See id.* art. 3.2 (defining public in judicial interpretation by Supreme People's Court).

148. *Id.* art. 1.

149. *See* Daikuan Tongze [General Rules for Loans], *supra* note 145, arts. 17–23 (generally limiting lending to commercial banks).

150. *Id.* art. 21.

151. Non-financial firms (enterprises) consist of firms mainly engaged in business other than finance.

152. Guanyu Dui Qiyejiedaihetong Jiedaifang Yuqibuguihuanjiekuande De Yingruhechuliwenti De Pifu (关于对企业借贷合同逾期不归还借款的应如何处理问题的批复) [Reply on How to Deal with Default on Lending Contracts between Enterprises] (promulgated by the Sup. People's Ct., Sept. 23, 1996, effective Sept. 23, 1996) (Lawinfochina).

153. Non-bank financial companies include trust companies, auto financing companies, money broker companies, financial leasing companies, local branches of foreign companies, and other companies that are approved by the CBRC. Zhongguoyinhangyejianduweiyuanhui Feiyinhangleijinrongjigou Xingzhengxu-keshixiang Shishibanfa (中国银行业监督委员会非银行类金融机构行政许可事项实施办法) [Measures of the Chinese Banking Regulatory Commission for the Implementation of Administrative Licensing Matters Concerning Non-Bank Financial Institutions] (promulgated by the Chinese Banking Regulatory Commission, Aug. 3, 2007, effective Aug. 3, 2007) (Lawinfochina), art. 2 [hereinafter Shishibanfa [Measures of the CBRC]]. Also, non-bank financial companies include pawnshops, guarantee companies, and micro-loan companies, which are not under the supervision of the CBRC. *Id.* (not including pawnshops, guarantee companies, and micro-loan companies within the scope of CBRC regulation); Jason Bedford, *Benefits of Banking in the Shadows*, CHINA DAILY (June 7, 2013), http://africa.chinadaily.com.cn/weekly/2013-06/07/content_16583439.htm.

154. *See* Sara Hsu et al., *Shadow Banking and Systemic Risk in China* 7 (Pol. Econ. Res. Inst., Working Paper No. 349, 2014) (noting the extent to which the Chinese government allows micro-loan companies and pawnshops to operate).

155. Rongzixingdanbao Gongsi Guanli Zhanxing Banfa (融资性担保公司管理暂行办法) [Interim Measures for the Administration of Financing Guarantee Companies] (promulgated by China Banking Reg. Comm'n, Ministry of Com., Ministry of Fin., Ministry of Indus. & Info. Tech., People's Bank of China, St. Admin. for Indus. & Com., & the St. Dev. & Reform Comm'n (including Former St. Dev. Plan.

The law places unreasonably strict restrictions on the scope of their business: None of these entities can take deposits or borrow from non-bank entities,[157] which leads to problems in terms of shortages of funds.[158] The interest and other management fees they can charge are kept at a low level.[159] Lack of sufficient funds to make loans and the low profit margin are the most significant problems faced by quasi-financial entities. These impediments may induce them to bypass legal barriers and engage in illegal activities.

Other non-bank financial institutions are prohibited from making loans. However, some entities or individuals engage in illegal financial activities, such as money houses and ROSCAs. Such illegal financial entities are very common in areas where the private economy is thriving.[160]

With little access to formal financial institutions, small enterprises are at the bottom of the food chain in the Chinese economy. Pawnshops, guarantee companies, micro-loan companies, money houses, and ROSCAs are lenders of last resort for small enterprises in China. The following Subpart explains the legal constraints and regulatory arbitrage strategies of those institutions.

Comm'n, former), Mar. 8, 2010, effective Mar. 8, 2010), art. 18 [hereinafter Rongzixingdanbao [Administration of Guarantee Companies]].

156. *See* Shishibanfa [Measures of the CBRC], *supra* note 153, art. 2 (not including pawnshops, guarantee companies, or micro-loan companies within definition of "non-bank financial institutions"); Jack Wang, *China's Statement on Bitcoin is Open to Interpretation*, COINDESK (Dec. 16, 2013), http://www.coindesk.com/bitcoin-china-statement-interpretation/ (excluding pawnshops, micro-loan companies, and guarantee companies from definition of financial institution).

157. Rongzixingdanbao [Administration of Guarantee Companies], *supra* note 1555, art. 21.

158. *E.g.*, *Shunned by Banks, Small China Firms Hit Pawn Shop*, YAHOO! FIN. SINGAPORE (May 25, 2011), https://sg.finance.yahoo.com/news/Shunned-banks-small-China-afpsg-4186880213.html ("[Shanghai pawnbroker] Wang said pawn shops, unable to take deposits . . . cannot always make a difference. 'More often than not, we are short of funds too . . . .'").

159. *See supra* Part II.C.1.a.

160. *E.g.*, Kellee S. Tsai, *Banquet Banking: Gender and Rotating Savings and Credit Associations in South China*, 161 CHINA Q. 142, 168 (2000) ("The second developmental context for ROSCAs were the peri-urban districts of Quanzhou and Wenzhou where economic growth has been driven by small-scale private enterprise since the early years of revorm and *hui* have played a prominent role in the financing of this growth.").

Table 1: Current Regulatory Structure for Financial Institutions

Lender / Borrower	Commercial Bank	Non-bank Financial Enterprise	Non-Financial Enterprise	Individual	Public
Commercial Bank	Legal	Legal	Legal	Legal	Legal
Non-bank Financial Enterprise	Legal	Maybe Legal	Illegal	Legal	Illegal
Non-financial Enterprise	Legal	Maybe Legal	Illegal	Legal	Illegal
Individual	Legal	Maybe Legal	Maybe Legal	Legal	Illegal
Public	Legal	Illegal	Illegal	Illegal	Illegal

2. Institutions of Quasi-legal Shadow Banking

The basic principle of legality requires that law be ascertainable without retroactive penalty.[161] According to this principle, commercial actions should not be deemed illegal if there is no law banning them.[162] However, the Chinese government's attitude toward financial activities is opposite to this principle: All financial actions not explicitly permitted by law are illegal. There are only two shadow banking institutions permitted by Chinese law to lend: pawnshops and micro-loan companies. Guarantee companies are allowed to make guarantees for loans. The law has unreasonably tight restrictions on their business scope: None of these entities can take deposits or borrow from non-bank entities. All of these entities are regarded as quasi-financial institutions by Chinese law because they have very limited functions as financial institutions.

161. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985).

162. *See id.* ("[A] fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.").

a. Pawnshops

i. Legal Constraints on Pawnshops

In the United States, a "pawn" is "a bailment of personal property as security for payment of a debt for which the holders of the property have an implied power of sale on default."[163] In China, pawnshops have a long history of about 1600 years, beginning in the period of the Southern and Northern Dynasties.[164] The legal definition of a pawn shop in modern China is very similar to that in the United States. According to Chinese law, pawning is a business transaction in which the pawner gives possessions, chattels, or property rights to a pawnshop as collateral for a loan.[165] The pawner can redeem the pawned item by repaying the loan and the interest thereon within the agreed period of time.[166] Otherwise, the pawner loses the collateral, and the pawnbroker sells it.[167] Borrowers have no obligation to repay and redeem.[168] Thus the pawning relationship looks like a conditioned sale in Chinese business law.[169]

A pawn shop should be organized as a limited liability company according to Chinese regulation of pawnshops.[170] Nevertheless, the state still places tight restrictions on the interest rate charged by pawnshops, which must not exceed the six-month interest rate for financial institutions set by the People's Bank of China.[171] The interest rate set by the People's Bank is quite low.[172] Thus, pawnshops mostly

163. Jarret C. Oeltjen, *Florida Pawnbroking: An Industry in Transition*, 23 FLA. ST. U. L. REV. 995, 996 (1996).

164. Lu Lue (路棣), *Zhongguo Dangpu, Qianzhuanghepiaohao Fazhanshi De Qishi* (*中国当铺、钱庄、票号发展史的启示*) [*The Inspiration for the Developmental History of Chinese Pawnshops, Money Houses, and Piaohao*], 2008 W. CHINA FIN., no. 3, at 32, 32.

165. Dangpu Tiaoli (当铺条例) [Measures for the Administration of Pawning] (promulgated by Ministry of Com. and Ministry of Pub. Sec., Feb. 9, 2005, effective Apr. 1, 2005) (Lawinfochina), art. 3 [hereinafter Dangpu Tiaoli [Administration of Pawning]] ("The term 'pawning,' as mentioned in the present Measures, shall refer to the act of a pawner giving his or her chattel or property rights to a pawnshop as a pledge for the pawned item, obtaining pawn money in return, and then, within the agreed period of time, redeeming the pawned item by repaying the pawn money and the interest thereupon. The term 'pawnshop' as mentioned in the present Measures, shall refer to an enterprise legal person that was established according to the present Measures and specially engages in pawning activities. And its organization form and its institutions shall accord with the relevant provisions of the Company Law of China." (translation by author)).

166. *Id.*

167. *Id.* art. 40.

168. *See id.* (implying that if the pawner fails to redeem, then nothing happens other than the pawnbroker keeping the pawn).

169. *See* Zhonghua Renmin Gongheguo He Tong Fa (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 45 (describing conditioned sales under Chinese contract law).

170. Dangpu Tiaoli [Measures for the Administration of Pawning], *supra* note 1655, art. 3 (stating that pawnshops must apply the relevant Chinese limited liability statute).

171. *Id.* art. 37. In the United States, pawnshops are exempted from usury law in some states because they are not regarded as small loan companies. Drysdale & Keest, *supra* note 6, at 598.

172. *China Central Bank Cuts Benchmark Interest Rates*, REUTERS (Nov. 21, 2014), http://www.reuters.com/article/2014/11/21/us-china-rates-idUSKCN0J510320141121 [hereinafter *China*

profit from the managing fees they collect and not on the interest they charge.[173] But the law places restrictions on the fees too.[174] The state also places tight regulations on the length of the pawning period, which must not exceed six months.[175] Title pawning, property pawning, and real estate pawning are allowed in China.[176]

Besides lending to individual consumers, pawnshops in China are also the lenders of last resort for small businesses.[177] Pawnshops made over a million loans for the total amount of 84.7 billion RMB in the first half of 2010.[178] Approximately 63.7 billion RMB in loans (about 75.4% of the total amount) went to small or medium-sized enterprises.[179] By comparison, the commercial banks made 4.63 trillion RMB in loans over that half of the year.[180] Businesses require large loans relative to loans often made to individuals, and Chinese law does not limit the size of a loan made by a pawnshop.[181] According to a survey done in Zhejiang Province, the average loans made by pawnshops ranged from 15,000 RMB to 2 million RMB.[182] The large amount of loans by pawnshops produces sufficient capital for the operation of the small or medium-sized firms.[183]

Central Bank Cuts Benchmark Interest Rates] (observing cut in People's Bank of China's benchmark loan rate to 5.6%).

173. *See Huirong IPO Prospectus Should Give Potential Investors Pause for Thought*, S. CHINA MORNING POST (Oct. 19, 2013), http://www.scmp.com/business/article/1334825/huirong-ipo-prospectus-should-give-potential-investors-pause-thought (explaining how "[t]he monthly interest rate on [a] loan is regulated but the administration fee is not. As liquidity on the mainland has tightened, [pawn company] Huirong's administration fee has climbed from 11.5 per cent in 2010 to 28.08 per cent this year" and "Huirong gets the profit in the form of exclusive management and consulting fees").

174. Dangpu Tiaoli [Measures for the Administration of Pawning], *supra* note 1655, art. 38.

175. *Id.* art. 36.

176. *See id.* art. 28 (enumerating forbidden activities for pawnshops, not including title pawning, property pawning, or real estate pawning).

177. Simon Rabinovitch, *China Pawnbrokers Cash In on Funding Gap*, FIN. TIMES, Apr. 27, 2012 [hereinafter Rabinovitch, *China Pawnbrokers*], http://www.ft.com/intl/cms/s/0/40690ba6-8dd4-11e1-bbae-00144feab49a.html#axzz2JK24iog1.

178. *Profit of Pawn Industry Totaled RMB1.09 Billion in the First Half of 2010*, MINISTRY OF COM. CHINA (July 21, 2010), http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201007/20100707035694.html.

179. Zhou Liming, A Study in the Nature of the Modern Pawnbroking under Financial Repression in China: Evidence from Firm Survey Data and a Theoretical Explanation 69 (Dec. 2, 2011) (Doctoral dissertation, Zhejiang University).

180. Lu Zheng Ren (任晓 卢铮), *Sheng bannian wogue xin zeng renminbi daikuan 4.63 wan yi yuan* (上半年我国新增人民币贷款 4.63 万亿元) [*Newly Issued Loans Increase to 4.63 Trillion RMB in the First Half of 2010*], CHINA SEC. NETWORK (July 12, 2010), http://www.cnstock.com/index/gdbb/201007/664780.htm.

181. *See generally* Dangpu Tiaoli [Administration of Pawning], *supra* note 1655.

182. Zhou, *supra* note 179, at 66.

183. *See* Rabinovitch, *China Pawnbrokers*, *supra* note 1777 (discussing how pawnshops in China fill gaps in small-and-medium-sized-enterprise lending needs created by lack of access to commercial loans).

ii. Regulatory Arbitrage Strategies Circumventing the Law on Fundraising

Mainly serving businesses, pawnshops in China need more funds than those in the United States to make loans. In China, pawn shops are not financial institutions, so they cannot take deposits.[184] How, then, can pawnshops remain sufficiently capitalized to make loans? A pawn shop can borrow from commercial banks, but it may not borrow amounts exceeding the value of its equity.[185] Pawnshops are also prohibited from borrowing from other enterprises since lending between non-financial enterprises is forbidden by Chinese law.[186] But pawnshops can take investments from institutions or individuals.[187] Thus, enterprises or individuals can lend to pawnshops in the name of "investment" to avoid the ban. *Figure 1* shows how trust companies "invest" in small companies.[188] In this example, individuals or companies buy investment products from Pacific Trust (a trust company) with an expected return of 8%, which is much higher than any bank's deposit interest.[189] Pacific Trust uses the funds to invest in the Pacific Pawn House.[190] Thus, Pacific Pawn House has sufficient capital to make loans to individuals or small enterprises with a high return at around 80% (comprised of interest and management fees).[191] In this case, Pacific Trust works like a bank. The only difference is that Pacific Trust did not make a loan to the pawn shop; it just invested in the pawnshop to circumvent the regulations. Pacific Trust and the Pacific Pawn House have the same controlling company, which is why they can have affiliated transactions.[192] Such an arrangement with a trust company can present some systemic risk of contagion between trust companies, pawnshops, and the network of finance, if any part of the financing chain is problematic. But it is not illegal in China; it is just a legal form of regulatory arbitrage.[193]

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184. Dangpu Tiaoli [Administration of Pawning], *supra* note 1655, art. 26.3.

185. *Id.* arts. 28.1, 44.1.

186. *See generally* Guanyu Dui Qiyejiedaihetong Jiedaifang Yuqibuguihuanjiekuande De Yingruhechuliwenti De Pifu (关于对企业借贷合同借贷方逾期不归还借款的应如何处理问题的批复) [Reply on How to Deal with Default on Lending Contracts between Enterprises] (promulgated by the Sup. People's Ct., Sept. 23, 1996, effective Sept. 23, 1996) (pkulaw.cn).

187. DAVID CUI ET AL., SHADOW BANKING: RISKY BUSINESS 14 (2012).

188. *Id.* at 14, chart 6.

189. *Id.*

190. *Id.*

191. *Id.*

192. Affiliated transactions are restricted by Chinese corporate law, but are allowed if they will not injure the interests of the company. Zhonghuarenmingongheguo Gongsi Fa (中华人民共和国公司法) [Corporate Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 1995) (Lawinfochina), art. 21. There are more restrictions on affiliated transactions for listed companies than for closed companies; listed companies require the approval of non-interested directors. *Id.* at art. 124. Similarly, the Code of Corporate Governance for Listed Companies in China does not forbid affiliated transactions; it merely requires the transactions to be fair, to be for reasonable consideration, and to not injure the company's interest. Zheng Jian Fa (上市公司治理准则) [Code of Corporate Governance for Listed Companies in China] (promulgated by the China Sec. Regulatory Comm'n & the State Econ. & Trade Comm'n, Jan. 7, 2002 effective Jan. 7, 2002), arts. 12, 13, *available at* http://www.csrc.gov.cn/pub/shanxi/xxfw/gfxwj/200712/t20071221_69334.htm.

193. *See* CUI ET AL., *supra* note 187, at 14–15 (discussing the legality of different sources of funding for

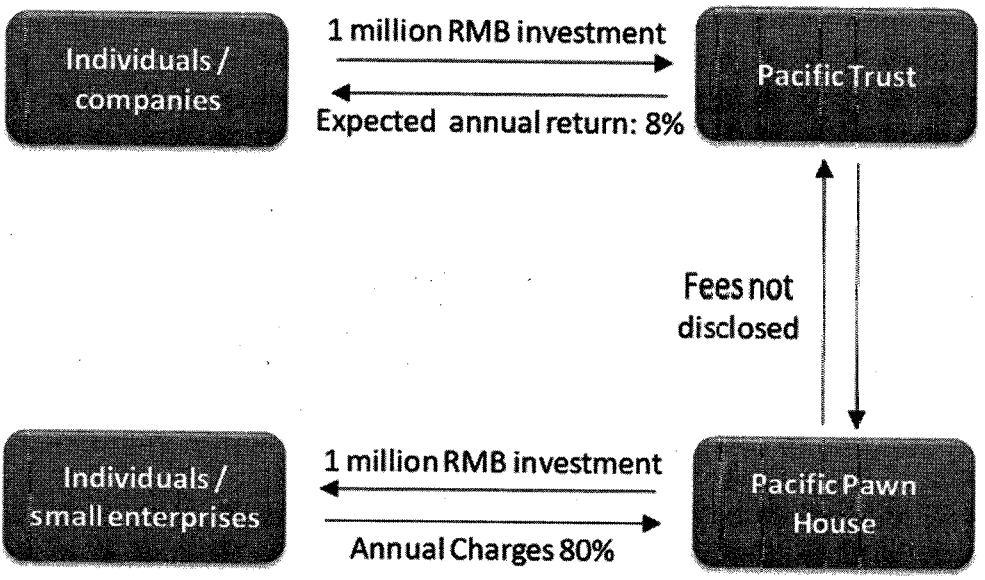

Figure 1. Lending by Regulatory Arbitrage

b. Financing Guarantee Companies

i. Legal Constraints on Financing Guarantee Companies

A financing guarantee company is defined by Chinese law as a company that promises to assume a financial obligation when the debtor defaults on repayment.[194] According to rules specified in the Interim Regulation of Financing Guarantee Companies, financing guarantee companies must be organized as limited liability companies or as joint-stock limited companies.[195]

Banks may have concerns about the ability of some borrowers to repay their debts and thus require them to have guarantors. Guarantee companies provide a guarantee for the loan so that a medium or small enterprise can qualify for a bank loan.[196] The guarantee companies derive their income from the guarantee fees they charge for this service.[197] The guarantee fee is set at a very low level by local laws,[198]

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pawnshops).

194. Rongzixingdanbao [Administration of Guarantee Companies], *supra* note 155, art. 2.

195. *Id.*

196. *See* CUI ET AL., *supra* note 187, at 16 (observing that local government regulators favor guarantee companies to facilitate lending to local businesses, and that it will often be necessary for less creditworthy borrowers to find a guarantor to qualify for a bank loan).

197. *See id.* (explaining that, while guarantors charge fees for their services, they tend to stay low).

198. The ceiling for guarantee fees is set by local governments. It is usually very low. For example, the Henan province limits the fee to 50% of the benchmark interest rate of commercial banks set by the People's Bank of China, which is very low. Henansheng Renminzhengfu Guanyu Jianli Jianquan

while the risk is high.[199] According to a report by the government of Guangdong province, the rate of return on invested capital for the financing guarantee industry was only 2.7% in 2011.[200] This low rate of return forces guarantee companies to seek higher-return opportunities, including risky and illegal ones.

ii. Regulatory Arbitrage Strategies Circumventing the Law

Figure 2 shows an example of such risky illegal business, which is called the "flow-in guarantee" by the guarantee industry.[201] In this scheme, Guarantee Company A gets some part of a guaranteed loan (70% of 10 million RMB) and uses the loan to invest in risky ventures (Project D) and profit by them (with interest rate of 37% per year).[202] Small or medium enterprises (collectively represented as Company B in *Figure 2*) are nominally the customers of the guarantee companies, but are actually partners with Guarantee Company A.[203] They design a scheme to secure a loan from banks (Bank C) at a low interest rate (4% per year) and use some part of the loan (7 million RMB; 1.12 million USD) to invest in risky ventures (Project D).[204] Do banks in this situation know about the real use of the loan? In some circumstances they do and may even be complicit in the scheme.[205] Bankers can

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Zhongxiaoqiye Xinyongdanbaotixi de Ruogan Yijian (河南省人民政府关于建立健全中小企业信用担保体系的若干意见) [A Number of Opinions on Establishing a Sound Credit Guarantee System for Small and Medium Enterprises] (promulgated by the People's Gov't of Henan Province, May 29, 2009, effective May 29, 2009), art. 18, http://www.henan.gov.cn/zwgk/system/2009/06/11/010139876.shtml.

199. *See* CUI ET AL., *supra* note 187, at 20 (stating generally that guarantors face risks from their poor investment choices and from borrowers' defaults, and illustrating one case where a guarantor paid over $400 million RMB in 2011 just from customers defaulting on their loans).

200. *2011 Niandu Zhongqi Piaoju Shichang Fenxi Baogao* (*2011 年度中期票据市场分析报告*) [*Annual Analysis of Medium-term Notes Market in 2011*], FIN. OFFICE OF GUANGDONG PROVINCIAL PEOPLE'S GOV. (Mar. 28, 2012) [*hereinafter 2011 Niandu* [*Annual Analysis of Medium-term Notes*]] (source on file).

201. This example is based on the real case of Huading Guarantee Company, which was involved in a huge "flow-in" business and went bankrupt due to the defaults of the projects it lent money to. *See* Peng Chen (陈蓬), *Huading Ruhe Zoushang Gao Fengxian Buguilu* (*华鼎如何走上高风险不归路*) [*Why Huading Went on a Risky Road with No Return*], SINA (Feb. 21, 2012), *available at* http://finance.sina.com.cn/roll/20120221/142711421833.shtml. Huading's illegal flow-in business is not unusual for companies of its kind: Ninety percent of guarantee companies in Guangdong are reportedly involved in similar business practices. Pang Huawei, *Huading Caused Industry Turmoil and Guangzhou 90% Guarantee Companies Out of Business*, SINA (Mar. 30, 2013), http://finance.sina.com.cn/money/bank/bank_hydt/20130330/094715004801.shtml.

202. Zhang Zhaohui (张朝晖), Xindai Piaobai Liuru Gushi Loushi (信贷漂白流入股市楼市) [*Guarantee Companies Cash Out Bank Loans to Legally Invest in the Stock Market and Real Estate Market*], NETEASE (Feb. 28, 2011), http://money.163.com/11/0228/02/6TUPBD9S00253B0H.html [hereinafter Zhang, *Guarantee Companies*]. The basic rate for commercial loans from banks is 6.6% per year while guarantee companies will add at least 30 points to the interest rate (about 37%). *Id.*

203. *Id.* The basic rate for commercial loans from banks is 5.6% per year, while guarantee companies will add at least 30 points to the interest rate (about 36%). *Id.*; *China Central Bank Cuts Benchmark Interest Rates*, *supra* note 171.

204. *See* Zhang, *Guarantee Companies*, *supra* note 202 (explaining the operation of the "flow-in" scheme).

205. *Chinese Shadow Banking System*, GLOBALSECURITIESWATCH, http://www.globalsecurities watch.org/china%27s_shadow_banking_system.pdf (last visited Nov. 28, 2014).

tolerate the risky activities of guarantee companies and debtors because the bankers can get high rent for their tolerance.

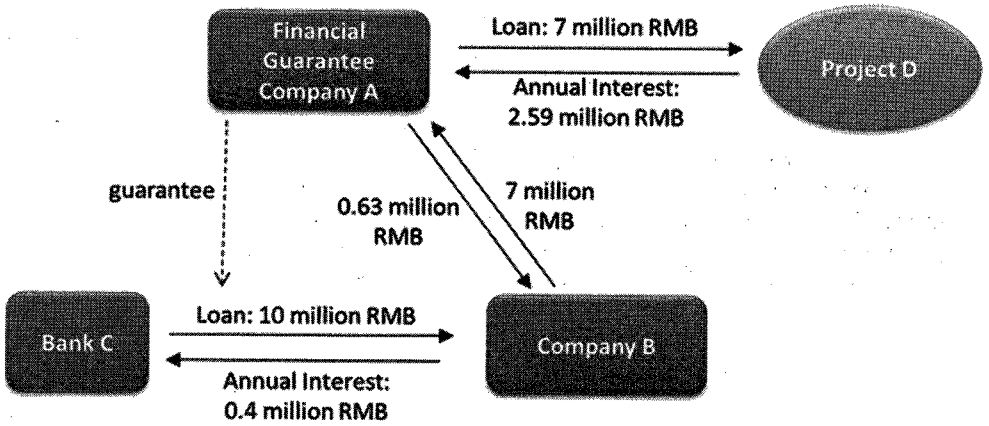

Figure 2. Flow-in Guarantee Model

c. Micro-loan Companies

Among the players in shadow banking, micro-loan companies (small-sum loan companies) are the latest on the scene. Micro-loan companies operated underground until 2008,[206] when the CBRC and the People's Bank decided to grant licenses to some underground banks.[207] According to the rules set by the CBRC and the People's Bank, "[a] small-sum loan company shall be a limited liability company," and it must not "absorb the public deposits."[208] A small-sum loan means that the total amount lent to a borrower will not exceed 5% of the equity of the micro-loan companies.[209]

i. Legal Constraints on Lending Rates and Funding Resources

There are tight restrictions on the lending rates of micro-loan companies, which can only make loans capped at four times the lending rate benchmark set by the

206. *See* Yan Yong, *A New Dawn for Microfinance in China, Part II*, ECON. OBSERVER (Aug. 19, 2008), http://eeo.com.cn/ens/feature/2008/08/19/110897.html (expressing hope that "recent guidelines" would allow micro-loan companies to compete lawfully with formal banks).

207. *See generally* Guanyuxiaoedaikuangongsi Shidianzhidaoyijian (中国银行业监督管理委员会、中国人民银行关于小额贷款公司试点的指导意见) [Guiding Opinions of the Chinese Banking Regulatory Commission and the People's Bank of China on the Pilot Operation of Micro-Loan Companies] (promulgated by the Chinese Banking Reg. Comm'n & the People's Bank of China, May 4, 2008, effective May 4, 2008) (Lawinfochina) [hereinafter Shidianzhidaoyijian [Guiding Opinions on the Pilot Operation of Micro-Loan Companies]].

208. *Id.* art. 1.

209. *Id.* art. 4.

People's Bank.[210] The legal interest rate charged by micro-loan companies is much lower than that of underground banks, which makes them very welcomed by small businesses. On the other hand, the low interest rate limits the return for micro-loan companies, about 5 to 6%, while the rate of return for rural credit cooperatives can be between 30% and 40%.[211] Plus, a heavy tax, which is twice that of rural credit cooperatives, makes micro-loan companies less profitable.[212]

What is worse is that micro-loan companies have limited funding to make loans. Generally, businesses need much larger loans than individual consumers do. Micro-loan companies cannot take deposits.[213] The rules set by the CBRC and the People's Bank require that loans be made out of the lender's equity or bank loans.[214] Micro-loan companies can only get loans from a maximum of two banks, and the amount of the loans cannot exceed 50% of their equity.[215]

ii. Regulatory Arbitrage Strategies Circumventing the Law

To solve the funding problem some micro-loan companies have evolved to be banks' loan distributors[216] or to cooperate with commercial banks in illegal financial activities. They may enter a complicated arrangement among three parties: a small business, a micro-loan company, and a commercial bank.[217] Suppose the micro-loan company wants to make a loan to the small business: a loan of 100 million RMB with an interest rate of 18% and a one-year repayment period.[218] Of course, 100 million RMB is a huge amount and may exceed the equity of the micro-loan company.[219] Thus, the micro-loan company finds a cooperator, a commercial bank, and sells the debt of 100 million RMB to the commercial bank with a guarantee that it will repurchase the debt within eleven months (one month before the debt becomes mature).[220] This arrangement brings benefits to all parties involved: The small business can gain access to a loan, the micro-loan company can find a source of

210. *See id.* art 4 (setting loan interest ceiling at the highest rate allowed by the judiciary); Guanyurenminfayuanshenli Jiedaianjian De Ruogan Yijian (关于人民法院审理借贷案件的若干意见) [Some Advice of the People's Supreme Court on the Trial of Lending Disputes] (promulgated by the Sup. People's Ct., July 2, 1991, effective Aug. 13, 1991) (Lawinfochina), art. 6 (establishing the judicial rule that while private lenders may charge interest rates beyond the cap imposed on commercial banks, they may not charge a rate that exceeds four times that cap).

211. *Henan Xiaoe Daikuangongsi Dishouyi Yinshehuiguanzhu* (*河南小额贷款公司低收益引社会关注*) [*The Low Profits of Micro-loan Companies in Henan Caused the Attention*], LOANCHINA (Dec. 7, 2012), http://www.loanchina.com/news/sort/NewsDetail_126299.html.

212. *Id.*

213. *See* CUI ET AL., *supra* note 187, at 3 (classifying small lenders as "non-deposit taking institutions" and stating that some may take deposits illegally).

214. Shidianzhidaoyijian [Guiding Opinions on the Pilot Operation of Micro Loan Companies], *supra* note 207, art. 3.

215. *Id.*

216. CUI ET AL., *supra* note 187, at 21–23.

217. *Id.* at 23.

218. *Id.*

219. *Id.*

220. *Id.*

adequate funds, and the commercial bank can make a loan indirectly to a small business while having a guarantee of repayment from the micro-loan company.[221] Besides the repurchase arrangement, the micro-loan company also acts as an agent for the commercial bank to distribute the loan or works as the co-lender with the commercial bank.[222]

3. Institutions of Illegal Shadow Banking

a. Money Houses

Currently, money houses are illegal in China because they take deposits and make loans, which is illegal for any institution or individual except commercial banks. Money houses in their present form first arose during the Qing dynasty, about two hundred years ago.[223] However, money houses were forbidden in China after 1949.[224] Even though money houses operate underground, they are not unorganized or completely hidden away.[225] Instead, they may present themselves as investment companies or consultancy firms, and have decent offices with bankers, lawyers, and accountants.[226] Money houses also take deposits and compete with commercial banks for savings.[227] In fact, money houses may be more attractive than commercial banks to savers because money houses provide high interest rates.[228] Despite the apparent competition between them, commercial banks and money houses may also secretly cooperate. For example, money houses may work as agents to help commercial banks make loans.[229] As agents, money houses work to find sources of capital for the commercial banks.[230] Commercial banks may also be customers of money houses. They may borrow from a money house to meet the capital ratio required by the CBRC, at interest rates of up to 0.5% per day.[231]

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221. *E.g.*, Huawei Pang (庞华玮), *Xiaodaigongsi: Qiaoyong Xindaizichan Zhuanrang* (*巧用信贷资产转让*) [*Micro Loan Companies: Strategy of Transferring the Credit Assets*], CHINA BUS. J. (Nov. 12, 2012), http://news.cb.com.cn/html/business_13_7029_1.html.

222. *Id.*

223. *Dang Pu, Piaohao he Qianzhuang* (*当铺、票号和钱庄*) [*Pawnshops, Piaohao, and Money Houses*], CSONLINE.COM (Sept. 9, 2003), http://www.changsha.cn/infomation/rljmsj/t20030808_1514.htm.

224. Xuzhao Jiang, *A Comparative Analysis of Regional Informal Financial Organizations in China*, *in* INFORMAL FINANCE IN CHINA: AMERICAN AND CHINESE PERSPECTIVES 60, 67 (Jianjun Li & Sara Hsu, eds., 2009).

225. *See* CUI ET AL., *supra* note 187, at 25 (explaining that although such organizations may not lawfully make loans, they can be quite sophisticated operations).

226. *Id.*

227. *See* Xuzhao, *supra* note 224, at 68 (noting that money houses accept deposits).

228. *See id.* (noting that residents in southern China with increased income would pursue profit through the higher interest rates offered by money houses over the lower rates of banks).

229. TRACY TIAN ET AL., AN INTERVIEW ON PRIVATE LENDING 3–4 (2010).

230. *See id.* (describing how a money house will sometimes work as an agent of a commercial bank to find depositors to enable the bank to make a large loan without increasing the bank's loan-to-deposit ratio).

231. *Id.* at 3.

b. Rotating Savings and Credit Associations

Rotating Savings and Credit Associations (ROSCAs) have a history spanning at least one thousand years in China.[232] A ROSCA is a "poor man's bank which is an informal saving group where people come together to save money collectively."[233] In the basic form of a ROSCA, "Members of the ROSCA group contribute money daily, weekly or monthly into a pot which is given to one of the members through a lottery at each meeting."[234] Through the ROSCA arrangement, each member gains access to a sizable sum of money at one point in the ROSCA's duration and can use that lump sum for whatever purpose desired.[235] A significant characteristic of a ROSCA is that the interest rate is determined by bidding,[236] a form of competition that is similar to variable interest rates in a competitive market. Thus, the interest rate in a ROSCA reflects the relationship between supply and demand. Another remarkable characteristic of a ROSCA is that it serves as a micro-finance cooperative allowing members to access accumulated savings.

Nowadays, ROSCAs not only work as micro-finance co-ops for consumers but also as fund pumps for small private firms.[237] In 1962, research by Professor Clifford Geertz on a ROSCA in North China found that only three of eight people used funds from the ROSCA for family expenses.[238] By contrast, four of eight used them for business and seven of eight used them for making loans to others.[239]

As a way of creating a thrift (that is, an informal savings and loan operation at a reasonable cost), ROSCAs were recognized as legal by governments before the establishment of the People's Republic of China in 1949.[240] ROSCAs are legal in Taiwan,[241] but are currently illegal in mainland China.[242] There is no law in China

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232. *See* BILIANG HU, INFORMAL INSTITUTIONS AND RURAL DEVELOPMENT IN CHINA 103 (2007) (noting that ROSCAs first appeared during the Tang dynasty, more than one thousand years ago).

233. Shafiqullah Muhammad Farid & Muhammad Rafiq, Abstract, *Rosca's Ability to Replace a Bank's Saving Account (A Case Study of Peshawar City, Pakistan)*, 27 EUR. J. SOC. SCI. 171, 178 (2012).

234. *Id.*

235. Xuzhao, *supra* note 224, at 65.

236. *Id.*

237. Kellee S. Tsai, *Beyond Banks: The Local Logic of Informal Finance and Private Sector Development in China*, *in* INFORMAL FINANCE IN CHINA: AMERICAN AND CHINESE PERSPECTIVES 80, 86 (Jianjun Li & Sara Hsu eds., 2009).

238. Clifford Geertz, *The Rotating Credit Association: A "Middle Rung" in Development*, 10 ECON. DEV. & CULTURAL CHANGE 241, 252 (1962).

239. *Id.*

240. *Cf.* Bala Shanmugam, *Development Strategy and Mobilising Savings Through ROSCAs: The Case of Malaysia*, 13 SAVINGS & DEV. 351, 352 (1989) (claiming that ROSCAs were recognized in China as early as 1899).

241. *See generally* Minfa (民法) [Civil Code] (promulgated May 23, 1929, revised Dec. 26, 2012) art. 709, *translated in* Civil Code, LAWS & REGS. DATABASE OF THE REPUBLIC OF CHINA, http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=B0000001 (last visited Nov. 29, 2014).

242. *See* Biliang Hu, *Active Informal Financing in Rural China: A Case Study of Rotating Savings and Credit Associations in a Chinese Village*, *in* RURAL FINANCE AND CREDIT INFRASTRUCTURE IN CHINA 237, 254 (2004), *available at* http://www.chinability.com/Rural%20Finance%20and%20Credit%20Infrastructure%20in%20China.pdf [hereinafter Hu, *Active Informal Financing*] (noting that while ROSCAs are not expressly banned in China, they are not recognized by the law).

specific to ROSCAs.[243] Creditors' rights in a ROSCA usually cannot be protected by the courts because the transactions of a ROSCA are regarded as illegal.[244] The debtors of a ROSCA may be charged with a crime if they owe numerous creditors considerable money and cannot repay it.[245]

Although the interest rate of a ROSCA is generally much higher than the fixed interest rate set by the People's Bank,[246] a ROSCA is usually only safe if a small number of people who belong to a small community are involved.[247] But there are some ROSCAs that are huge, operating in different cities or even different provinces.[248] Such ROSCAs usually have a complex structure with multiple sub-ROSCAs;[249] thus, the founders may speculate within the operation of ROSCAs and use one association's funds to pay another's interest.[250] Such a big, complex ROSCA is at high risk of default.[251]

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243. Wang Wei & Zhang Lijuan, *Discussion on Legal Regulation Problem of ROSCA*, 2011 INT'L CONFERENCE ON FUTURE COMPUTER SCI. AND EDUC. (Aug. 2011) at 506, 508.

244. *See* Jianjun Li, *Informal Finance, Underground Finance, Illegal Finance, and Economic Movement: A National Analysis*, *in* INFORMAL FINANCE IN CHINA: AMERICAN AND CHINESE PERSPECTIVES 39, 43, 45 (Jianjun Li & Sara Hsu eds., 2009) (stating that "underground finance," of which ROSCAs are a form, is unprotected by law and illustrating the outcome of a ROSCA default).

245. For example, Zheng Lefen, who could not repay 6,010,000 RMB (961,600 USD) in debts, was sentenced to death. *Zheng Lefen, Cai Shengnan Liyong "Taihui" Jinxing Jinrongtouji Dao Baan* (*郑乐芬、蔡胜南利用"抬会"进行金融投机倒把案*) [*The Case of Zheng Lefen, Cai Shengnan to Have Financial Speculation Using "Taihui"*], CHINA MONITOR (Sept. 18, 1991), http://www.chinamonitor.org/article/case/zhengcai.htm.

246. Hu, *Active Informal Financing*, *supra* note 242, at 246.

247. *See* Wang & Zhang, *supra* note 243, at 507–08 (explaining the need for ROSCA members to know and trust each other).

248. *See, e.g.*, Jianjun Li, *Conclusion: Regulating Informal Finance in China*, *in* INFORMAL FINANCE IN CHINA: AMERICAN AND CHINESE PERSPECTIVES 140, 144 (Jianjun Li & Sara Hsu eds., 2009) (describing how in 1985 a ROSCA "in Pingyang and Yueqing of Wenzhou city involved more than RMB 200 million and spread around . . . 10 counties").

249. *See* Xuzhao, *supra* note 224, at 65 ("*[T]aihui* is a new form [of *hehui*, or ROSCA] built up on the old forms. For a *taihui*, there are many small *hehuis* in a big *hehui*, that is, the bigger *hehui* is supported by many smaller *hehuis*. Smaller *hehuis* comprise the 'feet' of a bigger one . . . . The whole form looks like a pyramid.").

250. *Id.* at 65–66 (observing that the purpose of ROSCAs may shift from mutual aid to speculation, and that ROSCA proceeds may be used to pay the higher ROSCA interest rates that result from speculation); Ryan M. Tate, *Building a New Socialist Countryside: The Role of Informal Financial Institutions in China's Rural Development*, RYANMTATE (Aug. 26, 2011), http://ryanmtate.wordpress.com/2011/08/26/building-a-new-socialist-countryside-the-role-of-informal-financial-institutions-in-chinas-rural-development/ (describing these complex ROSCAs as funneling funds "from new members to older members in a pyramid-like scheme").

251. Hu, *Active Informal Financing*, *supra* note 242, at 253 ("[A]s the scale of a ROSCA gets larger, the probability for non co-operation increases. When it becomes very large, the likelihood of the ROSCA's failing is great.").

D. Risks of Shadow Banking Caused by Inefficient Regulation

1. Collusion between Commercial Banks and Shadow Banking Institutions

Although the financial great wall in the organized market appears impregnable, it cannot prevent collusion between insiders in the organized market and shadow banking institutions. To increase their profits and expand their funds, some shadow institutions may secretly cooperate with commercial banks to arrange more profitable transactions.[252] In some cases, such as collusion between a loan guarantee company and a commercial bank, the commercial bank may be happy to work with such a partner to increase profits. Some of the funds lent in shadow banking come from the formal banking sector. According to estimates by the People's Bank of China, 10% of shadow banking funds in Wenzhou came from formal bank credit in 2011.[253] The danger in this type of arrangement manifests itself when borrowers using shadow banks default on a large scale, as with the Wenzhou crisis.[254] In such a crisis, shadow banking institutions may not be able to repay debts owed to commercial banks and may therefore spread the instability of debt to the formal financial system.[255]

2. No External Supervision and Weak Internal Risk Control

In China, there is no systematic regulation of shadow banking institutions, which leads to several problems. For one, unlike with the banking regulatory commission, none of the regulators of shadow banking institutions are professional financial regulators.[256] The everyday regulators for most quasi-financial institutions are the Ministry of Commerce, local governments, or even police officers, which are not professional financial regulators.[257] A lack of professional regulation carries the risk of opening regulatory loopholes to shadow banking. Because the current regulators of shadow banking institutions are not the regulators of the commercial banking industry, it is hard for regulators to watch over the potentially problematic

252. See the example of the Huading case *supra* Part II.C.2.b.

253. Xuechuan Zhang, *Informal Finance in China*, OECD (Feb. 2012), www.oecd.org/finance/financial markets/49703155.pdf.

254. In 2011, global financial depression severely hit Wenzhou, a city famous for its export-oriented economy and underground banking system. Many firms went bankrupt and could not pay back the debt incurred by borrowing from underground banks, which charge high interest. The widespread default brought chaos to the economy of Wenzhou, where 60% of businesses and 90% of households were involved in some form of private lending. Austin Ramzy, *When Wenzhou Sneezes*, TIME, Nov. 28, 2011, http://www.time.com/time/magazine/article/0,9171,2099675,00.html#ixzz2D7DrU7gg.

255. MICHAEL F. MARTIN, CONG. RESEARCH SERV., R42380, CHINA'S BANKING SYSTEM: ISSUES FOR CONGRESS 6–7 (2012).

256. The professional financial regulators in question are those regulators of formal financial institutions referred to throughout this Article, such as the CBRC. These specified agencies have expertise in financial regulation.

257. MARTIN, supra note 255 at 6–7.

practices occurring between pawnshops and banks or other formal financial institutions.[258]

China has no nationwide regulator of shadow banking institutions.[259] Instead, local governments appoint the regulators of such institutions.[260] Local governments issue different rules to regulate financing guarantee companies. The regulators and rules of shadow banking institutions differ from area to area according to local regulations. Moreover, the local government usually appoints multiple regulators.[261] There is an old saying that too many cooks spoil the broth. Likewise, too many regulators spoil the shadow banking market since the regulators may shift responsibility from one to another and leave the market unregulated.

What is more, shadow banks are not required to make official reports of their financial affairs regularly to any authority. Shadow banking institutions lack significant external supervision, and proper internal risk control may well collapse over time.[262] Since quasi-financial institutions do not have to disclose their financial records, they may absorb funds through illegal channels, such as taking deposits from the public, excessive borrowing from banks, or even money laundering.[263] An official media outlet of the Chinese government, *China Daily*, reported that "[s]hadow banking, being outside State supervision, challenges the stability of China's financial market, because its inverted-pyramid financial structure could collapse at any time if there is a problem with its supporting funds."[264] Some transactions in shadow banking are speculative: Fundraisers use the high interest rate associated with shadow banks to attract "deposits," then use the newly deposited funds to repay old money.[265] Thus, a default on the final repayment is bound to lead to a collapse of the

258. *Id.*

259. *E.g.*, Rongzixingdanbao [Administration of Guarantee Companies], *supra* note 155, art. 2 (placing regulation of guarantee companies under the authority of local and provincial governments).

260. *E.g.*, *id.* ("The regulatory authorities of [financing guarantee companies] as referred to herein mean the official departments or institutions appointed by the People's Governments of provinces, autonomous regions and municipalities, responsible for supervising and managing the financing guarantee companies under their respective jurisdictions.") (translation by author).

261. In Henan province, for instance, the regulator for credit guarantee companies is a joint committee consisting of industry and the information technology office of the local People's Government, the police department, the commercial department, the finance office, the tax department, and so on. Henansheng Renminzhengfu Guanyu Jianli Jianquan Zhongxiaoqiye Xinyongdanbaotixi de Ruogan Yijian (河南省人民政府关于建立健全中小企业信用担保体系的若干意见) [A Number of Opinions on Establishing a Sound Credit Guarantee System for Small and Medium Enterprises] (promulgated by the People's Gov't of Henan Province, May 29, 2009, effective May 29, 2009), art. 16, http://www.henan.gov.cn/zwgk/system/2009/06/11/010139876.shtml.

262. *See* Hsu et al., *supra* note 154, at 16 (examining systemic risk trends among shadow banks).

263. *See, e.g.*, CUI ET AL., *supra* note 187, at 15 (discussing illegal funding sources for pawnshops).

264. Zhang Monan, *Shadow Banking Risky*, CHINA DAILY (Oct. 24, 2011), http://usa.chinadaily.com.cn/opinion/2011-10/24/content_13959654.htm.

265. *See, e.g.*, *Wealth Products Threaten China Banks on Ponzi-Scheme Risk*, BLOOMBERG (July 16, 2013), http://www.bloomberg.com/news/2013-07-15/wealth-products-threaten-china-banks-on-ponzi-scheme-risk.html (describing wealth-management products (WMPs), offered by commercial banks but "considered part of China's shadow-banking system," and how banks issue new WMPs to pay out maturing ones).

chain. Such a collapse brings economic hardship to participants and causes social instability.[266]

Based on the analysis above, we can conclude that the best option for the state—to maintain the benefits of shadow banking to the economy while avoiding its risks—is to include it within the scope of regulation. However, the Chinese government has yet to do so. There are two reasons for this. First, the government does not recognize the benefits of shadow banking but regards it as quasi-legal or illegal from the perspective of existing laws, even though such laws may not be reasonable or fair.[267] Second, the government attempts to control shadow banking activities through coercion, even though it does not have sufficient authority to do so.[268]

To deter illegal financing, the government has relied on the courts to mete out harsh criminal penalties to punish violators. Some people have even lost their lives for financial crimes.[269] The harsh punishment by the courts contradicts the principle of Chinese criminal law that the "death penalty is only to be applied to criminal elements who commit the most heinous crimes."[270] Current sentencing, especially capital punishment, for financial criminals has been criticized as too harsh because these informal, underground activities—the crimes being punished—are all too common in China.[271]

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266. Chunyu Wang (王春宇), Woguo Minjianjiedai Fazhanyanjiu (我国民间借贷发展研究) [Research on the Development of Informal Credit in China] (2010) at 5, 78 (unpublished Ph.D. dissertation, Haierbin University of Commerce) (on file with author).

267. *See supra* Part II.C.

268. *Id.*

269. *See, e.g.*, Walter Pavlo, *Financial Frauds Lead to Death Row in China*, FORBES, Apr. 12, 2012, http://www.forbes.com/sites/walterpavlo/2012/04/12/financial-frauds-lead-to-death-row-in-china (providing examples of people sentenced to death row for financial crimes).

270. Zhonghuarenmingongheguo Xing Fa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (Lawinfochina), art. 48.

271. Tang Xiangyang & Ruoji Tang, *Considered Opinion: The Wu Ying Case*, ECON. OBSERVER, Apr. 19, 2011, http://www.eeo.com.cn/ens/Politics/2011/04/19/199377.shtml ("If Wu Ying is sentenced to death, how should we deal with all those other people who are illegally accepting deposits and lending out at high rates? With at least one trillion yuan in funds being used for private financing in China, how many bank employees, guarantors and even public servants would be forced to go to prison?" (internal quotation marks omitted)). Ms. Wu, the founder of Bense Holding Group, raised 770 million yuan from investors between 2005 and 2007 with promises of high returns. *Shadow Banks on Trial as China's Rich Sister Faces Death*, BLOOMBERG (Apr. 11, 2012), http://www.bloomberg.com/news/2012-04-10/shadow-banks-on-trial-as-china-s-rich-sister-faces-death.html. She was arrested for illegal fundraising and fraud in 2007 and only 380 million yuan were returned to her investors. *Wuying Feifa Jizi Jinrong Zhapian* (*吴英非法集资金融诈骗*) [*Illegal Fundraising and Financial Fraud of Wu Ying*] (Jinhua Intermediate People's Ct.), [hereinafter *Illegal Fundraising and Financial Fraud of Wu Ying*] *aff'd* Zhejian High People's Ct. Wu was sentenced to death for financial fraud by the Intermediate People's Court in Jinhua in 2009, and the High People's Court of Zhejiang upheld the decision of the lower court in Wu's appeal. Daniel Ren, *Wu Ying Appeals to Supreme Court to Overturn Death Sentence for Fraud*, S. CHINA MORNING POST (Feb. 23, 2013), http://www.scmp.com/business/china-business/article/1156586/wu-ying-appeals-supreme-court-overturn-death-sentence-fraud. The major dispute of Wu's case was that whether Wu had fraudulent intent, which is punishable by death. *See Illegal Fundraising and Financial Fraud of Wu Ying*, *supra* note 271 (noting and rejecting Wu Ying's argument that she lacked intent to defraud). Wu asserted that she only borrowed money from eleven friends and only invested in most profitable business. *Id.* But both the Jinhua

The real reason why the state criminalizes some private financing activities and punishes them severely—instead of exacting a gentle administrative fine[272]—is that the state wants to deter private competitors from competing with state-controlled financial institutions in taking deposits. Deterrence is the only possible purpose for such a policy. However, criminal punishment does not effectively deter shadow banking but only serves to increase its pricing structure by adding risks and costs associated with violating the law. The best solution for shadow banking is to make its operations part of organized banking. In the words of Professor Shaw, "[I]f they cannot be suppressed, they too should be 'organized.'"[273] In the following Part, I put forth possible solutions to the problems of shadow banking in China.

III. SOLUTIONS FOR THE SHADOW BANKING PROBLEM IN CHINA

The shadow banking problem in China has emerged because the law "does not honor the expectations, choices, and preferences" of society.[274] On the demand side, private enterprises cannot access the financial resources of formal banks because most of those resources go to state-owned entities under current financially repressive policies.[275] Private enterprises thus pay high risk premiums to get funds from the shadow banking system, and such demand drives that system's growth. As for savers, they cannot get reasonable returns from their deposits in the formal banking system, as the interest rate is maintained by the government at a low level.[276] For a more reasonable return, some savers turn to the alternative banking system

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Intermediate People's Court and High People's Court of Zhejiang found that she intended to defraud when she began raising funds. *Id.* However, the Supreme People's Court overturned the death sentence against Wu in April 2012. *Supreme Court Disapproves Death Penalty for Wu Ying,* XINHUA NEWS, Apr. 20, 2012, http://news.xinhuanet.com/english/china/2012-04/20/c_131541052.htm. While it overturned the death penalty and ordered the High People's Court of Zhejiang to resentence Wu Ying (the penalty was reduced to death with a two-year reprieve), the Supreme People's Court still affirmed the guilty verdict of lower courts. *Id.* The death sentence reflected the harsh stance of the government against shadow banking activities that involve illegal fundraising. The harsh punishment of such activities aroused sympathy nationwide, and many criticized the unreasonableness of such penalties. *E.g.*, Edward Wong, *China Court Overturns Death Penalty for Tycoon in Fraud Case*, N.Y. TIMES, Apr. 21, 2012, http://www.nytimes.com/2012/04/21/world/asia/china-court-overturns-death-penalty-for-tycoon-in-fraud-case.html?_r=0.

272. China also has administrative rules for illegal fundraising activities but does not enforce them very often. *See* Feifa Jinrongjigou He Feifa Jinrongyewu Quid Banfa (非法金融机构和非法金融业务取缔办法) [Measures for the Banning of Illegal Financial Institutions and Illegal Financial Business Operations] (promulgated by Decree No. 247 of the State Council of China, July 13, 1998) (pkulaw), art. 22 ("Criminal liability shall be investigated in accordance with law for the establishment of an illegal financial institution or engagement in illegal financial business operations constituting a crime; where a crime has not been constituted, the People's Bank of China shall confiscate its illegal gains and concurrently impose a fine of more than one time and less than five times of the amount of illegal gains; where there are no illegal gains, a fine of more than RMB 100,000 Yuan less than RMB 500,000 Yuan shall be imposed." (translation by author)).

273. SHAW, *supra* note 19, at 136.

274. DE SOTO, *supra* note 1, at 12.

275. *See* Das, *supra* note 11 ("State controlled banks . . . focus on lending to State Owned Enterprises . . . . Other businesses have more limited access to bank credit. The shadow banking sector fills this market gap.").

276. Oxhorn, *supra* note 53, at 402–03.

outside of the state's control.[277] The quasi-legal and illegal institutions of shadow banking are excluded from financial regulation (though the quasi-legal institutions have other non-financial regulators). The biggest difficulty faced by shadow banking entities is that there are very few legal channels for them to get funds to make loans. The best hope for these institutions is to be organized as formal banks so that they can shed their illegitimate status and take in deposits. However, such a hope is currently impossible because there are barriers to entry excluding private entities.

The solution is to provide more equal access to financial institutions for savers, lenders, and borrowers. There should be access to formal banking and capital markets on the demand side so that those in need of capital do not have to rely on shadow banks. Reasonable returns should be made available to savers by gradually shifting to a market-based interest rate. Private entities should have equal entry into the banking sector so that shadow banking entities do not have to operate in the byways of the law and the back alleys of society. Shadow banking should be subject to the supervision of banking regulators so that these regulators can prevent risks when they see the beginnings of a dangerous trend. With active banking regulators, the state will not have to rely solely on draconian criminal punishments to deter improper shadow banking activities.

To bring shadow banking into the sunlight, financial repression must end. But there are huge interest groups that benefit from the present state of financial repression.[278] For this reason, breaking up financial repression must proceed gradually and step by step, with both short- and long-term action.[279]

A. Solutions for Battling the Risks of Shadow Banking

1. Including Shadow Banking in Financial Regulation

A significant risk of shadow banking institutions is that they are not efficiently regulated. Therefore, they grow unpredictably and bring risk to the financial system. The key measure in the short term is to include shadow banking in financial regulations instead of banning it or letting it develop in an uncontrolled manner. Regulations applicable to the quasi-financial institutions that are already licensed by

277. Heng Xie & Gabriel Wildau, *China Makes Fresh Bid to Curb Shadow Banking, Contain Debt Risk*, REUTERS (Jan. 6, 2014), http://www.reuters.com/article/2014/01/06/us-china-economy-shadow-banking-idUSBREA0503T20140106. The middle class in China has very few options for safe investment. The stock markets in China "more resemble a casino than a true market." Oxhorn, *supra* note 53, at 404.

278. *See* Oxhorn, *supra* note 53, at 413–19 (discussing how consumer financial reform is incompatible with China's political-legal structure and how reform is unlikely because too many powerful individuals personally benefit from the status quo).

279. As a start, such short-term solutions can be executed in the form of local decrees. Local decrees can apply to all kinds of local issues including economic, civil, and administrative ones. Lifa Fa (立法法) [The Law on Legislation] (promulgated by Order No. 31 of the President of the People's Republic of China, Mar. 15, 2000, effective July 1, 2000) (Lawinfochina), arts. 64, 65, 67. Local decrees are enacted by the People's Congress of a province, autonomous region, or municipality directly by the central government and the Standing Committee. *Id.* art. 63. Local decrees are important elements of the Chinese legal system.

local commercial registration bureaus, such as pawnshops, micro-loan companies, and guarantee companies, need to be clarified. These quasi-financial institutions, however, are usually small in size and their business is conducted locally.[280] That may be why the CBRC does not want to include them in regulation.[281]

The best solution for shadow banking in China is to have a professional local regulator in place, who may be the secretary of financial and professional regulation for the local government. The regulators should be financial experts who know the financial business well. If an institution wants to have a new branch outside its locale, it should apply for a license from and be supervised by the local government of the host province. There should also be a secretary of financial and professional regulation in the central government to coordinate the local financial and professional regulation offices.

The state should have laws that set principles of management and supervision of the shadow banking activities. But the daily regulation should be taken on by the local secretary of financial and professional regulators because different economic environments need financial institutions of different scales and structures. The duty of the regulators should be to ensure the order of the financial market and compliance with regulations by financial organizations.

2. Applying "Substance Over Form" Principle to Circumvention Schemes by Shadow Banking Institutions

The major customers of the shadow banking institutions are small businesses, which usually need much larger loans than consumers do. Chinese law prohibits shadow banking institutions from taking deposits to fund such loans.[282] To solve the problem of the funding shortage, the shadow banking institutions use various schemes to circumvent legal constraints, as discussed in Part II. Commercial banks often participate as conspirators in these schemes. Such schemes to circumvent the restraints of law by Chinese shadow banking institutions are quite similar to those used by fringe banking institutions in America, and the solutions implemented there can help China solve its similar problem.

To circumvent the restrictions of state law on interest ceilings[283] and to maximize their profits, fringe lenders in the United States have come up with ruses like

280. Hsu et al., *supra* note 154, at 8.

281. A perspective from the United States may reveal why the Chinese central regulators ignore fringe banking but should be wary of doing so. As Professor David Skeel commented in his book, "It never made sense to simply include consumer protection among the Fed's other tasks, for instance, since the Fed's primary concern is maintaining the stability of the banking system, which stands in considerable tension with consumer protection." DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 15 (2010). The Chinese banking regulator, the CBRC, may have similar concerns that the existence of shadow banking undermines financial stability in China. Yet, as Skeel points out in his book, this avoidance of consumer interests proved problematic during the 2008 financial crisis. *See id.* at 99–100 (discussing financial regulators' lack of involvement in consumer finance as a cause of the financial crisis).

282. *See supra* note 126 and accompanying text.

283. *See, e.g.*, Johnson, *supra* note 105, at 22 n.109 (quoting Omni Capital Grp. v. Lavay, 157 B.R. 712, 717 (Bankr. S.D. Fla. 1993)) (illustrating an American state law interest ceiling).

disguising lending with labels other than "loan."[284] However, such schemes have largely failed when challenged legally because courts have uniformly looked at the substance of the transactions.[285] One such case is the "rent-a bank" scheme. As with the schemes between shadow banking institutions and commercial banks in China, payday lenders in America are partnering with national banks to take advantage of a loophole in the law that allows for excessive interest rates, described as "rent-a-bank" or "rent-a-chapter" by American scholars.[286] The partnering national banks are usually located in states with no or higher usury limits.[287] The National Bank Act permits national banks to "take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located."[288] The payday lender works as the collecting agent of the national bank that makes the loans.[289] However, the bank usually sells the loans immediately to the payday lender,[290] as with the "repurchase" scheme by micro-loan companies and banks that was introduced in Part II.C.2.b.[291]

The practice of "rent-a-bank" lending has been rejected by one American court. The United States District Court for the District of Colorado held in *Colorado ex rel. Salazar v. Ace Cash Express, Inc.* that the "[d]efendant [a check-cashing company] and the national bank are *separate* entities and their relationship does not give rise to complete preemption under the [National Bank Act].... The Complaint *strictly* is about a non-bank's violations of *state* law." [292]

The U.S. experience in dealing with the schemes of fringe banking to circumvent the restraints of law can be of benefit to China in that the American courts and regulators have affirmed the "long-standing judicial principle that substance, not form, dictates whether a transaction is a loan subject to usury laws."[293] As discussed above in Part II, the current framework of regulation in China is too rigid and coarse, and can be easily circumvented by such schemes.[294] The supremacy of statutory and regulatory law prevents prompt and efficient regulation of the

284. *See* Drysdale & Keest, *supra* note 6, at 596 ("A particularly important characteristic of the credit-providing segments is that their product designs are rooted in an effort to enable the provider to argue that they are not extending 'credit.'").

285. *Id.* at 637.

286. *See, e.g.*, Johnson, *supra* note 105, at 105 (discussing a lawsuit in which a defendant payday lender contended that favorable Delaware law governed the transaction giving rise to suit because of its partnership with a Delaware bank).

287. *See, e.g., id.* (illustrating plan by a Texas lender to charge interest rates which would be legal in Delaware but usurious in Texas).

288. 12 U.S.C. § 85 (2012).

289. Johnson, *supra* note 105, at 106.

290. *E.g.*, Hudson v. ACE Cash Express, Inc., No. IP 01-1336-C H/S, 2002 WL 1205060, at *2 (S.D. Ind. May 30, 2002) (outlining an agreement between Goleta National Bank and ACE Cash Express in which Goleta would lend to ACE customers and then ACE would purchase a 95% interest in each payday loan as the collector).

291. *See* discussion *supra* Part II.C.2.b (discussing an arrangement by which a micro-loan company sells debt to a commercial bank with a guarantee that it will repurchase the debt within eleven months).

292. Colorado *ex rel.* Salazar v. Ace Cash Express, Inc., 188 F. Supp. 2d 1282, 1285 (D. Colo. 2002).

293. Drysdale & Keest, *supra* note 6, at 637.

294. *See supra* Part II.

changing forms of misconduct in the financial markets. The "substance over form" principle can make regulations more flexible, to pierce the veil of schemes by shadow banking institutions.

3. Allowing Shadow Financial Institutions to Raise Funds by Issuing Bonds

One possible ameliorative measure to solve the fund shortage problem of shadow banking institutions is to allow them to issue bonds. Although issuing bonds requires the expertise of accountants, lawyers, brokers, and rating agencies, service fees in China are not very high. The cost of issuance is acceptable, falling near 0.4%.[295] However, the bond market in China is far less developed. The majority of options in the bond market are treasury bonds, local government bonds (issued by local government), and financial institution bonds.[296] There are four major types of non-financial corporate bonds:[297] enterprise bonds,[298] listed company corporate bonds,[299] medium-term notes,[300] and short-term financial bonds.[301] State-owned enterprises dominate the market for all kinds of non-financial corporate bonds except listed company corporate bonds.[302] This is particularly pronounced with enterprise bonds: Until 2011, only two private enterprises had received approval to issue enterprise bonds.[303] Nor are listed company corporate bonds easy to issue: The threshold for issuing listed company corporate bonds is very high, requiring that registered corporate capital exceed 600,000,000 RMB (about 100,000,000 USD).[304]

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295. Prudence Ho et al., *China Critic Bank Plans $4.7 Billion Yuan Bond*, WALL ST. J., Aug. 30, 2011, http://online.wsj.com/articles/SB10001424053111904332804576539550147495030.

296. GIGI LIU ET AL., NOMURA INT'L LTD., CHINA BOND MARKET OVERVIEW 13 (July 2, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633879.

297. Yuko Gomi, *Corporate Bond Market in China: Its Present Situation and Prospect*, NEWSL. (Inst. for Int'l Monetary Aff., Tokyo, Japan), Sept. 24, 2014, at 3–4, *available at* http://www.iima.or.jp/Docs/newsletter/2014/NL2014No_36_e.pdf. The category of short-term financial bonds also contains what some term "super short-term financial bonds." *Id.*

298. *See generally* LIU ET AL., *supra* note 296, at 18–19.

299. *See generally* Gongsi Zhaiquan Faxing Shidian Banfa (公司债券发行试点办法) [Pilot Rules on the Issuance of Corporate Bonds] (promulgated by the China Sec. Reg. Comm'n, Oct. 14, 2007, effective Oct. 14, 2007) (Lawinfochina).

300. Chinese law does not currently define the maturity of the medium-term note, but approved notes usually mature in three or five years. *See 2011 Niandu* [*Annual Analysis of Medium-term Notes*], *supra* note 200; Yinhangjian Zhaiquanshichang Feijinrongqiye Zhongqi Piaoju Yewuzhiyin (银行间债券市场非金融企业中期票据业务指引) [Practice Guidelines for Medium-term Notes Issued by Non-Financial Corporations in the Inter-Bank Bond Market] (promulgated by the Nat'l Ass'n of Fin. Mkt. Institutional Investors, Nov. 3, 2009, effective Nov. 3, 2009), *available at* http://www.nafmii.org.cn/zlgz/201202/t20120226_1643.html (failing to define maturity of medium-term notes).

301. Short-term financial bonds mature in no more than one year. LIU ET AL., *supra* note 296, at 21.

302. *See* Gomi, *supra* note 297, at 5 chart 4 (breaking down issuers of non-financial corporate bonds).

303. Zhu Jian (朱健), *Ninengfa Qiyezhai ma—Xizilianhe: Piaoliangde "Linmenyijiao"* (*你能企-西子合：漂亮的"門一脚"*) [*Can You Issue Enterprise Bonds? Western Union: The Wonderful Finishing Shot*], SINA (May 24, 2012), http://zj.sina.com.cn/finance/news/regional/31/2012/0524/17985.html.

304. Zhengquan Fa (中华人民共和国证券法) [Securities Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1998, effective July 1, 1999) (Lawinfochina), art. 16.

The value of listed company corporate bonds issued cannot exceed 40% of corporate capital.[305] The approval process for issuance is also very time-consuming, usually taking about a year.[306] Also, corporate bonds need collateral or some other form of guarantee.[307] The capital threshold for issuing corporate bonds is too high even for most large private corporations, and most cannot afford to wait for approval (not to mention that obtaining approval for private enterprises is very hard).[308]

The other option for shadow banking institutions may be short-term financial bonds. Like the corporate bond market, the major players in issuing short-term financing bonds and medium-term notes are state-owned enterprises.[309] But if the state were to allow more private enterprises to issue short-term financial bonds, medium or large enterprises might benefit from the lack of a minimum registered capital threshold or any guarantee requirements imposed by law.[310] And approval to issue these two kinds of bonds is easier and faster.[311] If the Chinese government were to allow more private enterprises to issue bonds, it would go a long way towards relieving the shortage of capital.

4. Bringing Shadow Banking into the Sunlight by Gradually Allowing Private Firms to Enter the Banking Market

The biggest difficulty faced by shadow banking entities is that there are very few legal channels for them to get the funds they need to make loans. The best hope for these institutions is to be organized as formal banks so that they can shed their illegitimate or illicit status and take in deposits. The biggest barrier to beneficial competition in China is an unreasonable entry barrier to the banking market. Entry barriers are necessary to maintain the stability and safety of a banking system.[312]

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305. LIU ET AL., *supra* note 296, at 20.

306. Chen Wuzhuang & Wu Qichao (陈武装, 吴奇超), *Jiakuai Fazhan Woguo Gongsi Zhaiquanshichang de Sikao he Jianyi* (*加快发展我国公司债券市场的思考和建议*) [*Thoughts and Suggestions on Speeding Up the Development of the Corporate Bonds Market in China*], CHINA SEC. REG. COMM'N (June 9, 2011), http://www.csrc.gov.cn/pub/zjhpublicofhn/other/201106/t20110609_196234.htm.

307. *Id.*

308. *See id.* (discussing the high issuance costs of corporate bonds, time-consuming nature of approval process, and difficulty of successfully obtaining approval).

309. Yuko Gomi, *supra* note 297, at 1.

310. *See id.* (noting lack of capital guarantee requirement).

311. Chen & Wu, *supra* note 306 (noting that issuance process for short-term financial bonds and medium-term notes is relatively simple, typically taking around three months).

312. The Chinese Communist Party (CCP) has recently indicated a more liberal and flexible attitude toward private firms entering the banking sector. The report of the Third Plenary Session of the 18th CCP Central Committee, held from November 9 to November 12, 2013, implied that a CCP decision to reduce government intervention in the banking sector and ease private firms' entry is very likely to be realized in the near future. *See* Wei Qiang (魏强), *Sanzhongquanhuizhi Jinronggaigepian: Minyinyinghang Songbang* (*香港银行业监管的特点及启示*) [*The Financial Section of the Third Plenary Session of the 18th CCP Central Committee: The Relaxation of the Restrictions on Private Banking*], CCTV.COM (Nov. 11, 2013), http://jingji.cntv.cn/2013/11/11/ARTI1384158033180165.shtml. The President of the World Bank considered the report to be a clear and firm signal that the government will reform the economy and give more latitude to the private sector. *See World Bank Head Hails China's Reform Plan* CHINA DAILY (Nov. 13, 2013), http://usa.chinadaily.com.cn/china/2013-11/13/content_17101601.htm ("China's commitment to reforms of the business environment and the role

However, such barriers should be reasonable, fair, and without discrimination. The current legal barriers to entry focus on ownership structure, specifically on whether an institution operates using state-owned, private-owned, or foreign capital.[313] Policymakers and regulators may have concerns about private enterprises lacking experience in bank management and lacking sufficient capital to buffer against risk. Such concerns, however, lack a solid basis in reality. The problem of banking sector entry is a problem of investment in banking.[314] The key point is not who owns the capital but how much capital is enough to ensure the safety of a deposit, because "[c]apital in banking provides an insurance fund to depositors against the possibility of losses due to a reduction in the value of a bank's assets."[315] Thus, I suggest that lawmakers should reset the restriction criteria for entry and focus on the capital requirement instead of ownership.[316] And restrictions to entry should be clear and transparent to avoid discretionary, or discriminatory, interpretation by regulators. Regulators should approve licenses for those applicants who meet the entry requirements set by law.

Allowing expansion of the banking industry market can "increase the productivity of lending, reduce costs, and thus expand access and competition."[317] The best way to prevent risks brought on by expanding a sector is not to ban entry but to treat it in a market-friendly way.[318] Regulators can set entry criteria at different levels for banks of different sizes. Junior-level banks could have a low threshold but also a narrow business scope. The example of Hong Kong can benefit mainland China. Hong Kong has a three-tier structure of banks set by its banking ordinance.[319] The junior level is made up of deposit-taking companies registered according to the banking ordinance and supervised by the Banking Advisory Committee.[320] These banks can only take deposits longer than three months and no larger than 100,000 Hong Kong Dollars (HKD) (about 13,000 USD).[321] The middle level of banking is made up of registered companies, called restricted license banks, that can take no more than 500,000 HKD (about 65,000 USD), without limitation on

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of the private sector seems very firm, Kim added.").

313. *See supra* Part II.B.

314. Sam Peltzman, *Entry in Commercial Banking*, 8 J. L. & ECON. 11, 14 (1965).

315. *Id.* at 21.

316. Here, I propose using only the capital requirement as a criterion for entry instead of the ownership criterion (state-owned, private-owned or foreign-owned). I believe that the former criterion will be fairer and more efficient. I am not discussing, however, capital requirements in operation, which are beyond the scope of this Article.

317. *See* Raghuram G. Rajan, *Has Finance Made the World Riskier?*, 12 EUR. FIN. MGMT. 499, 499–503 (2006) (suggesting that subjecting financial intermediaries to market forces can result in such benefits).

318. *See id.* at 409 (expressing Professor Rajan's belief that the best way to cure the risks brought on by financial development is by "market-friendly policies that would reduce the incentive of intermediary managers to take excessive risk").

319. *The Three-Tier Banking System*, H.K. MONETARY AUTH. (last revised Jan. 2, 2015), http://www.hkma.gov.hk/eng/key-functions/banking-stability/banking-policy-and-supervision/three-tier-banking-system.shtml.

320. *See* Banking Ordinance, (2013) Cap. 155, 11–12, § 4–5 (H.K.) (explaining registration and supervision of deposit-taking companies).

321. *Id.* § 14(1)(a).

deposit term.[322] The deposit-taking companies and the restricted license banks can apply for assignment to a higher level if they have no record of violation during the period of their application.[323] Such a three-tier banking system is a good model for China, which has no modern system in place for private banks.[324]

B. Solutions for Eradicating Shadow Banking

The shadow banking problem in China was caused by the imbalance of financial resource allocation as a result of financially repressive policies, which failed to honor the expectations, choices, and preferences of society.[325] On the demand side, private enterprises cannot access the financial resources of formal banks and therefore need to pay high risk premiums to borrow funds from shadow banking. On the supply side, savers turn to the alternative banking system outside the state's control as the interest rate for formal banks is maintained by the government at a low level.[326] The solution for eradicating shadow banking is to encourage lending to private firms by formal financial institutions and to liberalize interest rates.

1. Encouraging Lending to Small Firms

The lack of access to credit has hampered the private sector, the most energetic economic sector in China, and has driven the growth of shadow banking. To solve this problem, the State Council in China has recently passed some rules to encourage commercial banks to provide loans to small and micro enterprises.[327] Loans to these

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322. *Id.* §§ 12(5), 14(1)(b).

323. *Id.* §§ 15(1), 18(1–3). Every bank will have a proposed period when it applies for a license. *Id.* § 18(6)(a).

324. A practical question to ask is whether the three-tier system can be successfully transplanted to China. The answer is that it may. Hong Kong does indeed have many legal and political differences from mainland China. For example, its legal system is based on the common law system, which would be difficult to transplant wholesale to China. But the three-tier system was imposed by statute, a circumstance that makes it comparatively less hard to transplant to mainland China. Actually, many Chinese scholars have claimed that the Chinese government should consider what it can learn from Hong Kong's banking system (the earliest literature on the topic is from 1988). *See, e.g.*, Shen Songjun (申松君), *Xianggang Jinrong Sanjizhi Fazhan Dongxiang Yu Qishi* (*香港金融三级制发展动向与启示*) [*Developmental Trends and Realizations Concerning the Three-Level Financial System in Hong Kong*], LIAOWANG (瞭望) [OUTLOOK], 1988 (examining Hong Kong's financial system and its potential benefits for addressing shortcomings among financial systems in Mainland China). Such opinions, though, have not been accepted by the central government—not because the government denies any value in the Hong Kong model but because the government has not heretofore been receptive to the idea of reforming entry requirements. *See* Yang Dong (杨东), *Xiangan Yinhangye Jianguan de Tedian ji Qishi* (*香港银行业监管的特点及启示*) [*Indication of Hong Kong Banking Regulations*], FIN. & ECON., no. 12, 2005 at 87.

325. *See* DE SOTO, *supra* note 1, at 12 (stating that people are better off violating the law when it "does not honor the expectations, choices, and preferences of those" who the law is supposed to affect).

326. The middle class in China has very few options for safe investment. The stock markets in China "more resemble a casino than a true market." Oxhorn, *supra* note 53, at 404.

327. *See* Zhongguo Yinjianhui Guanyu Zhichi Shangyeyinhang Jinyibu Gaijin Xiaoqiye Jinrongfuwu de Tongzhi (中国银监会关于支持商业银行进一步改进小企业金融服务的通通) [Notice of China Banking Regulatory Commission on Supporting Commercial Banks in Further Improving Financial Services for Small-Sized Enterprises] (promulgated by the China Banking Reg. Comm'n, May 25, 2011, effective May

enterprises can be accommodated by adjusting capital requirements.[328] However, such rules are currently too coarse and need refinement. On the one hand, such rules provide no good incentive to big banks, since the capital requirements are not a concern for big banks. On the other hand, such policies may encourage banks to make loans to small firms to enjoy the benefit of counting capital while forgetting the underlying risks. Also, the demand for funding by small businesses varies by region. In a developed region like Wenzhou, small business is the backbone of the local economy and demand is large.[329] In a less-developed region like Lanzhou, more dominated by state-owned enterprises, there are few privately-owned enterprises.[330] A better solution is to replace the capital ratio requirement with requirements specific to each branch. Such a requirement should require the branch to make loans to qualified small businesses, matching the ratio of loans to the private economy to the local GDP.

It should be noted that whatever requirement is set to encourage lending to small firms, it is a form of intervention by the state. Such intervention may not be desirable. Similar concerns were raised about the United States' Community Reinvestment Act. Professors Hylton and Rougeau criticized the Act for being "based on an assumption that regulators know the lending market better than banks."[331] The policy of requiring banks to lend to small businesses carries the same risk of replacing banks in the making of business decisions. The best way to encourage lending to small businesses is to let the market determine the decision. A market-based interest rate will incentivize banks to lend to small businesses if they can charge the extra risk premium commensurate with the risks they assume.[332]

2. Liberalizing Interest Rates

Interest rates should reflect the real value of capital. The current interest rate set by the People's Bank is detached from market value,[333] and depositors cannot get a reasonable rate of return from their savings. This reduces the incentive to save.

25, 2011) (Lawchinainfo) (providing guidance for "commercial banks in providing services for small-sized enterprises").

328. *See id.* art. 8 (adjusting capital requirements).

329. *See* Yu Ran, *Wenzhou Returning Entrepreneurs Breathe New Life into Economy*, CHINA DAILY (July 24, 2013), http://usa.chinadaily.com.cn/epaper/2013-07/24/content_16824259.htm (discussing the environment for small businesses in Wenzhou).

330. *See Ease of Doing Business in Lanzhou China*, WORLD BANK GRP., http://www.doingbusiness.org/data/exploreeconomies/china/sub/lanzhou/#starting-a-business (ranking Lanzhou among Chinese cities with the highest barriers to entry for small businesses).

331. Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 265 (1996).

332. Unlike poor consumers, small businesses can afford high interest rates because their returns may be very high if they can get enough funds to support them. *See China's Shadow Banks: The Credit Kulaks*, ECONOMIST, June 1, 2013, http://www.economist.com/news/finance-and-economics/21578668-growth-wealth-management-products-reflects-deeper-financial-distortions ("Neglected by the banks, small firms are willing to pay the 20–24% interest rates charged by China's 6,080 microlenders."). This is why shadow banking can flourish even when its interest rates are very high.

333. Silk & Zhu, *supra* note 128 (explaining that interest rates on ordinary Chinese bank deposits are subject to an interest-rate cap and are not determined by the market).

Also, banks have no incentive to make loans to small firms, even ones willing to pay high interest, because of current restrictions on the lending rate. As a remedy to this state of affairs, releasing interest rates from their artificial anchor and allowing a reactive, variable interest rate market-wide is a crucial step toward equitable financial policy.

That being said, there should be some exceptions for state regulation of interest rates when it comes to the consumer financing interest rate. The use of the consumer financing rate is for consumer goods, not for investment. Investment is different from buying consumer goods; the former can produce benefits much larger than the borrowing amount, while the latter is just for consumption. For investments, borrowers should bear all the risks of their investment, including the possibility that income made from investment comes out to be less than the cost of borrowing. The state cannot replace the borrower when it comes to deciding whether an interest rate is affordable because only the borrower knows the true value of an investment.

However, consumers should be protected from exposure to risk so high as to force them into poverty.[334] But such protection probably is not so desirable for business borrowers. Chinese law currently prevents all kinds of usury without having a clear definition of usury, and current judicial practice regards all interest rates that exceed four times the interest rate set by the People's Bank as illegal, even if the interest is reasonable and risky to an acceptable degree.[335] Thus, usury law in China should allow for more flexibility in determining a rate that qualifies as usury in practice.

By contrast, in the United States there is a dichotomy between businesses and individuals recognized by some usury laws that provides a good example for China. As is the case in China, usury laws in the United States create tension between economic development and the protection of vulnerable groups.[336] Therefore, across the United States, "numerous statutory and judicial exemptions in state usury laws" were made "to accommodate businesses that depend upon consumer credit for their viability."[337] In some states, there are different interest rate limits for individual and business borrowers.[338] In other states, corporations are exempt from usury law.[339] The rationale for such a dichotomy is based on the belief that business borrowers are more sophisticated in making financial transactions and therefore need less or no extra protection under usury law.[340] Such a policy that distinguishes between businesses and individuals in usury law is also suitable for China.[341]

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334. *See* William J. Boyes, *In Defense of the Downtrodden: Usury Laws?*, 39 PUB. CHOICE 269, 269–70 (1982) (describing the rationale behind usury laws as protecting unsophisticated consumers from "suffer[ing] unreasonably high interest rates").

335. Luo Jun & Kevin Hamlin, *China Slowdown Stymies Plan to Curb Shadow-Banking Risks*, BLOOMBERG (July 17, 2012), http://www.bloomberg.com/news/2012-07-16/china-slowdown-stymies-plan-to-curb-shadow-banking-risks.html.

336. Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPP. L. REV. 151, 154 (1988) (discussing the "tension between economic development and usury laws in American society").

337. *Id.*

338. Mark Barry Riley, *Usury Legislation—Its Effects on the Economy and a Proposal for Reform*, 33 VAND. L. REV. 199, 207–08 (1980).

339. *Id.*

340. W.J. Boyes & Dale Beck Furnish, *A Note on the Use of Incorporation as an Escape from Usury*

CONCLUSION

The problems of shadow banking in China call for pragmatic solutions, not platitudes. To prescribe the right solutions, we first need to know what caused the problems. One cause is clear: The Chinese government intervenes in the allocation of financial resources through financial repression. Financial repression creates "a privileged sector and an unprivileged sector with the former having access to cheap credit[] and the latter being rationed out."[342] Financial repression operates through a set of laws and regulations, like those that control interest rates, entry barriers to the banking industry, and intervention into credit allocation. Financial repression brings tremendous benefits to the state, including revenue and rents, but it can also harm the stability of the financial system and skew the fairness of distribution by blocking access to formal finance for private enterprise and ordinary citizens.

Shadow banks are set up to satisfy the demand for credit in the private sector. Private economic activities are not a mere hostage of legal restrictions; they react dynamically to suppressive legal institutions by creating more efficient zones of operation and opening up alternative avenues of commercial transaction. Shadow banking provides flexible and accessible financial resources for the private sector, which contributes significantly to China's GDP and employment rate. Of course, shadow banking operates in a gray zone alongside, and even outside, regulation, which may bring systemic risks to the economy and lead to crime caused by forcible debt collection. The intervention into usury by the Chinese government is both ineffective and unreasonable because it relies on the Supreme Court's interpretation and the People's Bank's rules, which are discrepant. The interest ceiling set by usury regulation is presently set at too low a level to reflect the normal value of lending. The law for regulating shadow banking institutions is currently vague and incomplete. Shadow banking activities are not in the realm of regulation. The state instead relies on post facto criminal punishment by the courts to deter illicit shadow banking activities. To strengthen the deterrent effect, the courts usually hand down excessively punitive sentences for players in shadow banking who cannot repay their debts. Such excessive punishment would not be necessary were there better financial regulations in place. The legal and quasi-legal banking system is subject to instability owing to the risk of incurring excessive criminal punishment, which inflates pricing structures to compensate for the high risk.

The most pressing issue for lawmakers and regulators is how to find effective solutions that address the origins of shadow banking's problems. This article proposes that the best solution is to gradually break up the mechanisms of financial repression. Of course, breaking up financial repression is a long process and will encounter opposition from those who profit from it. So, as first steps, there are some measures China can take. First, the state should include shadow banking in the scope of financial regulation and combat its risk by inspecting its financial activities

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Ceilings, 32 J. INDUST. ECON. 367, 367 (1984).

341. *But see id.* at 367–68 (explaining that "the corporate exemption induced unincorporated firms to incorporate simply to avoid usury limits" in the U.S. because "[i]n most states incorporation is a relatively easy and inexpensive process"). In China, however, incorporation is very expensive and time-consuming.

342. Feng Lu & Yao, *supra* note 14, at 763.

in substance. Second, small businesses should have more access to loans, and qualified private enterprises and shadow financial institutions should be allowed to issue bonds to solve their fund shortage. Third, bank regulators can increase competition by permitting the entry of shadow financial institutions into the banking industry, even if they are limited to conducting simple and low-risk financial transactions. Last but not least, the law that shields interest rates from market fluctuations should be changed and only the usury rate should be restricted.

The U.S.–Mexico Border Wall and the Case for "Environmental Rights"

DAVID FISHER*

SUMMARY

INTRODUCTION

On November 3, 2005, U.S. Representative Duncan Hunter proposed a plan to the U.S. House of Representatives calling for the construction of a reinforced fence along the United States border with Mexico.[1] This proposal, inspired by post-9/11 calls

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1. Ricardo Alonzo-Zaldivar, *Proposal Would Fence Off Mexico*, L.A. TIMES, Nov. 4 2005, http://articles.latimes.com/2005/nov/04/nation/na-fence4.

for greater national security and concerns over the rising tide of illegal immigration from Latin America, eventually led to the passage of the Secure Fence Act of 2006, signed into law by President George W. Bush, which authorized the construction of 700 miles of fencing along the United States's southwest border.[2] Since then, specific numbers of exactly how many miles of fencing have been constructed on the border fence have been hard to come by.[3] As of January 15, 2013, the Department of Homeland Security (DHS) had installed 651 miles of primary fencing (352 miles of primary pedestrian fencing and 299 miles of vehicle fencing), as well as 36 miles of secondary fencing, along the country's southwestern border, out of a total of 653 miles of the border identified by United States Border Patrol officials as "appropriate" for fencing and barriers.[4]

Despite what is suggested by the Border Patrol's determination of where fencing is appropriate, border-wall construction may well not be over. One good example comes from 2013's Senate Bill 744, the "Border Security, Economic Opportunity, and Immigration Modernization Act," which passed by a 68–32 vote in the Senate on June 27, 2013.[5] In addition to providing a legal path to citizenship for immigrants who arrived before December 31, 2011, incorporating the previously proposed Development, Relief, and Education for Alien Minors Act (DREAM Act) and the Agricultural Job Opportunities, Benefits and Security Act (AgJOBS Act), and introducing the concept of "merit-based" visas,[6] Senate Bill 744 also proposed the allocation of $46.3 billion additional to the Comprehensive Immigration Reform Trust Fund.[7] The bill includes allocations for towers, cameras, and ground sensors and, notably, calls for the construction of a minimum of 700 miles of pedestrian fence.[8] While much of the existing vehicle fencing will be replaced with pedestrian fencing,

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

3. *See, e.g.*, Michael Corey, *The Surprising Tools CIR Used to Map the US-Mexico Border Fence*, CENTER FOR INVESTIGATIVE REPORTING (Apr. 10, 2014), http://cironline.org/blog/post/surprising-tools-cir-used-map-us-mexico-border-fence-6255 ("We filed several Freedom of Information Act requests with U.S. Customs and Border Protection, and after several appeals, we received limited data showing where individual fence segments start and end. But we were told repeatedly that the actual lines showing the details of the fence segments were sensitive law enforcement information that could give away secrets to drug cartels, illegal border crossers or terrorists."); *see also Borderland*, NAT'L PUB. RADIO, http://apps.npr.org/borderland/#_/23 (last visited Nov. 22, 2014) (including a map of the border fencing at present time, and claiming that "about a third" of the 1,969 miles of the U.S.-Mexico border has been fenced).

4. MARC R. ROSENBLUM, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 16 (2013). Detailed maps of the border wall, posted in October 2013, can be found on the Rapoport Center for Human Rights website. Border Fence Locations, UNIV. OF TEXAS RAPOPORT CTR, (Oct. 23, 2013), www.utexas.edu/law/centers/humanrights/borderwall/maps/final_border_fence_locations_oct_2013.pdf.

5. S.744, 113th Cong. (as passed by Senate, June 27, 2013); *accord* Alan Silverleib, *Senate Passes Sweeping Immigration Bill*, CNN (June 28, 2013), http://www.cnn.com/2013/06/27/politics/immigration/.

6. S.744, §§ 2103, 2201.

7. S.744, § 6(a)(3)(A)(iv). Senate Bill 744 has been criticized by immigration law experts for, among other things, allocating astronomical sums for border enforcement, imposing unnecessary and unaffordable costs on would-be legal immigrants, and eliminating the sibling and diversity visa categories. *E.g.*, NAT'L IMMIGRATION LAW CTR., SUMMARY & ANALYSIS: BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT OF 2013, at 2, 4, 10 (2013), *available at* http://www.nilc.org/document.html?id=895.

8. S. 744, §§ 5(a)(3), (b)(1).

the bill proposes the construction of, at minimum, 120 miles of new border wall.[9] Given that most of the border in California, New Mexico, and Arizona is already walled, almost all of this new wall will likely be constructed in the state of Texas.[10]

While Senate Bill 744 was lost to the turmoil of the 2014 elections and then-looming government shutdown,[11] the bill serves as an exemplar of a fearsome truth: Despite the heated debate around the border wall, its extension and maintenance remain politically salient.[12] As prominent members of Congress continue to push for border security measures as a necessary component of immigration reform,[13] the political reality is that many more miles of border wall will likely be constructed in the future. And, as human rights and environmental activists have argued, the very legal peculiarities of the border wall legislation—the waiver of dozens of comprehensive federal statutes,[14] a lack of accountability in the courts,[15] and the difficulty of achieving concrete results from international human rights bodies[16]—make the prospect of challenging the wall in front of international human rights bodies a difficult task.[17]

From a human rights perspective, the border wall and the actions of the U.S. government surrounding its construction have been criticized for violating several

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9. Stefanie Herweck, *Immigration Reform Legislation Hits the Texas Border Hard*, VALLEY GREEN SPACE (July 15, 2013), http://valleygreenspace.wordpress.com/2013/07/15/immigration-reform-legislation-hits-the-texas-border-hard/ (calculating based on current figures and the bill as a whole that more than 120 miles would have to be built).

10. *Id.*

11. *See, e.g.*, Lawrence Downes, Editorial, *Immigration Reform is Dead*, N.Y. TIMES (June 25, 2014), *available at* http://takingnote.blogs.nytimes.com/2014/06/25/immigration-reform-is-dead/?_php=true&_type=blogs&_r=0; Mary Giovagnoli, The Legacy of S. 744, The Senate Immigration Reform Bill, American Immigration Council: Immigration Impact (June 27, 2014), http://immigrationimpact.com/2014/06/27/the-legacy-of-s-744-the-senate-immigration-reform-bill/ (noting that Congress was unable to enact any immigration reform).

12. *E.g.*, *History and Debate of Border Fence*, DEBATE, http://www.debate.org/border-fence-debate/ (last visited Nov. 22, 2014).

13. *See Top Republicans Support Immigration Reform, but Stress Border Security Must Come First*, FOX NEWS (Feb. 2, 2014), http://www.foxnews.com/politics/2014/02/02/top-republicans-support-immigration-reform-but-stress-border-security-must-come/ (discussing Republican House leadership's plan for "tighter border security," as well as statements from top Republican representatives that a lack of increased border security was the main reason why they did not support recent Senate immigration reform legislation).

14. *E.g.*, Jenny Neeley, *Over the Line: Homeland Security's Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1 ARIZ. J. ENVTL. L. & POL'Y 140, 142–43 (2011) (describing the waiver authority exercised by the Department of Homeland Security (DHS) as "unprecedented" and "fall[ing] outside the broad [boundaries] of the non-delegation doctrine").

15. *E.g.*, *id.* at 161–65.

16. *See, e.g.*, 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, 290 (2011) [hereinafter Gilman, *Seeking Breaches*] ("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. 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." (footnote omitted)).

17. *See id.* at 291 ("International human rights do not dramatically differ in their basic shape from rights guaranteed under the U.S. Constitution. 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." (footnote omitted)).

international norms, including the rights of indigenous peoples,[18] the right to private property,[19] and the right to non-discrimination.[20] This Note aims to expand the human rights critique of the wall in terms of its impact on the environment, to examine the various ways of articulating what some have termed "environmental rights,"[21] or "the right to a healthy environment,"[22] and to identify a theory of environmental rights as they pertain to the wall and other government actions with large-scale environmental impacts. It is motivated by the understanding that the wall has serious and long-term environmental effects that were neither investigated nor addressed properly by the U.S. government,[23] and that, from an advocacy perspective, addressing environmental harms within the framework of human rights will better serve both the environment and the people who depend on it.[24] It calls for an understanding of environmental rights as an aspect or subset of pre-existing human rights,[25] the violation of which results in or from environmental harm. Finally, it attempts to illustrate the concept and the limits of its application through an analysis of the U.S.–Mexico border wall.

The environmental rights issues posed by the border wall include procedural and substantive environmental harms. The United States has a complex statutory framework intended to protect against environmental impacts and mitigate those impacts that are unavoidable, including such bedrock laws as the National Environmental Policy Act (NEPA),[26] the Endangered Species Act (ESA),[27] the Clean

18. *See generally* 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 (Oct. 18, 2008) (unpublished briefing paper), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-violations-of-indigenous-rights.pdf.

19. *E.g.*, Leah Nedderman et al., 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 7 (2008) (unpublished briefing paper), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-violations-of-the-right-to-property.pdf.

20. *E.g.*, *id.*

21. *E.g.*, Dinah Shelton, *Human Rights, Environmental Rights, and the Right to the Environment*, 28 STAN. J. INT'L L. 103, 105 (1992) [hereinafter Shelton, *Right to Environment*].

22. *E.g.*, Adriana Fabra Aguilar, *Enforcing the Right to a Healthy Environment in Latin America*, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 215, 215 (1994) ("The right to a healthy environment has progressed from the realm of moral values to enforceable legal obligations.").

23. *See* Lindsay Eriksson & Melinda Taylor, The Environmental Impacts of the Border Wall between Texas and Mexico 2 (2008) (unpublished briefing paper), *available at* http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-The-Environmental-Impacts-of-the-Border-Wall.pdf ("[I]n its environmental reviews the [U.S.] government failed to adequately consider the proposed border wall's indirect or cumulative effects, the effects to wildlife and conservation lands, and meaningful alternatives that could minimize environmental damage.").

24. *See, e.g.*, Dinah Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice* 23–24 (World Health Org. Health & Human Rights Working Paper Series, Paper No. 1, 2002) [hereinafter Shelton, *Linkages*] (listing the benefits of rights-based approaches to environmental problems).

25. *Cf.* Shelton, *Right to Environment*, *supra* note 21, at 138 ("[Human rights and environmental protection] represent different but overlapping social values with a core of common goals. Efforts on behalf of both seek to achieve and maintain the highest quality of human life. In this regard, human rights depend upon environmental protection, and environmental protection depends upon the exercise of existing human rights . . . .").

26. 42 U.S.C. §§ 4321–4370k (2012).

27. 16 U.S.C. §§ 1531–1544.

Water Act,[28] and many other laws, both state and federal[29] The border wall's empowering legislation includes new and unprecedented authority in the DHS to suspend the application of NEPA, the ESA and other federal laws—which typically apply to government actions and are designed to protect all Americans, without exception—for the construction of the wall on the U.S.–Mexico border,[30] thus violating the "procedural environmental rights" of those affected by the wall.[31] As a result, the wall's construction resulted in the destruction of critical habitat for endangered species,[32] cut off indigenous peoples from important cultural sites,[33] disrupted otherwise pristine conserved lands,[34] and other possible environmental impacts which have not been investigated,[35] thus violating the "substantive environmental rights" of people living along the border.[36]

I. THE BORDER WALL, INTERNATIONAL HUMAN RIGHTS, AND "ENVIRONMENTAL RIGHTS"

Human rights violations caused by the government's actions surrounding the wall's construction include violations of the right to private property and the right to non-discrimination. Central among the findings of human rights advocates is that the construction of the wall included the taking of lands without any effort to establish the necessity and proportionality of such a taking as required by international law.[37] Advocates have pointed out that the takings disproportionately affected Latinos and indigenous groups in violation of international norms,[38] and that the federal government acted without transparency throughout the planning and construction process, thus denying its citizens the ability to investigate and disseminate information

28. 33 U.S.C. §§ 1251–1374.

29. *E.g.*, 42 U.S.C. §§ 7401–7671q; CAL. FISH & GAME CODE §§ 2050–2069 (West 2013).

30. REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (granting the Secretary of Homeland Security the authority to waive all laws the Secretary "in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section").

31. *See infra* Parts I.D, II.A.

32. *E.g.*, Aaron D. Flesch et. al., *Potential Effects of the United States-Mexico Border Fence on Wildlife*, 24 CONSERVATION BIOLOGY 171, 177–79 (2010) (analyzing the effects of the border fence on the pygmy owl and desert bighorn sheep); Matt Clark, *On the Line: Walls, Waivers and Wildlife*, DEFENDERS WILDLIFE BLOG (June 6, 2013), http://www.defendersblog.org/2013/06/on-the-line-walls-waivers-and-wildlife/; *cf.* Jeffrey P. Cohn, *The Environmental Impacts of a Border Fence*, 57 BIOSCIENCE 96, 96 (2007) (citing a biologist for the claim that the construction of the U.S.–Mexico border wall would impact at least fifteen "endangered, threatened, or candidate species" in the Sonoran Desert ecosystem); Laura Bies, *Bordering on Disaster: New Homeland Security Legislation Jeopardizes Wildlife*, WILDLIFE PROF., Spring 2007, 24, 27 (explaining how the construction of the U.S.–Mexico border wall would restrict the movement of species across habitats resulting in negative impacts on species populations).

33. Guzman & Hurwitz, *supra* note 18, at 3.

34. *See, e.g.*, Neeley, *supra* note 14, at 148–50 (describing the disruptive impact of fencing projects located near the Organ Pipe Cactus National Monument and the Otay Mountain Wilderness).

35. *See, e.g.*, Flesch et al., *supra* note 32, at 179–80 (addressing where more research is needed to understand and recognize the effects of the border wall on various animal species).

36. *See infra* Parts I.E, II.B.

37. *E.g.*, Nedderman et al., *supra* note 19, at 2–3 (demonstrating examples of two families who have arbitrarily lost property without just compensation due to the construction of border fence).

38. *E.g.*, Gilman, *Seeking Breaches*, *supra* note 16, at 276–77.

about the wall.[39] Meanwhile, the waiver of otherwise applicable federal law, as well as the judiciary's unwillingness to entertain constitutional challenges to the wall, deprived affected parties of judicial protection as required by both domestic law and international norms.[40] The U.S. government also violated the rights of indigenous people by failing to establish free, prior, and informed consent with indigenous communities before construction[41] and by failing to enforce treaties and agreements signed between indigenous groups and the federal government.[42]

In addition to the direct harms on indigenous communities and other groups caused by the planning and construction of the wall, the direct and indirect environmental harms created by the wall also have serious human rights ramifications. The border wall serves as a good example of how substantive and procedural environmental rights can and should be addressed through the human rights framework. While human rights and environmental activists alike have recognized the mutual benefit for the environmental and human rights agendas by approaching environmental issues through a human rights framework,[43] many have disagreed about which approach to doing so is most appropriate.[44]

As has been recognized in international human rights law, environmental health and human rights are inextricably related.[45] While the right to a healthy environment is not yet widely recognized,[46] the connection between a healthy environment and formally protected human rights has been established through many international reports and resolutions. The Declaration of the United Nations Conference on the Human Environment (1972 Stockholm Declaration)[47] was the first international instrument to make a connection between human rights and environmental protection, although it failed to explicitly articulate a right to a healthy environment.[48] Since then, the right to a healthy environment has been formally recognized in a number of international protocols, including the Organization of American States' Protocol of San Salvador, which provides that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services."[49]

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39. *E.g.*, *id.* at 281.

40. *Id.* at 284–85.

41. Guzman & Hurwitz, *supra* note 18, at 18–20.

42. *Id.* at 14–15.

43. *E.g.*, Shelton, *Right to Environment*, *supra* note 21, at 105 (recognizing that a human rights approach to environmental issues can create potential conflict between the two fields but can also contribute to achieving their common objectives).

44. *See, e.g.*, *id.* at 104–05 (addressing the differences of opinion about which approach is best).

45. *See, e.g.*, Inter-Am. Comm'n of Human Rights, Org. of Am. States, Report on the Situation of Human Rights in Ecuador, 96th Special Sess., Apr. 21–25, 1997, at 88, OEA/Ser.L/V/II.96 doc. 10 rev. 1, 88 (Apr. 24, 1997) ("The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment.") [hereinafter Human Rights in Ecuador].

46. *See generally* Erin Eacott, *A Clean & Healthy Environment: The Barriers & Limitations of This Emerging Human Right*, 10 DALHOUSIE J. LEGAL STUD. 74 (2001).

47. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Report*, U.N. Doc. A/CONF.48/14/Rev.1 [hereinafter Stockholm Declaration].

48. SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY 3–4 (2008).

49. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter Protocol of San Salvador]. The Protocol of San Salvador has been ratified by sixteen Organization of American States Member States,

The Inter-American Commission on Human Rights has said of the connection between environmental harm and the right to life, "The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."[50]

Furthermore, the United Nations Human Rights Council has recognized the inextricable link between substantive human rights and a healthy environment, affirming that "a democratic and equitable international order requires, *inter alia*, the realization of . . . [t]he right of every person and all peoples to a healthy environment"[51] and that "environmental damage . . . can have potentially negative effects on the enjoyment of some human rights."[52]

A link between human rights and environmental law is not only useful for parties who litigate in front of international and regional courts, but it can also serve as a means of re-evaluating the broad range of sociopolitical issues faced by real people.[53] Such a link is integral to a holistic understanding of issues that are perhaps too often artificially limited by the realities of addressing problems within one legal framework—but that nonetheless fundamentally affect people's access to justice and dignity—and allows for the creation of solutions to better address those issues.[54] Furthermore, environmental law and human rights have much to gain from each other. The introduction of environmental issues into the human rights paradigm strengthens human rights protections, thus allowing more effective protection for people whose rights are systematically violated and producing preventative and remedial solutions to avoid future injustices.[55]

The link between the environment and human rights is often articulated in terms of a human "right to a healthy environment."[56] This term, however, may be misleading since the right is not yet widely recognized by the international community,[57] and while

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but, importantly, the United States has not signed the document. *Signatories and Ratifications*, ORG. AM. STATES, http://www.oas.org/juridico/english/sigs/a-52.html (last visited Nov. 22, 2014).

50. Human Rights in Ecuador, *supra* note 45, at 88.

51. Human Rights Council Res. 18/6, U.N. Doc. A/HRC/RES/18/6, para. 6(l) (Oct. 13, 2011).

52. Commission on Human Rights Res. 2003/71, U.N. Doc. E/CN.4/2003/L.11/Add.7, para. Z (Apr. 25, 2003).

53. Fernanda Romina Picolotti & Sofía Bordenave, *Linking Human Rights and the Environment*, *in* ENVIRONMENTAL DEFENSE GUIDE: BUILDING STRATEGIES FOR LITIGATING CASES BEFORE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 3 (Interamerican Ass'n for Envtl. Def. ed., 2010).

54. *See id.* at 3–4 (listing issues "such as poverty, water pollution, unsanitary living conditions, the latent exposure to dangerous wastes, untreated wastewater and air pollution" as affecting the quality of life of millions of people).

55. *Id.* at 4; *see also* Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1, 2–4, 21–23 (Alan E. Boyle & Michael R. Anderson eds., 1996) (discussing the relationship between human rights and environmentalism).

56. *E.g.*, Aguilar, *supra* note 22, at 215.

57. *See, e.g.*, Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence*, HUM. RTS. BRIEF, Spring 2007, at 33, 37 ("[I]nternational declarations regarding the right to a healthy environment represent aspirational 'soft laws' offering guidelines for environmental protection, not strict standards for environmental preservation.").

it has been the subject of a number of international conventions and treaties,[58] it is not articulated as a right in any of the core international human rights instruments, such as the American Convention on Human Rights.[59] Nonetheless, in the words of Dinah Shelton, "nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally-guaranteed human rights,"[60] and the right to a healthy environment continues to be recognized in a number of regional treaties[61] and discussed by international human rights scholars.[62]

The right to a healthy environment can be conceived of in three ways: (1) as a fundamental right in itself, derived from national, regional, and international laws and treaties;[63] (2) as a precondition for the protection of other rights;[64] or (3) as the result of the protection of human rights.[65] By exploring these three equally legitimate means of defining environmental rights and by applying them to the border wall, we may better assess ways to address the broad range of environmental and human rights challenges posed by the wall and other similar projects.

A. The Right to a Healthy Environment as a Fundamental Right

The first, and perhaps most obvious, approach to furthering environmental rights is by establishing a "right to a healthy environment" as a fundamental right. Declaring the right to a healthy environment as a substantive right in itself can be achieved in a couple of ways. First, many define the right as part of the "solidarity" or "third generation" rights, that is, a right which is necessary for the full protection of first-generation rights (i.e., civil and political rights) and second-generation rights (i.e., economic, social, and cultural rights), and which require a concerted group effort to achieve.[66] A second means for achieving the substantive protection of the right to a

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58. *E.g.*, Stockholm Declaration, *supra* note 47; Protocol of San Salvador, *supra* note 49.

59. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143. *But see* Shelton, *Linkages*, *supra* note 24, at 6 (discussing references to environmental rights in various human rights instruments).

60. Shelton, *Linkages*, *supra* note 24, at 23.

61. *E.g.*, Protocol of San Salvador, *supra* note 49, art. 11(1) ("Everyone shall have the right to live in a healthy environment and to have access to basic public services.").

62. *E.g.*, Shelton, *Right to Environment*, *supra* note 21, at 104 (evaluating whether human rights and environmentally protection are premised upon "fundamentally different social values, such that efforts to implement both simultaneously will produce more conflict than improvement, or, on the other hand, whether human rights and environmental protection are complementary, each furthering the aims of the other"); *see also* Tavares, *supra* note 57, at 34 (discussing the implications of the Secure Fence Act of 2006 on "several core human rights protections, namely, the right to life, the rights of indigenous peoples, and the right to a healthy environment").

63. *See, e.g.*, Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351, 367–69 (1993) (arguing that environmental damage threatens human rights and therefore a third-generation right to a healthy environment should be recognized); *cf.* Protocol of San Salvador, *supra* note 49, pmbl. (reaffirming that certain fundamental rights "have been recognized in earlier international instruments of both world and regional scope").

64. *E.g.*, Puneet Pathak, *Human Rights Approach to Environmental Protection*, OIDA INT'L J. SUSTAINABLE DEV., no.1, 2014, at 17, 20.

65. *E.g.*, Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 1 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

66. *See, e.g.*, Downs, *supra* note 63, at 363–67 (discussing the need for cooperation among all organs of

healthy environment is through its adoption in national, regional, and international legal instruments, such as constitutions and treaties.[67] The constitutions of many nations recognize the right to a healthy environment for all of their citizens,[68] either by direct invocation or through ratification of a constitutionally-respected international agreement such as the Protocol of San Salvador[69] or the African Charter on Human and Peoples' Rights.[70]

This approach is appealing for a number of reasons. First, clearly articulating the right in a domestic, regional, or international instrument gives the right legitimacy in a way that the other approaches do not, putting it on equal footing with other substantive rights. Furthermore, this approach may allow for the right to be protected by national and international bodies, for example, through appeal to domestic courts and by petitioning regional and international judicial and quasi-judicial bodies.[71]

However, from the perspective of the United States, the approach may not be entirely feasible. First of all, no international instrument recognizes "third-generation" rights per se;[72] this type of right has been relegated to a few "progressive" documents such as the 1972 Stockholm Declaration, stemming from the United Nations Conference on the Human Environment,[73] and the 1993 Rio Declaration on Environment and Development (1993 Rio Declaration),[74] which are widely considered as non-binding "soft law."[75] Neither the 1972 Stockholm Declaration nor the 1993 Rio

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society—individual, state, regional, and international—in order to realize third generation rights); Tavares, *supra* note 57, at 37 ("[Solidarity rights or third generation rights] include the right to development, peace, common heritage, communication, and humanitarian assistance, aspirational rights to be realized through international and local cooperation and initiative.").

67. *E.g.*, Tavares, *supra* note 57, at 37.

68. David R. Boyd, *The Constitutional Right to a Healthy Environment*, LAW NOW (Feb 28, 2013), http://www.lawnow.org/right-to-healthy-environment/ ("[A]s of 2012, 177 of the world's 193 [United Nations] member nations recognize this right, either through their constitutions, environmental legislation, court decisions, or ratification of an international agreement. The only remaining holdouts are the U.S., Canada, Japan, Australia, New Zealand, China, Oman, Afghanistan, Kuwait, Brunei Darussalam, Lebanon, Laos, Myanmar, North Korea, Malaysia, and Cambodia." (citation omitted)).

69. Protocol of San Salvador, *supra* note 49, art. 11(1).

70. African Charter on Human and Peoples' Rights art. 24, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58 (1982).

71. *See, e.g.*, Shelton, *Right to Environment*, *supra* note 21, at 113–15 (discussing cases where international tribunals have considered petitions for redress of environmental rights violations). Note that the San Salvador Protocol does not allow petitioners to bring complaints. *See* Protocol of San Salvador, *supra* note 49, art. 19 (providing various means to enforce the protocol, but not providing for individuals to petition for redress).

72. Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 44–45 (2001) (refuting the "traditionalist approach," which argues that "the human right to environment 'has not found express affirmation in any binding or effective international legal instrument'") (quoting Günther Handl, *Human Rights and Protection of the Environment: A 'Mildy Revisionist' View*, *in* HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND ENVIRONMENT 122 (Antonio Augusto Cançado Trindade ed., 2d ed. 1995)).

73. *See supra* notes 48–49 and accompanying text.

74. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Report of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

75. *E.g.*, Tavares, *supra* note 57, at 37 ("[I]nternational declarations regarding the right to a healthy environment represent aspirational 'soft law' offering guidelines for environment protection, not strict

Declaration allow for parties to bring complaints alleging violations of their right to a healthy environment, and the documents are not enforceable against signatories.[76] Furthermore, the United States has not signed the International Covenant on Economic, Social and Cultural Rights,[77] the landmark international instrument for the protection second-generation rights,[78] and it seems unlikely to assume that it will sign on to a binding international agreement recognizing the requirement to protect third-generation rights, even if such an instrument did exist.

The same can be said for the adoption of the right as part of national or regional instruments. While this approach avoids the problem of defining the right to a healthy environment as a "third-generation" right—namely that it is seen as wrapped up in and therefore in conflict with second-generation rights, the recognition of which the United States has historically been opposed[79]—it poses a similar problem: The United States has not signed on the Protocol of San Salvador, the Inter-American instrument that recognizes "the right to live in a healthy environment" and the obligation of all States to "promote the protection, preservation, and improvement of the environment."[80] And, while at least one state constitution includes a provision for environmental protection,[81] it seems equally dubious that such a rights-based approach to environmental protection will be incorporated into the U.S. Constitution.

In a more general sense, articulating a substantive right to a healthy environment presents the problem of defining what amounts to a "healthy environment."[82] Because the right to a healthy environment is often seen in conflict with other substantive rights, such as the right to development,[83] some amount of environmental manipulation must be allowed—or even required—under a human rights paradigm; regional bodies that recognize the right have chosen to avoid the difficult task of determining what amounts to a violation of the right by barring parties from bringing complaints alleging its violation.[84]

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standards for environmental preservation.").

76. *See, e.g.*, Neil A.F. Popović, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles of Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 505–06 (1996) (comparing global instruments do not "explicitly recognize[] the right to . . . environmental quality" with regional instruments that are enforceable through regional human rights tribunals).

77. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

78. *See* AMNESTY INT'L, Q&A: OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1 (2013) (referring to the International Covenant on Economic, Social and Cultural Rights as "a landmark achievement for economic, social and cultural rights").

79. *E.g.*, Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 394 (1997).

80. Protocol of San Salvador, *supra* note 49, art. 11.

81. N.Y. CONST. art. XIV, §§ 1, 3–4 (declaring, *inter alia*, that "the lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands," and that forest and wildlife conservation and the protection of natural resources and scenic beauty shall be policies of the state).

82. *See* Shelton, *Right to Environment*, *supra* note 21, at 135 (stating that even though the 1979 Peruvian Constitution proclaims a "right to live in a healthy environment," such a right "remain[s] fairly nebulous").

83. *See, e.g., id.* at 130–31 (arguing that similar considerations are inherent in both the rights to a healthy environment and to development).

84. *See, e.g., id.* at 113–14 (discussing cases where international human rights bodies have expressed doubts as to whether individuals could hold states accountable for environmental rights violations).

B. *The Right to a Healthy Environment as a Precondition for Human Rights*

Another approach to the right to a healthy environment is to understand environmental protection as a precondition for the exercise of human rights.[85] This approach is one of the earliest conceptions of the right to a healthy environment[86] and is reflected in the 1972 Stockholm Declaration, which proclaims that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights."[87] The approach sees the full exercise of all human rights as impossible without first ensuring a healthy environment.[88] The approach seems appealing since, after all, the right to a healthy environment has shown to be integral to the full exercise of, *inter alia*, the right to life, the right to health, the right to development, the rights of indigenous peoples, and procedural rights such as the rights to information, public participation, and equal justice.[89] However, the conceptualization of environmental protection and integrity as a necessary element *before* human rights can be fully realized creates problems for a number of theorists who consider this position risky because of the tendency of governments to use such preconditions as pretexts to avoid human rights protection.[90] Such a formulation of the relationship risks the goals both of human rights and of environmental protection since it encourages states to protect neither and to avoid international responsibility.

C. *Environmental Protection as a Result of the Full Realization of Human Rights*

Perhaps the most constructive and attractive approach to articulating the right to a healthy environment is by seeing environmental protection as integral to the full enjoyment of human rights. This approach allows for the incorporation of environmental protection into the realm of human rights by recognizing the connection between environmental degradation and human rights violations while avoiding the difficulty of adding a substantive right to the list of rights protected under international and regional systems. It conveniently avoids the task of articulating what amounts to a "healthy" environment, instead determining what is "acceptable" environmental degradation according to the degree to which it threatens individuals'

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85. *Id.* at 112–13.

86. *See, e.g.*, G.A. Res. 2398 (XXIII), U.N. Doc. A/RES/2398 (Dec. 3, 1968) (noting, *inter alia*, "the continuing and accelerating impairment of the quality of the human environment," expressing concern "about the consequent effects on the condition of man . . . and his enjoyment of basic human rights," and deciding to convene the 1972 Conference on the Human Environment); *see also* Shelton, *Right to Environment*, *supra* note 21, at 112 (citing to other scholars who previously viewed "environmental protection as a prerequisite" to human rights).

87. Stockholm Declaration, *supra* note 47, pt. 1, ch. 1, art. 1.

88. *E.g.*, Dinah Shelton, *Derechos ambientales y obligaciones en el sistema interamericano de derechos humanos*, 6 ANUARIO DE DERECHOS HUMANOS 111, 112 (2010) [hereinafter Shelton, *Derechos*].

89. *See generally* Shelton, *Derechos*, *supra* note 88 (describing country reports produced by the Inter-American Commission on Human Rights that detail the influence of environmental conditions in providing distinct human rights for individuals residing in Member States of the Organization of American States).

90. *E.g.*, Shelton, *Right to Environment*, *supra* note 21, at 112–13.

pre-existing substantive and procedural rights.[91] Furthermore, since this approach ties environmental protection to the full enjoyment of articulable rights, it also allows for parties to bring complaints alleging environmental degradation to regional human rights bodies.[92] This formulation of environmental rights can be divided into two groups: those to which I call "procedural environmental rights" and those which are best described as "substantive environmental rights."

D. Procedural Environmental Rights

Citing landmark decisions from international and regional bodies, theorists have described environmental rights as a formulation of existing human rights within the context of environmental protection.[93] Professor Dinah Shelton has formulated a particularly useful definition of environmental rights in this framework, focusing primarily on the importance of procedural rights to environmental protection:

> "[E]nvironmental rights" refers to the reformulation and expansion of existing human rights and duties in the context of environmental protection. This approach is an intermediate step between simple application of existing rights to the goal of environmental protection and recognition of a new full-fledged right to environment. These environmental rights would be closely aligned with the concepts of political participation and informed consent. By building on existing political rights, immediate procedural guarantees could be provided against arbitrary action likely to cause significant deterioration of the environment. Thus, an individual right of action to conserve the environment should be established.[94]

According to Shelton, the full protection of environmental rights requires: (1) "a right to prior knowledge of . . . actions [which may result in environmental degradation] with a corresponding state duty to inform" those affected (implicit in which would be the state's duty to acquire and disseminate information on the environmental impacts of planned actions); (2) "a right to participate in decision-making;" and (3) "a right to recourse before competent administrative and judicial organs."[95]

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91. *See, e.g.*, Paula Spieler, *The La Oroya Case: The Relationship between Environmental Degradation and Human Rights Violations*, HUM. RTS. BRIEF, Fall 2010, at 19, 22–23 ("[E]nvironmental degradation can directly harm human rights violations. The maintenance of a healthy environment should be a major concern today, both domestically and internationally, because of the human rights implications associated with failing to protect the environment effectively. The regional and universal organs for human rights protection should be able to address this issue . . . .").

92. *E.g.*, Shelton, *Right to Environment*, *supra* note 21, at 113.

93. *E.g.*, Lynda Collins, *Are We There Yet? The Right to Environment in International and European Law*, 3 MCGILL INT'L J. OF SUSTAINABLE DEV. L. & POL'Y 119, 143–46 (2007); Pathak, *supra* note 64, at 21; Shelton, *Right to Environment*, *supra* note 21, at 117 ("In a more manageable interpretation, environmental rights refers to the reformulation and expansion of existing human rights and duties in the context of environmental protection." (internal quotation marks omitted)); *cf.* Spieler, *supra* note 91, at 21–22 (discussing a case in which petitioners alleged to the Inter-American Commission on Human Rights that the Peruvian government had violated numerous human rights due to the poor environmental condition).

94. Shelton, *Right to Environment*, *supra* note 21, at 117.

95. *Id.*

The advantage of focusing on existing political rights, such as the rights to political participation and informed consent, as central to the environmental rights regime is that international and regional bodies have, to a large extent, recognized the necessity of environmental impact statements, access to information, and other procedural protections and their importance for environmental protection.[96] These types of environmental rights are perhaps constructively called "procedural environmental rights"[97] since they guarantee some level of procedural protection from environmental harms. This branch of environmental rights addresses the problem of having to define what amounts to a healthy environment by instead defining rights along the lines of process;[98] it seems to recognize that some amount of environmental manipulation is necessary and even desired for the protection of other rights, but limits such manipulation through the requirement of public acknowledgement and consent.[99] The right is violated not when the State causes environmental harm, but when it does so without following through with the required steps of dissemination of information, the conducting of meaningful environmental impact statements, and ensuring informed consent of those impacted by the action.[100] Due to the special protection granted to indigenous peoples with respect to the right to culture, the right to self-determination, and the right to prior consent, it is perhaps not surprising that a majority of cases pertaining to procedural environmental rights deal with indigenous groups and the protection of their rights and territories.[101]

E. Substantive Environmental Rights

As opposed to talking about the reinterpretation or expansion of existing rights, as proposed by Shelton and others,[102] or the "environmental components" of existing rights,[103] Professor Lynda Collins has called for the articulation of environmental deprivations of existing rights, which allows for environmental harms to be articulated through their effect on other rights: "Taking the right to life, for example, it is not

96. *See id.* at 117–19 (citing and discussing actions by various intergovernmental bodies to give people the right to participate in or receive information about environmental policymaking).

97. *Id.* at 120.

98. *Id.*

99. *Id.* at 117 ("[E]nvironmental rights would be closely aligned with concepts of political participation and informed consent.").

100. *See* Shelton, *Right to Environment*, *supra* note 21, at 117 (arguing that "[e]ffectuating such a regime would require" such steps).

101. *See, e.g.*, Spieler, *supra* note 91, at 23 ("As of today,all [sic] of the cases judged by the Inter-American Court regarding to [sic] environmental degradation were related to indigenous communities and the protection of their rights and territories.").

102. *See supra* Part I.D. *but see* Rodriguez-Rivera, *supra* note 72, at 18–20 ("[I]t is conceptually possible to conceive that such an expansive reformulation of recognized international human rights could be achieved whereby . . . pollution could be effectively tackled through this human rights approach to environmental protection. However, it seems unlikely that even the most expansive reformulation of international human rights realistically would extend to the protection of such global environmental problems as climate change, threats to biodiversity, and protection of the environment based on its own intrinsic value.").

103. John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 290–92 (2000).

necessary to formulate a new 'environmental component' of the right to life in order to address lethal environmental harm. Instead, courts need only recognize that environmental harm may cause loss of life just as surely as other means."[104] And it seems that courts have done so; environmental degradation has been recognized at the international and regional levels as leading to the violation of the rights to life[105] and health,[106] in addition to the rights of indigenous people and the rights to "privacy and family life, property, suitable working conditions, adequate standard of living, and culture."[107] This branch of environmental rights is best described as the "substantive environmental rights," since each deals with non-procedural rights violated by actions that are in themselves environmentally destructive.

Substantive environmental rights are not merely a means of describing threats to human rights through environmental terms; they may also be useful for achieving environmental protection goals since they provide prescriptive boundaries for environmental degradation.[108] Environmental health and human rights are undeniably interrelated, and international human rights bodies "should be able to address, at least indirectly, the relationship between the two and determine the measures that a state should take in order to protect the environment, and through it, human rights."[109]

One example of the usefulness of substantive environmental rights for achieving environmental goals is in the case of *Community of La Oroya v. Perú* wherein the Inter-American Commission on Human Rights granted precautionary measures to protect the rights of life and integrity of Peruvian citizens whose health had been jeopardized by harmful pollutants emitted from a nearby metal smelter.[110] The case has been held up as an example of the implications that a lack of regulation and

104. *Collins*, *supra* note 93, at 127. Collins expressly refutes John Lee, citing to and quoting him as stating the opposite of her *Cf.* Lee, *supra* note 103, at 291 ("Claiming an environmental component to a recognized human right is to give a new component of a presently-recognized human right the same legal footing as the recognized definition. For this recognition to be universally accepted, the new component must develop as a principle of customary international law, or else be accepted through a convention or binding multilateral treaty.").

105. *See, e.g.*, Öneryildiz v. Turkey, 2004–XII Eur. Ct. H.R. 79, 121–22 (recognizing a violation of the right to life caused by a preventable explosion at a waste site); Yanomami Indians Case, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1984–1985) (finding that Brazil had violated, *inter alia*, the Yanomami people's rights to life, liberty, and personal security by failing to prevent serious environmental damage caused by resource companies); *cf.* Human Rights Committee, *E.H.P. v. Canada* (Communication no. 67/1980), U.N. Doc. CCPR/C/17/D/67/1980, para. 8 (1982), *available at* http://www1.umn.edu/humanrts/undocs/html/67-1980.htm (finding that the storage of nuclear waste within complainants' community "raises serious issues, with regard to the obligation of States parties to protect human life").

106. *E.g.*, World Health Org., *Our Planet, Our Health: Report of the WHO Commission on Health and Environment* 13–14 (1992); Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment under International Law*, 16 TUL. ENVTL. L.J. 65, 101 (2002); *see also* Aguilar, *supra* note 22, at 215 ("The judiciary has played a key role in the formal recognition and enforcement of environmental rights . . . .").

107. Prue Taylor, *Ecological Integrity and Human Rights*, *in* RECONCILING HUMAN EXISTENCE WITH ECOLOGICAL INTEGRITY: SCIENCE, ETHICS, ECONOMICS AND LAW 89, 94 (Laura Westra et al eds., 2008).

108. *See, e.g.*, Spieler, *supra* note 91, at 22–23 (arguing that human rights can be used to protect the environment indirectly).

109. *See id.* at 23 (arguing that the Inter-American bodies should have these abilities).

110. Case 1473-06, Inter-Am. Comm'n H.R., Report No. 76/09, OEA/Ser.L/V/II doc. 51 rev. 1 paras. 8–9 (2009) [*hereinafter La Oroya*].

environmental degradation can have on human rights and the ability of human rights bodies to hold states accountable for environmental harms.[111] However, the case also marks the limits of this approach in human rights jurisprudence: While the Commission requested information about the environmental controls used at the plant,[112] the precautionary measures against Peru were ultimately limited to addressing the medical ailments of the affected without directly addressing the source of pollution.[113] Professor Paula Spieler nonetheless sees potential in these types of cases. She argues that human rights bodies such as the Inter-American Commission on Human Rights have the tools required to effectively address threats to the environment through the enforcement of existing rights and that cases such as *La Oroya*, where human rights violations can be directly traced to environmental degradation, are the best opportunity to do so.[114]

In theory, Spieler is right: Human rights bodies are perhaps especially well-armed for effecting positive environmental change. Through mechanisms such as precautionary measures, international human rights organizations have the potential to order states to cease activities that degrade the environment and affect human rights. Furthermore, international human rights law follows the rule of *restitutio in integrum*, which refers to the requirement of restoration to the same situation in which the victims were in before the acts that resulted in the violation of their human rights.[115] According to this principle, courts have an obligation to enact positive measures to ensure the cessation of the violation of the rights concerned[116] and to guarantee that

111. *See* Spieler, *supra* note 91, at 19 (stating that the *La Oroya* case would be the first time that the Inter-American Commission on Human Rights has assessed the responsibility of a state for the violation of human rights caused by the contamination of the environment).

112. *La Oroya*, *supra* note 110.

113. *See id.* ("The Commission asked the Peruvian State to adopt the appropriate measures for making a specialized medical diagnosis of the beneficiaries, provide specialized and adequate medical treatment for those persons whose diagnosis shows that they are at risk of facing irreparable harm to their personal integrity or life, and coordinate with the persons requesting the measures and the beneficiaries to ensure implementation of the precautionary measures.").

114. Spieler, *supra* note 91, at 22–23.

115. *See, e.g.*, Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 400 (2008) ("An international consensus . . . holds that justice requires *restitutio in integrum*."). This is especially true of the Inter-American Court of Human Rights. *E.g.*, Mendoza v. Argentina, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, para. 307 (May 14, 2013); Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, para. 53 (Nov. 19, 2004) ("Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation."); "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, para. 259 (Sept. 2, 2004); Gómez Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, para. 189 (July 8, 2004); 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, para. 221 (July 5, 2004); Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, para. 42 (July 3, 2004).

116. *See, e.g.*, Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, paras. 232–34 (Feb. 24, 2011) (discussing the obligation of Uruguay to no longer enforce laws that infringe rights protected by the American Convention on Human Rights and to ensure that continuing violations cease).

similar violations do not recur in the future.[117] In many cases of environmental harm, it can be argued that *restitutio in integrum* requires the cessation of environmental harms that cause human rights violations, thus achieving both human rights and environmental goals.

II. ENVIRONMENTAL RIGHTS IN THE BORDER CONTEXT

The U.S.–Mexico border wall serves as an example of the connection between environment and human rights and how the recognition of procedural and substantive environmental rights may work to better protect human rights and, through it, the environment. Central among the violations of procedural environmental rights in the border wall context is the U.S. government's waiver of laws meant to avoid environmental degradation through environmental studies and impact statements, thus implicating the right of equality under the law, the right of non-discrimination, and the right to freedom of information, as well as the right to judicial protection of those affected by the wall.

A. The REAL ID Act, the Retroactive Waiver, and the Denial of Procedural Environmental Rights

The REAL ID Act of 2005 modified, *inter alia*, Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Importantly, the law specifically granting the Secretary of Homeland Security the authority to waive all laws the Secretary "in [his] sole discretion, determines necessary to ensure expeditious construction of the barriers and roads" along the U.S.-Mexico Border.[118] The act also limited judicial review of the Secretary's waiver, stating that courts shall only have the authority to review claims alleging a violation of the U.S. Constitution, and requiring all claims to be filed within 60 days of the action or decision by the Secretary.[119] Furthermore, it also stripped appellate courts of jurisdiction, stating that district court's decisions on a use of the waiver "may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States."[120]

Secretary Chertoff applied the waiver five times. In April 2008, he waived thirty-six federal laws, in addition to any other "federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" the thirty-six listed federal laws; these federal laws provided for environmental protection, cultural preservation, and public health and safety laws, and included the Federal Safe Drinking Water Act, the Solid Waste Disposal Act, and the Administrative Procedure Act "to ensure the expeditious construction" of around 470 miles of border barriers and roads.[121] He also issued another waiver the same day for approximately twenty-

117. Inter. Am. Comm'n H.R., Org. of Am. States, Principal Guidelines for a Comprehensive Reparations Policy, OEA/Ser/L/V/II.131 doc. 1, para 1 (citing Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 101, paras. 236–37 (Nov. 25 2003)).

118. REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 306.

119. *Id.* § 102(c)(2).

120. *Id.*

121. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended, 73 Fed. Reg. 19078, 19078–80 (Apr. 8, 2008); *see also*, Neeley, *supra* note 14, at 140 (estimating that the segments detailed in the Determination amount to a total 470 miles of

one miles of wall in Hidalgo County, Texas.[122] Secretary Chertoff waived eight laws for a fourteen-mile fencing project in San Diego, California in September 2005[123] and waived nine laws for thirty-seven miles of fencing in southwestern Arizona.[124] Then, in April 2007, he waived twenty laws for almost five miles of wall through the San Pedro Riparian National Conservation Area in Arizona.[125] This last waiver was the only one issued in response to a court challenge; the other waivers appear to have been issued preemptively.[126] The manner in which the laws were waived is purely ad hoc; each determination applied to a specific section of wall—the lengths of which varied—and each included the waiver of different laws.

Perhaps most notably, in each instance Secretary Chertoff waived the application of the NEPA and the ESA, two of the nation's most comprehensive environmental statutes. The NEPA requires that federal agencies conduct environmental affects analyses of "major Federal actions" that "significantly affect[] the quality of the human environment."[127] It requires that an agency must, before taking action that could significantly affect the quality of the environment, publish an environmental impact statement (EIS) analyzing the potential environmental impacts of the proposed action, as well as any alternatives to federal action, including no action at all.[128] The EIS must include: (1) analysis of the environmental impacts of the proposed action, (2) adverse environmental effects "which cannot be avoided should the proposal be implemented," (3) "alternatives to the proposed action," (4) "the relationship between local short-term uses" and "the maintenance and enhancement of long-term productivity," and (5) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action."[129]

Meanwhile, the ESA requires that an agency consult with the Secretary of the Interior to insure that the agency's action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical."[130] Additionally, the consultation process must ensure, among other things, the identification of measures that will minimize the impact of the proposed action on any such species.[131]

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barriers).

122. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended, 73 Fed. Reg. 19077, 19077–78 (Apr. 8, 2008).

123. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005, 70 Fed. Reg. 55622, 55622–23 (Sept. 22, 2005).

124. Determination Pursuant to Section 102 of Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 2535, 2535–36 (Jan. 19, 2007).

125. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60870, 60870 (Oct. 26, 2007).

126. Neeley, *supra* note 14, at 141–42.

127. 42 U.S.C. § 4332(c) (2012).

128. *Id.*

129. *Id.*

130. 16 U.S.C. § 1536(a)(2).

131. *See id.* § 1536(b)(4)(ii) ("[T]he Secretary shall provide the Federal agency and the applicant

The waiver power itself serves as a primary example of the violation of procedural environmental rights of people living along the border. International law calls for the equal protection under the law and the principle of non-discrimination, which require that laws be applied equally to all citizens.[132] By allowing for the waiver of environmental laws for the construction of the border wall, the U.S. government left border populations unprotected by the procedural laws that protect other groups in the United States from environmental damages caused by government actions, thus violating the principle of equal protection under the law.[133] Without the procedural and substantive protections of these laws, environmental resources and populations in the border region have been exposed to a much greater risk of environmental impacts than would otherwise be permitted under U.S. federal law.[134] Under international human rights law, a state action is discriminatory not only if the action is *intended* to discriminate, but if it has a discriminatory *effect*.[135] Because the waiver of the NEPA, the ESA, and other environmental laws disproportionately affects Hispanics, indigenous groups, and those living along the border, the waiver power itself violates the principle of non-discrimination.[136]

Furthermore, the waiver of the application of the NEPA violated every aspect of Shelton's articulation of procedural environmental rights by denying affected parties of any prior knowledge of actions which may result in environmental degradation, as well as the right to participate in decision-making and the right to recourse before competent administrative and judicial organs.[137] Before Secretary Chertoff waived the application of environmental protections, the DHS prepared a draft EIS (DEIS) and a draft environmental assessment (DEA) for some segments of the wall.[138] Environmental organizations and legal scholars criticized the studies for their

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concerned . . . with a written statement that specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact [on any endangered or threatened species].").

132. *See, e.g.*, Gilman, *Seeking Breeches*, *supra* note 16, at 286 ("[U]nder 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.").

133. *See id.* at 262 ("[T]he 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.").

134. *See, e.g.*, Eriksson & Taylor, *supra* note 23, at 3 ("[E]nvironmental resources, and the people who rely on them, will suffer as a result of the U.S. government's decision to build the wall without a thorough analysis or mitigation of its environmental impacts.").

135. *E.g.*, Gilman, *Seeking Breeches*, *supra* note 16, at 286.

136. While future border wall construction is presumably subject to the same waiver power as the rest of the wall, Senate Bill 744 calls for an environmental impact statement (EIS) in accordance with the National Environmental Policy Act (NEPA). S. 744, 113th Cong. § 1105(c)(1) (as passed by Senate, June 27, 2013). However, such a concession appears to be entirely superficial; the bill explicitly states that the EIS "shall not control, delay, or restrict actions by the Secretary to achieve effective control on Federal lands." *Id.* § 1105(c)(4)(b). The bill also explicitly exempts new border wall construction from NEPA-imposed protections, requiring that "[a]ny decision by the Secretary concerning any rulemaking action, plan, or program described in this section shall not be considered to be a major Federal action subject to review under the National Environmental Policy Act of 1969." *Id.* § 2110(c).

137. *See* Shelton, *Right to Environment*, *supra* note 21, at 117 ("Effectuating such a regime [including an individual right of action to conserve the environment] would require: (1) a right to prior knowledge of [environmental] actions, with a corresponding state duty to inform; (2) a right to participate in decision-making; and (3) a right to recourse before competent administrative and judicial organs.").

138. Eriksson & Taylor, *supra* note 23, at 3.

inadequacy.[139] Significantly, the government statements relied on "unacceptably short studies [conducted] outside normal migratory and breeding seasons."[140] They also failed to analyze wetlands impacts on sections of the wall that traversed through wetland areas.[141] Further, the reports made no mention of the impact on the numerous endangered species in project areas and failed to address the impacts on species not listed on the endangered species list, including the impacts of artificial lighting at the wall on birds and other animals.[142] Both reports focused, albeit haphazardly, on direct impacts of the wall, and neither included an analysis of the indirect or cumulative effects of the wall's construction.[143] Finally, and perhaps most importantly, neither report discussed any alternatives to construction of the wall as required by the NEPA.[144] By naming the wall itself as the government's goal, the DHS left no room for discussion of any alternatives to construction of the wall.[145] As noted by Professors Melinda Taylor and Lindsay Eriksson of the University of Texas School of Law, "[T]he environmental studies commissioned by DHS appeared to be designed to support a predetermined decision: construct the border fencing regardless of any cost to the natural environment or the people who depend on it."[146]

By failing to carry out proper EISs and to publicize such statements prior to beginning construction, the U.S. government failed to allow those affected by the border wall to make an informed decision about the wall's construction. It thus violated the procedural environmental rights of those affected by the wall's construction, namely their right to prior knowledge of an action that may result in environmental degradation. This failure to make public reliable information about the wall's construction and potential environmental impacts also denied the public the right to participate in decision-making about the project. If these steps would have been taken, in accordance with the requirements of typically applicable domestic legislation and of international human rights law, not only would the human rights of people living along the border have been fully exercised, but many opportunities would have arisen to avoid the environmental impacts of the border wall, including as a result of exploring alternatives or changing the location of the wall so as to avoid protected areas and critical habitat.

Furthermore, the REAL ID Act's waiver power violated the right to judicial protection as guaranteed by international law and, specific to the procedural environmental rights described by Shelton, denied the right to recourse before competent administrative and judicial organs. The actions of the federal government surrounding the construction of the border wall have inspired a number of court cases challenging the constitutionality of the Act, but since the Act restricts federal appellate review, none of the district court decisions have been appealed.[147] The very aspects

139. *E.g.*, *id.* at 3–5.
140. *Id.* at 3.
141. *Id.*
142. *Id.* at 3–4.
143. *Id.* at 4–5.
144. Eriksson & Taylor, *supra* note 23, at 4.
145. *Id.*
146. *Id.* at 3.
147. The wall has been unsuccessfully challenged in the courts as an unconstitutional delegation of

that make the waiver power constitutionally questionable also make its existence and implementation immune from any real judicial challenge: Without a grant of certiorari (which the U.S. Supreme Court has repeatedly denied),[148] the waiver power has gone largely unaddressed in the U.S. judicial system.

The Real ID Act and the federal government's actions surrounding the construction of the border wall are thus illustrative of the importance of procedural environmental rights. By failing to acquire and disseminate reliable environmental information about the wall's impacts, and by restricting appellate judicial review of environmental and other harms related to the waiver, the government has denied its citizens their procedural environmental rights and thus the ability to check the environmental harms caused by the wall and determine what amount of environmental degradation was acceptable.

B. Environmental Impacts of the Border Wall: Pushing the Limits of Substantive Environmental Rights

The "looming threat" of the border wall inspired a prompt response in the legal community.[149] A number of the human rights criticisms of the border wall illustrate well the concept of substantive environmental rights and how they can be used in human rights cases to promote environmental protection. As is the situation with many cases relating to substantive environmental rights, the wall and its construction caused human rights violations against indigenous groups along the U.S.–Mexico border, including the Lipan Apache, Kickapoo, and Tigua (Ysleta del Sur) tribes.[150] Human rights activists have argued, for example, that by fragmenting important land resources, the border wall violates indigenous groups' right to access to and use of natural resources they consider important for their survival, religious practices, and ways of life, in violation of Article XXIII of the American Declaration of the Rights

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Congressional authority to an executive agency. Arguments that the waiver power is unconstitutional have focused on the REAL ID Act's lack of an intelligible principle for applying the power, a grant of power to an executive officer to "partially repeal laws," and that the statute unconstitutionally restricts judicial review since it bars appellate review of District Court decisions. Neeley, *supra* note 14, at 142 (internal quotation marks omitted); *see also* Cnty. of El Paso v. Chertoff, 2008 No. EP-08-CA-196-FM WL 4372693, at *4 (W.D. Tex. Aug. 29, 2008) (arguing that the authority of the Secretary of DHS both lacks an intelligible principle and is unconstrained by judicial review); Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 124 (D.D.C. 2007) (arguing that the Act gives the Secretary of the DHS the power to partially repeal or amend laws); Sierra Club v. Ashcroft, No. 04CV0272-LAB, 2005 U.S. Dist. LEXIS 44244, at *16–19 (S.D. Cal. Dec. 12, 2005) (discussing plaintiff's arguments concerning the unconstitutionality of the REAL ID Act). Each action failed in district court, and none has been appealed because the statutory language strips federal circuit courts of appellate jurisdiction. Neeley, *supra* note 14, at 142. The district court opinions in these cases have been criticized for failing to recognize the waiver power's unprecedented nature and for mischaracterizing the waiver power's geographical breadth and the types of laws that can be waived. *Id.* at 143. In addition to the arguments presented in the various district court cases challenging the law's constitutionality, the waiver power has also been criticized for bypassing the constitutional requirements for enacting and repealing laws under the Presentment Clause. *Id.* at 150–52. Another approach for advocates may be to challenge the Secretary's interpretation of the scope of the waiver authority under the statutory language.

148. Neeley, *supra* note 14, at 142.

149. Denise Gilman, Obstructing Human Rights: The Texas-Mexico Border Wall 2 (June 2008) (unpublished briefing paper), http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-INTRODUCTION.pdf.

150. Guzman & Hurwitz, *supra* note 18, at 20.

and Duties of Man (American Declaration)[151] and Article 26(2) of the U.N. Declaration on the Rights of Indigenous Peoples.

However, there is one important difference between the border wall and cases such as *La Oroya*, in which issues of environmental degradation are easily linked to pre-existing, substantive human rights: The border wall does not effect any direct and traceable threat to the right to health or the right to life. While there is strong case law recognizing environmental threats to human health,[152] environmental damage is much more difficult to address through human rights bodies when it affects other widely recognized rights. The most direct environmental harms caused by the border wall, namely the destruction of otherwise protected habitat and the impact on endangered species, are much more difficult to address through human rights bodies.

The environmental impacts of the border wall, despite the difficulty to articulate them in human rights terms, are nonetheless substantial. Eriksson and Taylor rejected as "inaccurate" the DHS's conclusion that construction of the border wall would only have "short- and long-term negligible to moderate adverse and minor beneficial impacts."[153] The fact that the border wall has had "serious deleterious effects" on wildlife and the environment has been established by ecologists and wildlife biologists is supported by data from the government's own preliminary documents.[154] Notwithstanding the lack of governmental consideration of these negative impacts, studies suggest that the border wall has had severe direct and indirect impacts on past, present, and future conservation efforts. The wall runs through important ecological areas and refuges[155] which were carefully designed by government bodies and private agencies on both sides of the border to protect what has become critical habitat for many species in an area stripped of 95% of its native vegetation.[156]

Furthermore, the wall fragments key wildlife habitat, causing problems such as road mortality, loss of habitat cover and connectivity, altered behavior and range, and interruption of mating activities in an area populated by several endangered species, including the ocelot, the jaguarondi, the northern aplomado falcon, the southwestern willow flycatcher, and the Mexican wolf, which is the most endangered mammal in North America.[157] Further, it prevents the free movement of many non-endangered

151. *E.g.*, Gilman, *Seeking Breaches*, *supra* note 16, at 275–81; Guzman & Hurwitz, *supra* note 18, at 11, 13; *cf.* American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. XXIII, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948) ("Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.").

152. *E.g.*, Yanomami Indians Case, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./II.66 doc. 10 rev. 1 (1984–1985).

153. Eriksson & Taylor, *supra* note 23, at 2 (quoting U.S. DEP'T OF HOMELAND SEC. ET AL., DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR CONSTRUCTION, MAINTENANCE, AND OPERATION OF TACTICAL INFRASTRUCTURE: RIO GRANDE VALLEY SECTOR, TEXAS executive summary at 5 (2007) (asserting construction of the border wall would only confer "short- and long-term negligible to moderate adverse and minor beneficial impacts" to wildlife and aquatic resources) [hereinafter IMPACT STATEMENT].

154. Eriksson & Taylor, *supra* note 23, at 2.

155. These include, but are not limited to, the Lower Rio Grande Valley National Wildlife Refuge and the Sabal Palm Audubon Center and Sanctuary. *Id.* at 5.

156. *Id.* at 5–6.

157. *Id.* at 7.

species from seasonal migration patterns that cross the international border by creating a physical impediment along migration paths, causing animals to change migration patterns to avoid the wall and even massive "tower kills" of birds that fatally collide with light structures.[158]

Even non-migratory species can be pushed to endangerment or regional extinction due to habitat fragmentation caused by the wall. Jaguars, which have become all-but-extinct in the United States, used to occasionally cross the border into the United States from Mexico's Sierra Madre Occidental forests,[159] but experts have reported that the wall "closes the door on any potential for" the jaguar to repopulate the southwestern United States.[160] Biologists have confirmed the harmful effects of the wall on pygmy owls and desert big-horned sheep, whose populations on both sides of the border will be isolated because they cannot transcend the wall,[161] and studies suggest that many other land-bound species, as well as birds, have been similarly affected by the wall.[162]

While the direct impacts of the wall are serious and permanent, indirect impacts on species and the environment can be just as damaging and have gone completely unaddressed by the government's preliminary reports. Eriksson and Taylor cite shifting immigration patterns and interference with land management practices as two of the most harmful indirect effects of the wall,[163] and biologists consider this problem, referred to as "squeezing the balloon," as a major threat to "already tenuous" wildlife populations.[164] Studies have shown that enforcement efforts tend to shift rather than decrease illegal immigration activities,[165] and the wall's probable effect of shifting immigration patterns into increasingly isolated corridors compounds the impact on endangered species like the ocelot, which are very likely to be affected by the increase in human traffic in many areas.[166] Meanwhile, the border wall as proposed may have caused up to "40,000 acres of federally maintained land" to become inaccessible to land managers, preventing integral maintenance tasks such as invasive species control, wildlife response, and prescribed burns.[167] Further specific impacts of the wall on protected lands and on endangered species and other wildlife may well go untold because of the government's waiver of federal laws requiring reporting on the

158. *Id.* at 5–7.

159. *See* Cohn, *supra* note 32, at 96 (discussing how the wall would prevent jaguars from "repopulating the southwestern United States").

160. Bies, *supra* note 32, at 27.

161. Flesch, *supra* note 32, at 177–79.

162. Examples include, but are not limited, to mountain lions, black bears, desert tortoises, pronghorns, wild turkey, and ocelots. Clark, *supra* note 32.

163. Eriksson & Taylor, *supra* note 23, at 8–9.

164. *See, e.g.*, Bies, *supra* note 32, at 27 (citing the phenomenon as a threat to endangered pronghorn antelope populations).

165. *See, e.g.*, U.S. GEN. ACCOUNTABILITY OFFICE, GAO-04-590, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS 3 (2004) ("[M]uch of the illegal traffic has shifted to more remote federal lands, where the Border Patrol has fewer resources, such as agents and fencing, to deter illegal entry.").

166. *See, e.g.*, Bies, *supra* note 32, at 25 (noting the ocelot is one endangered species that could be negatively impacted by fences designed to block human movement).

167. Eriksson & Taylor, *supra* note 23, at 8. The Sabal Palm Audubon Center, for example, will end up entirely on the other side of the border wall. *Id.* at 8–9.

subject,[168] but they almost certainly extend well beyond the "moderate adverse and minor beneficial" impacts found by the shoddy federal studies on the subject.[169]

Because of the nature of its impacts, the wall illustrates one important limitation on addressing environmental harms through human rights bodies: Severe environmental degradation does not necessarily affect human rights in a correspondingly severe way. While environmental harms that lead to violation of the rights to health and life are easily articulable as violations of substantive environmental rights, environmental damage that is substantial from an environmental perspective may not directly affect preexisting fundamental human rights. Thus, while articulating substantive environmental rights as such is helpful in certain extreme cases (such as when severe pollution affects human health), without the ability to turn to a right to a healthy environment, environmental advocates are limited to the anthropocentric aspects of environmental damage. Substantive environmental rights do not include intrinsically environmental harms, such as habitat destruction and damage to endangered species.

CONCLUSION

The border wall is a useful example of the possibilities presented by, and the limitations of, recognizing environmental rights in the human rights context. The procedural environmental rights issues presented by the wall are its most obvious violations, lending credence to Dinah Shelton's theory that environmental rights are best articulated as procedural rights that provide limits on the government's power to cause environmental damage, namely "a right to prior knowledge" of actions which may result in environmental degradation, "a right to participate in decision-making," and "a right to recourse before competent administrative and judicial organs."[170] By waiving the federal laws that provide for procedural checks on government actions that cause environmental damage and by removing that waiver from review by federal intermediate appellate courts, the United States violated the procedural environmental rights of those affected by the wall. These procedural environmental rights are easily articulated in the human rights context since they correspond to pre-existing rights guaranteed by human rights bodies.

The border wall also presents potential violations of substantive environmental rights. It violates, for example, the right to culture of indigenous groups living along the border by restricting their access to traditional lands. At the same time, the border wall serves as an example of the limitations of addressing substantive environmental rights in this way. While anthropocentric environmental harms, such as environmental threats to human health, life, and culture, may be articulated through human rights bodies, other serious environmental harms with less direct effects on humans are

168. In addition to waiving the NEPA, the ESA, and other protective statutes, the federal government has also failed to publish data about how many miles of wall are actually planned to be constructed, as well as the specific relation of those wall segments to specific landmarks, making any precise discussion of the wall's impacts impossible. *See supra* Part II.A.

169. IMPACT STATEMENT, *supra* note 153, executive summary at 4–6.

170. Shelton, *Right to Environment*, *supra* note 21, at 117.

difficult to reach through human rights bodies, such as habitat degradation and harm to endangered species caused by the border wall.

Bridging the Swamp: Currie's Interest Analysis as a Principled Solution to the Conflict of Laws Problem in Bakalar and Other Stolen Art Cases

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SUMMARY

* Candidate for the degree of Juris Doctor at The University of Texas School of Law and an Executive Editor of the *Texas International Law Journal*. First, I would like to thank Professor Hans Baade, whose guidance was essential to me. Many thanks also to Professor Patrick Woolley for his generous comments, and to Mr. Burton DeWitt, for his friendship and his help as a discussion partner. Lastly, I owe much appreciation to my family and friends for their constant support, and to Connie for her patience and understanding during the writing of this Note.

> The realm of the conflict of laws is a dismal swamp, filled with quaking 7uagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.[1]
>
> –Dean William Prosser

The problem of conflict of laws in international stolen art cases appears to the uninitiated observer just as the field of conflicts in general appeared to Dean Prosser: like a pit of bubbling muck. Composed of only a handful of major cases, all purportedly applying different theories in different ways, the law of conflicts in stolen art cases can most charitably be described as "confused." The Second Circuit's recent decision in *Bakalar v. Vavra* has not helped to clarify this.[2] However, in resolving practical choice of law problems, doctrine need not be a stumbling block. Where doctrine builds straightforward rules on clear foundations, it has the power to illuminate difficult legal questions and provide a solid framework for reasoned decisions.

This Note assesses the Second Circuit's application of "interest analysis" in *Bakalar v. Vavra*. It reflects on the meaning of interest analysis and considers Brainerd Currie's interest analysis as a principled solution to the problem of choice of law in stolen art cases. It proposes that courts should apply governmental interest analysis to the transaction by which a disputed property interest was created. If the forum state has an interest in applying its law to the transaction, its law should apply, even if a foreign state also has an interest. However, there will be many cases in which the forum state has no interest in the disputed transaction. In such cases, where a foreign state does have an interest, its law should apply. By considering the interests in play, but providing a clear, rules-based analysis that does not force courts to weigh competing interests or policy justifications, Currie's interest analysis can ensure consistency and predictability without sacrificing rationality. It also prevents courts from applying forum law based on vague policy arguments rather than a genuine interest in the specific transaction at issue.

I. INTRODUCING *BAKALAR*

Movement, whether of persons or objects, tends to create choice of law issues. The social upheaval and mass migrations caused by World War II are no exceptions. Over the twelve years of Nazi rule, Germany, its allies, and opportunistic persons divested Europeans of more than a billion pounds worth of precious art.[3] Many of

1. William L. Prosser, Dean of the College of Law at U.C. Berkeley, Interstate Publication (Feb. 2–6, 1953), *in* 51 MICH. L. REV. 959, 971 (1953).

2. 619 F.3d 136 (2d Cir. 2010).

3. Martin Gayford, *Cracking the Case of the Nazis' Stolen Art*, TELEGRAPH, Nov. 9, 2013, http://www.telegraph.co.uk/news/worldnews/europe/germany/10437728/Cracking-the-case-of-the-Nazis-

these paintings were seized and returned to their respective national governments by the Allied powers,[4] but others were not and found their way back into the art trade.[5] In recent years, as the stolen artworks have surfaced, original owners (or, more often, their heirs) have sued to recover them.[6] Given that many of these suits bridge the Atlantic Ocean, it should not be surprising that U.S. courts have been forced to choose between American and foreign law in deciding them.[7]

Because American and European law often differ on whether a good faith purchaser can obtain valid title to a chattel from a thief, this choice can determine the outcome of a suit. Throughout the fifty U.S. states and other common law jurisdictions, a thief cannot convey good title, even to a good faith purchaser.[8] By contrast, in many European countries, a good faith purchaser can acquire clear title by way of prescription or by expiration of the statute of limitations, even if he or she purchased the item from a thief.[9] While this is changing as states strengthen protections for the original owners of cultural property, these new statutes do not generally apply retroactively to good faith purchases made before their enactment.[10]

The recent Second Circuit case of *Bakalar* presented just such a conflict of laws question over whether to apply New York, Austrian, or Swiss law to determine the ownership of a 1917 drawing by Austrian expressionist painter Egon Schiele.[11] David Bakalar, the possessor of the drawing, purchased it from a New York art gallery in 1963.[12] Its original owner was a certain Fritz Grünbaum, an Austrian cabaret performer.[13] When Austria came under the control of the Nazi regime in 1938, the authorities arrested Grünbaum and sent him to a concentration camp.[14] After

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stolen-art.html.

4. Jonathan Petropoulos, *Inside the Secret Market for Nazi-Looted Art*, ARTNEWS, Jan. 29, 2014, http://www.artnews.com/2014/01/29/inside-the-secret-market-for-nazi-looted-art/; *see also* Laura Gilbert, *Israel Steps Up Hunt for Nazi-Looted Art*, ART NEWSPAPER, Mar. 5, 2014, http://www.theartnewspaper.com/articles/Israel-steps-up-hunt-for-Nazilooted-art/31991 ("Nazi-confiscated works of art recovered by the Monuments Men team were returned to their country of origin, leaving that country to decide who owned them.").

5. Petropoulos, *supra* note 4.

6. *See* Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1200–02 (2005) (describing the recent spate of suits for the return of stolen World War II-era artwork).

7. *See id.* at 1203 (noting how often the choice between U.S. and European law is contested when dealing with Nazi-looted artwork).

8. Alan Schwartz & Robert E. Scott, Essay, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1333 n.2; John Henry Merryman, *The Good Faith Acquisition of Stolen Art* 4 (Stanford Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 1025515, 2007).

9. Kreder, *supra* note 6, at 1203.

10. *Compare* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 13(c), Nov. 14, 1970, 823 U.N.T.S. 231 ("The States Parties to this Convention also undertake, consistent with the laws of each State to admit action for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners."), *with* CODE CIVIL art. 2 (Fr.) ("The law provides only for the future; it has no retrospective operation." (translation by author)), *and* Bundesverfassungsgerichts [Federal Constitutional Court] Nov. 7, 1961, 13 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 261 (Ger.) (establishing constitutional limits on retroactive laws).

11. Bakalar v. Vavra, 619 F.3d 136, 137, 146 (2d Cir. 2010).

12. *Id.* at 139.

13. *Id.* at 137.

14. *Id.* at 137–38.

Grünbaum's arrest, the drawing disappeared until 1956, when Mathilde Lukacs-Herzl, a distant relative of Grünbaum, sold it to Galerie Gutekunst, a Swiss art gallery.[15] Galerie Gutekunst sold the drawing to Galerie St. Etienne, from whom Bakalar purchased it some six years later.[16]

When Bakalar attempted to sell the drawing at auction at Sotheby's in 2005, Grünbaum's heirs objected, alleging that the painting was stolen and that they were thus entitled to possession.[17] Bakalar responded by seeking a declaratory judgment that the drawing was his in federal district court.[18] He claimed that under New York's choice of law rules, Swiss property law should apply, and that according to Swiss law, an original owner's claim against a good faith purchaser of chattels expires after five years.[19] Grünbaum's heirs, Milos Vavra and Leon Fischer, counterclaimed, contending that Austrian law should apply, under which a thief cannot convey good title.[20] The trial court held for Bakalar, interpreting New York's choice-of-law rules to require the application of Swiss law.[21] Vavra and Fischer appealed to the Second Circuit, which reversed, holding that New York law should apply.[22] On remand, the district court held in Bakalar's favor on the basis that New York's doctrine of laches barred the claim.[23]

The basic problem underlying the dispute in *Bakalar* is the unformed state of New York's conflict of laws rules, particularly as applied to disputes over stolen art or other chattels. Stated simply, New York has abandoned its conflicts jurisprudence in favor of case-by-case development.[24] The major result of this is that while areas in which conflicts issues arise frequently are well addressed, obscure areas are neglected.[25] This problem is compounded in the case of art litigation by the inherent portability and value of art, which tends to ensure that cases end up in federal court under diversity jurisdiction.[26] Thus, few major modern New York cases exist on the issue of conflicts as to stolen art, and most of these were heard in federal court.[27]

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15. *Id.* at 138–39.

16. Bakalar v. Vavra, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at *1 (S.D.N.Y. Sept. 2, 2008), *rev'd on other grounds*, 619 F.3d 136.

17. *Bakalar*, 619 F.3d at 139.

18. *Id.*

19. *Bakalar*, 2008 WL 4067335, at *5.

20. *Id.*; Arabella Yip, *Stolen Art: Who Owns It Often Depends on Whose Law Applies*, 1 SPENCER'S ART L.J. (2010), *reprinted in* ARTNET (July 2010), http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal7-26-10.asp?print=1.

21. *Bakalar*, 2008 WL 4067335, at *6.

22. *Bakalar*, 619 F.3d at 146–48 .

23. Bakalar v. Vavra, 819 F.Supp. 2d 293, 307 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6, 9 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2038 (U.S. 2013).

24. *See, e.g.*, Istim, Inc. v. Chemical Bank, 581 N.E.2d 1042, 1043–44 (N.Y. 1991) (extending case law to answer novel question of which choice-of-law method to apply to a problem).

25. *See, e.g.*, Elie Salamon, Note, *A Neu* Neumeier*: The Need for a More Flexible Framework for Choice of Law in the State of New York*, 76 ALB. L. REV. 1323, 1324 (2013) (explaining and critiquing New York's elaborate *Neumeier* rules governing choice of law in tort disputes).

26. *See, e.g.*, *Bakalar*, 619 F.3d at 139 (noting that jurisdiction was based on diversity of citizenship); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278, 284 (7th Cir. 1990) (discussing the diversity of parties' citizenship); Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1152 (2d Cir. 1982)(noting that the suit was brought on diversity grounds).

27. *See* Laurie Frey, Note, Bakalar v. Vavra *and the Art of Conflicts Analysis in New York: Framing a Choice of Law Approach for Moveable Property*, 112 COLUM. L. REV. 1055, 1066-74 (2012) (discussing the importance of the choice-of-law question in New York cases involving stolen art, and acknowledging that cases are brought in federal court under diversity jurisdiction).

The first of these two decisions, *Kunstsammlungen zu Weimar v. Elicofon*, involved two portraits by Albrecht Dürer, which were lost by the plaintiff museum in the chaos at the end of the World War II, and which the defendant possessor claimed by way of adverse possession under Swiss law.[28] The court decided the issue narrowly by observing that under Section 246 of the Second Restatement, the law of the place the relevant transfer occurred applies for purposes of determining whether adverse possession or prescription has occurred.[29] Because this approach was consistent with the law of New York under its traditional choice-of-law rules,[30] while still acknowledging interest-based choice-of-law theories,[31] it allowed the court to sidestep the problem of inventing a new rule for chattels in the wake of *Babcock v. Jackson* and the conflicts revolution.[32]

While the district court in *Bakalar* hewed narrowly to *Elicofon* and its rule,[33] the Second Circuit took greater cognizance of modern developments, particularly as exemplified in *Istim, Inc. v. Chemical Bank*, a 1991 decision by the New York Court of Appeals.[34] In *Istim*, the Court of Appeals held that interest analysis should apply to a dispute over an attorney's lien, reasoning that because interest analysis is an analytical approach "of general application," and because it had applied interest analysis before in a number of different areas, it saw "no reason not to apply this approach" to the lien dispute.[35] The Second Circuit interpreted the Court of Appeals' perfunctory assertion that interest analysis applied as a general endorsement of interest analysis for property law,[36] and purportedly applied it to the facts, holding that New York law should apply to the question of ownership.[37] The court reasoned that because New York had an interest in preventing the state from "becoming a marketplace for stolen goods," and because Switzerland could not have an interest in the dispute "simply because the Drawing passed through there," New York had an interest and Switzerland did not.[38]

II. THE CONFLICT OF LAWS PROBLEM

As the foregoing account of the *Bakalar* decision hints, there are significant problems with the Second Circuit's conflict of laws analysis. However, before addressing these concerns and suggesting a means of resolving them, this Note will

28. 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982). Elicofon raised other defenses as well, but the issue of prescription presented the conflict of laws problem. *See generally id.*

29. *Id.* at 845–46; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 246 (1971).

30. Zendman v. Harry Winston, Inc., 111 N.E.2d 871, 873 (N.Y. 1953).

31. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 246 cmt. a (1971) (predicating application of situs rule on the supposition that the situs has the "dominant interest" in applying its law of prescription or adverse possession).

32. This Note will address *Babcock* and the conflicts "revolution" *infra*.

33. Bakalar v. Vavra, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at *5 (S.D.N.Y. Sept. 2, 2008), *rev'd on other grounds*, Bakalar v. Vavra, 619 F.3d 136, 143 (2d Cir. 2010).

34. *Bakalar*, 619 F.3d at 143.

35. Istim, Inc. v. Chemical Bank, 581 N.E.2d 1042, 1044 (N.Y. 1991).

36. While this author does not necessarily endorse the Second Circuit's interpretation of *Istim* to govern the dispute in *Bakalar*, such concerns are beyond the scope of this Note.

37. *Bakalar*, 619 F.3d at 144–45 (internal quotation marks omitted).

38. *Id.*

recap the basic tenets of American conflicts jurisprudence and briefly examine its three most prevalent theories.

A. *Defining the Subject of Inquiry*

The Second Restatement of Conflict of Laws defines conflict of laws as "that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."[39] Alternatively referred to in the international context as "private international law," the subject arises wherever one encounters the question of which jurisdiction's law should apply to a legal question.[40] Each state has its own conflict of laws rules, which determine what substantive law to apply to the facts.

Likewise, each American state adopts its own conflict of laws rules, which may be applicable in federal court as well as in state court.[41] Naturally, each state's courts apply that state's rules.[42] While an American federal jurisprudence of conflict of laws exists,[43] when U.S. federal courts sit in diversity jurisdiction, they apply the choice of law rules of the forum state.[44] Thus, because American property law is predominantly governed by state law,[45] the court in *Bakalar* applied New York conflicts law to determine the ownership of the drawing.[46]

B. *Common Approaches to the Conflict of Laws Problem*

Whether a suit over stolen art is brought in state or federal court, it will be governed by the conflict of laws jurisprudence of the state in which it is brought.[47] Unfortunately, there is no such uniformity in conflicts law between states.[48] Before the revolution in conflict of laws analysis of the 1960s, American states broadly employed a "vested rights" theory of conflict of laws.[49] The demise of the rights-based system has replaced this uniformity with what can only be described as a

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39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

40. Charles T. Kotuby, Jr., *Private International Law Before the United States Supreme Court: Recent Terms in Review*, 4 J. PRIV. INT'L L. 61, 62 (2008).

41. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279, 285 (N.Y. 1963) (adopting most significant contacts analysis for conflict of laws disputes in New York courts).

42. *See generally, e.g., id.*

43. *E.g.*, Chuidian v. Phil. Nat'l Bank, 976 F.2d 561, 564 (9th Cir. 1992). Because the Supreme Court has not addressed the issue of choice of law in federal question cases, the Courts of Appeals are divided on the issue, some applying forum law per *Klaxon*, and others applying some form of federal common law. Viktoria A. D. Ziebarth, Note, *Choice of Law Rules in Bankruptcy: An Opportunity for Congress to Resolve Conflicting Approaches*, 5 SEVENTH CIRC. REV. 309, 312 (2010) (citing Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)).

44. *See Klaxon*, 313 U.S. at 496 (holding that federal courts should apply state conflict of laws rules in diversity cases (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938))).

45. Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 (2005).

46. Bakalar v. Vavra, 619 F.3d 136, 146 (2d Cir. 2010).

47. *Klaxon*, 313 U.S. at 496.

48. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 279 (2013) [hereinafter Symeonides, *Choice of Law in 2012*] (cataloguing the prevailing conflict of laws theories among the American states).

49. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1278–79 (1989)

chaotic hodgepodge of competing theories.[50] This section will survey in brief several of the more popular theories, beginning with the traditional vested rights theory.

1. The Vested Rights Theory

Because a dwindling but still significant number of states employ it, and because more modern interest- or contacts-based theories are best understood in relation to it, the vested rights theory of conflict of laws remains relevant. As of 2012, some fourteen states retained this theory for the law of torts, contracts, or both; this is down one from fifteen in 1996.[51] However, before the New York Court of Appeals' 1963 *Babcock v. Jackson* decision,[52] the vested rights theory was universal.[53] Under the vested rights theory, any cause of action arising in a foreign jurisdiction exists solely by virtue of the law of that jurisdiction.[54] Thus, a court must apply the law of the foreign jurisdiction in which the event giving rise to the cause of action occurred.[55] In a torts case, this is the *lex loci delicti*, the law of the place of the tort, where the injury occurred.[56] In a contracts case, it would be the *lex loci contractus*, the site of the contract's formation.[57] Because the cause of action could exist only by operation of the *lex loci*, a court could only apply the *lex loci*. A court adjudicating a dispute arising from an event occurring elsewhere could no sooner consider its interests in applying forum law than apply foreign law to a dispute having no contacts with a foreign state.[58] As Joseph Beale, the reporter for the First Restatement of the Conflict of Laws and the greatest proponent of the vested rights theory explains, "all that has happened outside the territory, including the foreign laws which have in some way or other become involved in the problem, is regarded merely as fact to be considered by the national law [of the place of injury] in arriving at its decision, and to be given such weight in determining the decision as the national law may choose to give it."[59]

2. Interest Analysis

As one might imagine, while the vested rights theory ensured relative predictability and consistency, it came under attack as a new generation of conflicts

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50. Symeonides, *Choice of Law in 2012*, *supra* note 48, at 279.

51. *Compare id.*, *with* Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review*, 44 AM. J. COMP. L. 181, 197–98 (1996).

52. 191 N.E.2d 279 (N.Y. 1963).

53. *See* R. Harvey Chappell, Lex Loci Delicti *and* Babcock v. Jackson, 7 WM. & MARY L. REV. 249, 250 (1966) ("The lid was blown off [the topic of vested rights] when in 1963 the New York Court of Appeals rendered its decision in *Babcock v. Jackson*.").

54. *Id.* at 249–50.

55. *See id.* at 249 (explaining that "the substantive rights and liabilities arising from a tort are determined by the law of the place of the tort . . . .").

56. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1043 (1987).

57. *Id.*

58. JOSEPH H. BEALE, HISTORY AND DOCTRINES OF THE CONFLICT OF LAWS §73 (1935), *reprinted in* GENE R. SHREVE AND HANNAH BUXBAUM, A CONFLICT OF LAWS ANTHOLOGY (2nd ed. 2012) ("[T]he national law provides for a decision according to certain provisions of the foreign law . . . .").

59. *Id.*

scholars began to question whether predictability or consistency were a sufficient basis in themselves to justify always applying the *lex loci*. Walter Wheeler Cook succinctly summarized the problem in 1924:

> [W]hile . . . the law of a given state or country can be enforced only within its territorial limits, this does not mean that the law of that state or country cannot, except in certain exceptional cases, affect the legal relations of persons outside its limits. As we have seen, "law" is not a material phenomenon, which spreads out like a light wave until it reaches the territorial boundary and then stops.[60]

Professor Cook was one of a number of scholars advocating alternatives to the vested rights theory.[61] Cook reasoned that because the forum state has its own interests even in disputes arising elsewhere, and because courts in practice considered these interests in bending the territorial rules to achieve the desired effect, courts should not be compelled to apply the law of the place of injury.[62] Thus, Cook's theory would liberate courts to fashion their own rules from the policies of the forum state.[63] Albert Ehrenzweig sharpened Cook's liberation of the court into a theory providing generally for the application of forum law, with foreign law to be applied only where justified by specific, limited exceptions.[64] He condemned the willingness of courts to effect injustice by applying foreign law to disputes lacking any connection to the foreign state except the location of the injury.[65]

Out of this intellectual ferment came Brainerd Currie's "governmental interest analysis," the theory that catalyzed widespread acceptance of interest-based conflicts theories and fueled the conflict of laws revolution.[66] Like Cook and Ehrenzweig before him, Currie prescribed forum law as the default.[67] However, unlike his predecessors, Currie provided a method by which courts could determine when to depart from forum law.[68] Under Currie's interest analysis, one must first determine the relevant law of the forum state and the policy underlying that law.[69] If the forum state has a "legitimate basis for the assertion of an interest in the application of that

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60. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L.J. 457, 484 (1924).

61. *See id.* at 458–59 (referencing Dicey's and Story's "territorial" theories about law and legal rights).

62. *See id.* at 484 (observing that, barring some positive law to the contrary, the court has the power to determine which law to apply); William Tetley, *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299, 309–10 (1999) ("Cook . . . contend[ed] instead that courts did not in fact 'enforce' rights created under foreign law, but rather enforced only domestic rights which they themselves chose to create and enforce.").

63. Cook, *supra* note 60, at 484.

64. Albert A. Ehrenzweig, *The Lex Fori–Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 642–43 (1960).

65. *Id.* at 639–40.

66. Gary J. Simson, *Choice of Law After the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 MERCER L. REV. 715, 716–21 (2012).

67. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959). While Currie refined his method of interest analysis somewhat in later years, this essay provides the clearest step-by-step explanation of its application.

68. *Id.*

69. *Id.*

policy" to the case before the court, then forum law should apply.[70] If the forum state lacks an interest in applying its policy to the facts, the court should examine the foreign law for which a party has advocated.[71] If the foreign state has an interest in applying its law, then that law should apply.[72] If it does not, then forum law must apply by default.[73]

3. The Second Restatement

Despite Professor Currie's centrality to the conflict of laws revolution and the common assertion that interest analysis is the prevailing approach in the United States today,[74] Currie's interest analysis, as he set it out, is only employed in a small minority of states.[75] Instead, more than half of the states base their conflicts rules on the Second Restatement of Conflict of Laws.[76] Promulgated in 1971, some ten years after Currie's theory debuted, the Second Restatement was significantly influenced by interest analysis, among other interest-based theories.[77] However, it departed from interest analysis significantly. Where Currie's interest analysis involved a straightforward assessment of whether the states implicated had an interest in applying their law to the dispute, Section 6 of the Restatement prescribes a multi-factor balancing test by which courts are to determine which state has the "most significant contacts" to the dispute.[78] In making this determination, the court must consider the Restatement's provisions specific to the legal question at hand, which will often establish a presumption in favor of the *lex loci*,[79] or, in certain instances, for the *lex loci*'s outright application.[80]

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70. *Id.*

71. *Id.*

72. *Id.*

73. Currie, *supra* note 67, at 178.

74. *See, e.g.*, Simson, *supra* note 66, at 720 ("Virtually every state high court that has explicitly departed from the traditional approach has made the 'governmental interest analysis' approach formulated and championed by Currie a significant ingredient of its choice-of-law methodology." (citation omitted)).

75. Symeonides, *Choice of Law in 2012*, *supra* note 48, at 279.

76. *Id.*

77. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (listing "the relevant policies of the forum," and "of other interested states . . . in the determination of the particular issue" as factors).

78. *See, e.g.*, § 244 (stipulating that the law applied regarding the conveyance of a chattel is that of the state with the "most significant relationship to the parties, the chattel and the conveyance" as determined by § 6); *see also* William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash*, 34 MERCER L. REV. 645, 657 (1983) (characterizing the Restatement's multi-factor test as a "'laundry list' of choice of law mumbo jumbo").

79. Michael S. Finch, *Choice of Law Problems in Florida Courts: A Retrospective on the* Restatement (Second), 24 STETSON L. REV. 653, 668 (1995); *see, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971) (providing for presumption in favor of *lex loci* in personal injury cases).

80. Finch, *supra* note 79, at 675; *see, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) § 246 (prescribing *lex loci* in the transference of an interest in chattel).

III. THE SUBSTANTIVE LAW IN *BAKALAR*

As noted supra Part I, the court in *Bakalar* purported to apply interest analysis to resolve whether Swiss or New York law applied. This Part will provide a detailed analysis of the substantive law on point.

A. Swiss Law

Under Swiss law, Vavra and Fischer could not challenge Bakalar's title to the Schiele drawing. Article 934 of the Swiss Civil Code establishes that the original owner may bring an action to reclaim a chattel within a period of five years after its loss.[81] After the expiration of five years, however, the original owner's claim is barred, either by a statute of limitations,[82] or by prescription.[83] Furthermore, Swiss law presumes good faith on the part of the possessor.[84] This presumption of good faith is contingent on the possessor's due diligence.[85] However, the purchaser of an object has no general duty to inquire as to how the seller acquired title.[86] Thus, unless some red flag existed that should have aroused the suspicion of the purchaser, his title would be unassailable after five years.[87] Furthermore, even if there were suspicious circumstances that should have alerted the purchaser, any claimant must prove that the required investigation would have revealed the illegal origin of the object.[88]

Recognizing that this policy is unfavorable to original owners of stolen cultural property, the Swiss legislature ratified the 1970 UNESCO convention by passing the Cultural Property Transfer Act (CPTA) in 2003.[89] However, the CPTA does not apply retroactively.[90] Because the purchase at issue occurred in 1956, it was not subject to the CPTA.[91]

Because Galerie Gutekunst purchased the drawing from Lukacs-Herzl in good faith under the standards prescribed by Swiss law, Vavra and Fischer had no cause of action against Bakalar under Swiss law.[92] Galerie Gutekunst had no actual

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81. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], [CIVIL CODE] Dec. 10, 1907, art. 934 (Switz.).

82. *Id.*

83. *See id.* art. 728 (providing that the good faith possessor of a chattel acquires title by adverse possession after five years).

84. *Id.* art. 3.

85. *Id.*

86. Bundesgericht [BGER] [Federal Supreme Court] Apr. 18, 2013, 3.2.2, 5A_372/2012, *available at* http://relevancy.bger.ch/php/aza/http/index.php?lang=de&type=show_document&highlight_docid=aza://18-04-2013-5A_372-2012&print=no (citing BGER [Federal Supreme Court] Mar. 5, 1996, 122 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS III 1).

87. *See* BGER [Federal Supreme Court] Apr. 18, 2013, 3.2.2, 5A_372/2012 ("According to the settled caselaw of this court, the purchaser has no general duty to inquire as to the authority of the transferor to dispose of the object; only if there are specific grounds for suspicion must the circumstances [of the seller's acquisition] be clarified.") (translation by author).

88. *Id.*

89. SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] June 20, 2003, SR 444.1.

90. *Id.* art. 33.

91. *See* Bakalar v. Vavra, 619 F.3d 136, 139 (2d Cir. 2010) (noting that the relevant good faith purchase occurred in 1956, when Galerie Gutekunst purchased the drawing from Mathilde Lukacs).

92. *See id.* (noting that Bakalar acquired good title when he purchased the drawing and that any claim to the property expired through the statute of limitations).

knowledge that Lukacs-Herzl lacked authority to sell the drawing.[93] Thus, Vavra and Fischer had to prove that Galerie Gütekunst failed to exercise due diligence in purchasing it.[94] Because Swiss due diligence standards only require a purchaser to inquire into a seller's authority to sell an object if there are suspicious circumstances, and because no such circumstances existed, Galerie Gütekunst was not obligated to inquire further, and any claim arising from a loss or theft of the drawing prior to Galerie Gütekunst's acquisition expired within five years, by 1961.[95]

B. New York Law

Under New York law, a thief cannot convey good title, even to a good faith purchaser.[96] Thus, the original owner of an artwork stolen in World War II will always have a claim against a subsequent purchaser, though such a claim may be barred by the operation of the statute of limitations or the doctrine of laches.[97] New York's statute of limitations for recovery of a chattel is three years.[98] Because New York employs the demand-and-refusal rule, the claim does not accrue and the limitations period does not begin to run until the original owner has made a demand for return of the lost chattel and its possessor has refused.[99] Alternatively, the doctrine of laches may defeat (as it ultimately did in *Bakalar*) an original owner's suit for the return of a stolen artwork.[100] The doctrine of laches, "which bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered recovery inequitable," applies to equitable claims for the return of stolen art.[101]

New York law did not foreclose Vavra and Fischer's action. Because the drawing was in all probability stolen, and because a thief cannot convey good title in New York, Vavra and Fischer's claim to title was superior to Bakalar's.[102] While the heirs' superior claim to title in no way guaranteed them a cause of action against Bakalar to recover the drawing, New York's more generous demand-and-refusal rule for computing the statute of limitations ensured that the statute of limitations did not bar their action.[103] Vavra and Fischer had three years to file suit from their demand

93. Bakalar v. Vavra, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at *1 (S.D.N.Y. Sept. 2, 2008), *rev'd on other grounds*, 619 F.3d 136.

94. *Id.*

95. *Id.* at *7–*8; *see also* ZGB [CIVIL CODE] Dec. 10, 1907, art. 934 (Switz.) (providing that an original owner has a claim against any possessor regardless of the possessor's good faith for five years).

96. Menzel v. List, 267 N.Y.S.2d 804, 819 (N.Y. Sup. Ct. 1966) ("[T]he principle has been basic in the law that a thief conveys no title as against the true owner.").

97. *See id.* at 820 (upholding verdict in favor of original owners of Chagall painting looted by Nazis); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 427 (N.Y. 1991) (applying statute of limitations and doctrine of laches to suit for return of stolen art).

98. N.Y. C.P.L.R. § 214 (McKinney 2013); *Lubell*, 569 N.E.2d at 429.

99. *Lubell*, 569 N.E.2d at 429.

100. *Id.* at 427.

101. *See* Blinds To Go, Inc. v. Times Plaza Dev., 846 N.Y.S.2d 296, 297 (N.Y. App. Div. 2007) (quoting Hilgendorff v. Hilgendorff, 660 N.Y.S.2d 150, 151 (N.Y. App. Div. 1997)).

102. Menzel, 267 N.Y.S.2d at 819.

103. *See* Antony Haden-Guest, *Artist Leaves a Legacy in His Troublesome Image*, FIN. TIMES (Sept. 10, 2005), http://www.ft.com/intl/cms/s/0/a406f68e-2196-11da-a603-00000e2511c8.html#axzz312fcPqlS (showing that Bakalar brought suit in 2005, shortly after the failed auction at Sotheby's, when Vavra and Fischer demanded return of the drawing).

and Bakalar's subsequent refusal.[104] Because they filed within one year, they complied with the statute of limitations, though their claim was ultimately barred by the doctrine of laches.[105]

IV. CRITIQUE OF *BAKALAR*

If one considers *Istim* to adopt interest analysis for all conflicts questions as to property law in New York, then the Second Circuit would seem, at first blush, to be applying the theory advocated for in this Note. As has been suggested supra, this is not the case. This section will show that the court did not apply interest analysis, but instead a "most significant contacts" test, analogous to the balancing test employed in the Second Restatement, but applied in a more arbitrary fashion, without regard for the Second Restatement's checks on judicial discretion. It will then examine the faults of the "most significant contacts" test: namely, that it enables courts to ignore the determinative legal questions and the policy interests embodied in the applicable laws, in order to apply forum law.

In *Bakalar*, the court purportedly applied interest analysis.[106] It weighed New York's putative interest in resolving the controversy of the Schiele drawing, which Mr. Bakalar purchased in New York, against Switzerland's interest in a drawing that only "passed through" Switzerland, and which was resold in just five months.[107] However, this "interest analysis" is interest analysis in name only. It is actually best characterized as a type of "most significant contacts" analysis, unmoored by interest analysis' guiding focus on the actual laws governing the determinative issue and the specific policy interests undergirding those laws.

The first problem is that the court is actually weighing interests of the implicated states against each other.[108] Interest analysis does not provide for such weighing of competing interests.[109] In the event that both states have a specifically cognizable interest in deciding the determinative legal question, Professor Currie provided that forum law should apply.[110] In this way, interest analysis avoids the difficult and subjective problem of weighing two legitimate interests against each other. As Currie observes, "assessment of the respective values of the competing legitimate interests . . . of two sovereign states, in order to determine which is to prevail, is a political function of a very high order," and not a task for the courts.[111]

Such weighing of interests suggests instead a "most significant contacts" analysis, characteristic of Section 6 of the Second Restatement. However, such application of the "most significant contacts" analysis apart from the other provisions of the Second Restatement creates a serious problem. The fundamental

104. *Lubell*, 569 N.E.2d at 429.

105. *See* Haden-Guest, *supra* note 103 (explaining that Vavra and Fischer filed suit against Bakalar in the same year that the demand and refusal took place).

106. Bakalar v. Vavra, 619 F.3d 136, 143–44 (2d Cir. 2010).

107. *Id.* at 144–45.

108. *See id.* ("The tenuous interest of Switzerland created by these circumstances, however, must yield to the significantly greater interest of New York . . . .").

109. *See* Currie, *supra* note 67, at 178 (providing that if both states have an interest, the forum state's interest must prevail).

110. *Id.*

111. *Id.* at 176.

indistinctness of multi-factor balancing tests is mitigated under the Second Restatement by the existence of specific provisions included to govern different types of conflicts.[112] In the present case, the applicable specific provisions, at Section 244, provided that there should be a general presumption in favor of the place where the disputed property interest was created (i.e., in favor of the *lex loci*).[113] Furthermore, Section 246 provides that in cases where ownership by prescription or adverse possession is in issue, the *lex loci* should apply.[114] These provisions work to ensure consistency and predictability in the interests created by way of a transaction in a particular jurisdiction. They also strongly suggest that Swiss law should apply to the facts.[115] In applying its quasi-Restatement analysis, the Second Circuit ignored these anchoring rules and presumptions, opening the door to the exercise of unmoored judicial discretion.

The more concerning issue, however, is that the court did not confine its analysis to the specific legal question on which the dispute hinges.[116] Under any analysis of the facts, the 1956 sale of the drawing from Lukacs to Galerie Gütekunst in Switzerland is determinative of Bakalar's current state of title.[117] Any claim of Grünbaum's heirs is contingent on the title received by Bakalar upon his purchase of the drawing.[118] Thus, if Bakalar took good title, cleared by operation of foreign law against any prior owner, no prior owner can attack his title on the ground that he did not purchase the drawing in good faith, or that any other applicable law does not allow a thief to convey title against an original owner.[119] Under Article 728 of the Swiss Civil Code, the New York gallery's 1956 purchase of the drawing from Galerie Gutekunst would have resulted in the gallery's ownership by prescription in five years.[120] Even if the gallery did not gain ownership by prescription, under Swiss law, any claim available to an original owner against a good-faith purchaser expires after five years.[121] Furthermore, Swiss law presumes good faith on the part of any possessor.[122] Thus, the only way by which Grünbaum's heirs could recover was by applying the law of New York to the 1956 sale. Switzerland plainly has an interest in regulating transactions within its borders.[123] Accordingly, for New York law to apply

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112. Bruce Posnak, *The Restatement (Second): Some Not So Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or Is It Cob?)*, 75 IND. L.J. 561, 562 n.10 (2000) [Hereinafter Posnak, *Leflar over Reese*].

113. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 244 (1971).

114. *Id.* § 246.

115. If the dispute would be resolved on the basis that Bakalar acquired title by prescription, as the court decided *Elicofon* some thirty years prior, then Swiss law must apply. *Id.* § 244. Alternatively, if the case were decided on the basis that action was foreclosed by the statute of limitations, § 246 would apply to create a strong presumption in favor of Swiss law. *Id.* § 246.

116. *See, e.g.*, Bakalar v. Vavra, 619 F.3d 136, 143 (Cir. 2010) (analyzing the "traditional situs rule").

117. *See, e.g.*, Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., No. 98 Civ. 7664 (KMW), 1999 WL 673347, at *5 (S.D.N.Y. 1999) (suggesting that, when the validity of title is in issue, it must be determined with reference to the "relevant transfer of title").

118. *Id.*

119. ZGB, [CIVIL CODE] Dec. 10, 1907, art. 728 (Switz.).

120. *Id.*

121. *Id.* art. 934.

122. *Id.* art. 3.

123. *See* Frey, *supra* note 27, at 1080 ("The fact that the transfer took place on Swiss soil closely relates to the purpose of Switzerland's rights-defining rule: to promote predictability and protect the

under the theory of interest analysis, as purportedly adopted in *Istim*, New York must have had an interest in applying its relevant property law to this transaction.[124] If New York had a legitimate interest, Swiss law would have had to yield.[125] However, in the absence of such a New York interest, Swiss law would apply.[126]

The position that New York can have any significant interest in the 1956 sale is absurd. In order for New York to have such an interest, one would have to consider New York to have an interest in applying its law to any sale of art that could ultimately result in the subsequent sale of the piece in New York. Given the international nature of the art market, this would include any sale of any artwork of any significant value anywhere in the world. The court observed correctly that the drawing spent only five months in Switzerland.[127] In light of this circumstance, the court suggested that New York had an interest in not becoming "a marketplace for stolen goods."[128] However, there is nothing in the *Bakalar* opinion suggesting any intent on the part of Lukacs-Herzl to launder title to the drawing by selling it in Switzerland, nor any intent of Galerie Gutekunst to purchase the drawing specifically for sale in New York. Because, based on the available facts, Galerie Gutekunst could have sold the drawing to any buyer in any country, New York had no particular interest in applying its law to Galerie Gutekunst's purchase of the drawing beyond whatever nebulous quasi-interest it might have in any sale of stolen art.

V. PURE INTEREST ANALYSIS AS AN ALTERNATIVE

The major differentiating factor among interest-based theories is not whether they avoid unjustified application of the *lex loci*, but rather whether they are able to provide for departure from the *lex loci* in a principled manner, insulated from arbitrariness and judicial whim. It is here where the *Bakalar* court fell short, using an unmoored balancing test to apply New York law to a transaction having nothing to do with New York.[129] And it is here where Currie's interest analysis demonstrates its merits as an elegant and rational alternative to the rigid and formalistic vested rights theory and the vague and exception-riddled Second Restatement method.

This section will first examine the basic reasons for which a court should consider applying a certain jurisdiction's law to a dispute. It will examine the pitfalls inherent in an overly broad examination of the question. Finally, it will consider how the analysis may be directed and anchored, not by a motley set of situationally-derived rules and presumptions, but merely by focusing the inquiry on the specific policies and the determinative facts involved.

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enforceability of transactions that take place on Swiss soil.").

124. Currie, *supra* note 67, at 178. In the alternative, if neither Switzerland nor New York had an interest in applying their law, New York law would apply. *Id.*

125. *See id.* (noting that forum law should be applied if the forum state has an interest, even if the foreign state also has an interest).

126. *See id.* (noting that if the forum state has no interest and the foreign state does have an interest, foreign law should be applied).

127. Bakalar v. Vavra, 619 F.3d 136, 144–45 (2d Cir. 2010).

128. *Id.* at 145.

129. *See id.* at 144–45 (asserting tenuous New York interest in controlling sale of stolen art over Swiss interest in regulating property transfers within Swiss borders).

A. *Allowing Flexibility*

One of Professor Currie's basic premises in departing from traditional territorial theories is that legal rules should reflect the actual logic of judicial decision making, not serve as legitimizing cover for concealed motives.[130] Where application of the *lex loci* will result in an absurdity or an injustice, courts will distort formalistic rules to obtain the desired result.[131] Consider *Grant v. McAuliffe*, a classic case from the vested rights era, in which a court had to decide whether to apply California or Arizona law to a car accident in Arizona involving four traveling Californians.[132] Because the accident occurred in Arizona, Arizona law would apply as the *lex loci delicti* under traditional conflicts rules.[133] However, at the time, Arizona law did not allow a tort cause of action to survive the death of the tortfeasor.[134] Thus, despite Arizona's lack of interest in the California plaintiffs' right of recovery against the California defendant, Arizona law would operate to bar the action.[135] The Supreme Court of California avoided this problem by characterizing the survival of claims against a dead tortfeasor as a procedural issue, as to which forum law must apply.[136] Thus, while Arizona law applied to some issues, California law applied to permit the victim's survivors to sue.[137]

Courts commonly employed such "artful dodges" to avoid injustice under the old situs rule.[138] If modern interest-based theories have any purpose, it should be to create a rule that will facilitate such departures from the *lex loci* within a transparent framework, making these dodges unnecessary. Interest analysis serves this purpose effectively. While the actual motivations underlying such "artful dodges" are obscured by the legal fictions and false distinctions used to justify them, it seems likely that the lack of connection between the *lex loci* and the particulars of the dispute is a large factor.[139] Beyond the unfairness inherent in not allowing claims

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130. *See* Currie, *supra* note 67, at 179 ("We have invented an apparatus for the solution of problems . . . which obscures the real problems, deals with them blindly and badly, and creates problems of its own . . . . We shall have to go back to the original problems, and to the hard task of dealing with them realistically by ordinary judicial methods . . . .").

131. *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1598 (1966) [hereinafter Leflar, *Choice-Influencing Considerations*] (discussing the "manipulative gimmicks" employed by courts to avoid an undesired result under mechanical choice of law rules).

132. 264 P.2d 944, 946 (Cal. 1953).

133. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 377–78 (1934) (providing that the law of the place of wrong applies to tort cases).

134. *Grant*, 264 P.2d at 946.

135. *Id.*; RESTATEMENT OF CONFLICT OF LAWS § 390 (1934).

136. *Grant*, 264 P.2d at 949. Courts commonly apply forum law to procedural issues, even if they are applying foreign law to the substantive issues. Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 334–35 (1933).

137. *Grant*, 264 P.2d at 949.

138. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 268 (1966) (observing that just results were "often concealed by manipulative devices such as characterization or multiple-choice conflict rules").

139. The regressive nature of the Arizona law at issue was undoubtedly also a factor. This Note sets aside the question of whether courts should consider the relative merits of the competing laws. While advocated for by such august scholars as Dean Leflar, the "better law" approach is a minority position, and beyond the scope of our discussion. Leflar, *More on Choice-Influencing Considerations*, *supra* note

against a dead tortfeasor, applying Arizona law was absurd in *Grant v. McAuliffe* because neither plaintiff nor defendant had any ties to Arizona beyond the bare incidental fact that the accident occurred there.[140] Interest analysis would spare courts from such absurd application of foreign law where the foreign state lacks an interest in applying its law, obviating the need for logical contortions like those used in *Grant*.[141]

B. Principled Departure from the Lex Loci

However, it is not enough for a modern conflicts theory to permit departure from the *lex loci* where its application would offend reason. As the Second Circuit's putatively interest-based analysis in *Bakalar* demonstrates, there is a danger that courts may, in replacing the traditional rules, confer on themselves unlimited discretion to decide choice-of-law issues.[142] Thus, any alternative theory must not only allow for departure from the *lex loci* but must also require a principled basis for doing so. The major failure of the test applied in *Bakalar*, and of unanchored "most significant contacts" theories in general, is that such tests may be construed to favor any outcome the court desires.[143] Even when guided by a set of factors or principles, such as those established in Section 6 of the Second Restatement, their malleability allows significant judicial discretion in their interpretation.[144] This malleability must give way to a more rigid, rules-based analysis, which does not require any balancing or weighing of competing contacts or interests.

However, it means nothing to achieve this aim by sacrificing rationality. Consider Ehrenzweig's writings, which critiqued traditional theories' assumption that a cause of action must arise from the *lex loci*.[145] Ehrenzweig's contrary assertion that forum law must provide the cause of action,[146] while useful as a critique of the then-prevailing orthodoxy, is less useful as a practical system for resolving conflicts, since the rigid rule it propounds is at least as prone to irrational results as the traditional method. This should be nowhere more obvious than in the stolen art context, where the unjustified application of forum law would defeat the obvious policy interest of foreign states in applying their laws to transactions within their borders, on the vague basis that "the law of the forum . . . should not be displaced without valid reasons."[147]

131, at 296–97; Symeonides, *Choice of Law in 2012*, *supra* note 48, at 279.

140. Grant v. McAuliffe, 264 P.2d 944, 946 (Cal. 1953).

141. Unjust forum law is something to be avoided by way of legislative action, not judicial fiat.

142. *See supra* Part IV.

143. In Chief Justice Roberts' words: "Totality-of-the-circumstances seven factor, policy based balancing tests are by their nature vague, indeterminate, manipulable, and lead to different results, depending on who does the balancing . . . ." Transcript of Oral Argument at 49–50, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) (Nos. 93-762, 93-1094), 1994 WL 665269, at *49–50.

144. *See* Winn Cutler, Note, *Texas Conflicts Law: The Struggle to Grasp the Most Significant Relationship Test*, 65 BAYLOR L. REV. 355, 361 (2013) ("The trumping ability of Section 6 in light of the breadth and malleability of its factors gives courts a great deal of deference in determining the law applicable to a given dispute.").

145. *See* Ehrenzweig, *supra* note 64, at 638–39 (asserting that traditional approaches have brought conflict of laws to the "brink of defeat").

146. *Id.* at 643, 687–88.

147. Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972); *see generally, e.g.*, Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010).

A rule that will consistently result in the application of the wrong law in certain situations is no better than one which may permit the court to apply the wrong law in any situation. As with the vested rights theory, consistency and predictability, while virtuous qualities, are not sufficient in themselves to justify irrationality or absurdity in application.

To ensure consistency and predictability without accepting irrationality, a concrete but flexible rules-based analysis is required. Interest analysis provides such an alternative. Prescribing neither the law of the forum nor that of the situs, but allowing choice between them, within the confines of a structured binary analysis, Currie's interest analysis strikes a sensible middle ground between dogmatic vested rights and *lex fori* systems and overly malleable balancing analyses.[148] It ensures some semblance of rationality by providing that no state's law should apply where that state lacks an interest and another state has an interest. It favors predictability by creating a presumption in favor of forum law, and by narrowly construing governmental interests to classify many conflicts issues as false conflicts. Finally, as the next section will consider, its simplicity is preferable to the multiplicity of specific provisions and special rules prevailing under the Second Restatement.

C. Simplicity and Universality Over Exceptions

The Second Restatement's solution to the problem of balancing certainty with flexibility is to erect a multiplicity of rules, presumptions, and factors on top of the basic principles set out in Section 6.[149] These rules all govern different types of issues and establish a presumption or, in certain circumstances, a rigid rule, in favor of the law of one state or another.[150] For example, in tort actions for fraud or misrepresentation, Section 148 of the Second Restatement provides that, where the alleged false representation and the plaintiff's actions in reliance on that representation occurred in the same state, the law of that state should apply, unless a different state has a "more significant relationship" under the Section 6 principles.[151] And as to the prescription or adverse possession of chattels, such as stolen art, Section 246 provides that the law of the place of the transfer (*lex loci*) should apply.[152] These specific rules anchor the flexible Section 6 analysis in the particular context of various types of disputes, providing tailored guidance to courts. However, they unnecessarily complicate the analysis by requiring courts to characterize and classify issues and do not cure the greatest weakness of the "most significant contacts" test: its malleability.

Characterization is the stage at which a court determines what area of law a conflicts problem "sounds in."[153] Any theory that prescribes different choice-of-law rules for different legal questions requires characterization as a preliminary step to

148. For a review of Currie's approach, see *supra* notes 66–73 and accompanying text.
149. Cutler, *supra* note 144, at 360–61.
150. *Id.*
151. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 (1971).
152. *Id.* § 246.
153. Posnak, *Leflar Over Reece*, *supra* note 112, at 564 n.20.

determine which rules to apply.[154] Because both the traditional and Second Restatement theories differentiate between different legal areas, both require characterization.[155] Forcing courts to decide whether an issue is one of tort or of contract serves no useful purpose.[156] At best, characterization adds an additional step to the analysis, which a court can misapply or distort to avoid an undesired result.[157] At worst, an issue may straddle two areas of law, defying easy categorization.[158]

Because it prescribes more rules based on finer distinctions, the Second Restatement creates even more characterization problems than vested rights theories.[159] For example, in the stolen art context, the Second Restatement provides a different rule for ownership by prescription or adverse possession than the general rule for determining the validity of a conveyance.[160] This forces courts to determine whether title would have passed by prescription or by virtue of the transaction itself, creating potential not only for ambiguity and difficulty in honest application, but also for trickery. Consider how under Swiss law, a dispute over a chattel may be resolved after five years either by prescription or by a statute of limitations.[161] The court in *Elicofon* relied on Section 246 of the Second Restatement to bolster its application of German law under the situs rule.[162] However, where a statute of limitations provides an alternative rule of decision, such as under Swiss law,[163] a court could avoid applying Section 246 by characterizing the dispute as one governed by Section 244, which would resolve the conflict by applying the vague Section 6 factors.[164]

More importantly, however, the Second Restatement's situation-specific provisions do not make Section 6 any less vague or malleable. Section 6 is theoretically more definite than a generalized most-significant contacts analysis, like that employed in *Bakalar*, because it provides a set of factors to inform the analysis.[165] However, these factors only muddy the waters further. The Section 6 factors strongly resemble Professor Leflar's choice-influencing considerations,[166] which have

154. *See id.* at 564 (noting that characterization only "raises an easily rebutted presumption of the law to apply").

155. *See id.* (commenting on the characterization problems associated with both the First and Second Restatements). While the Restatements differ in the nature of their specific provisions (hard rules versus presumptions and factors), both discriminate between issues sounding in tort or contract, and based on many finer gradations besides.

156. Bruce Posnak, *Choice of Law—Rules vs. Analysis: A More Workable Marriage Than the (Second) Restatement; A Very Well-Curried Leflar over Reese Approach*, 40 MERCER L. REV. 869, 889 (1989).

157. *See id.* ("[Judges] can employ characterization sincerely but arrive at a result that does not make sense, or they can 'fudge' on the characterization issue in order to reach a sensible result.").

158. *Id.* Consider, for example, vicarious liability, which contains elements of both tort and contract law. *Id.*

159. Posnak, *Leflar over Reece*, *supra* note 112, at 564 ("Not only has the *Second Restatement* not reduced the characterization problems associated with the *First Restatement*, it has made them worse. There are more, finer gradations of characterization required, yet the *Second Restatement* provided no better tools for determining the pigeon hole.").

160. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 244, 246 (1971).

161. ZGB, [CIVIL CODE] Dec. 10, 1907, art. 934; *see also supra* Part III.A.

162. Kunstsammlungen Zu Weimar v. Elicofon, 536 F.Supp. 829, 846 (E.D.N.Y. 1981).

163. ZGB, [CIVIL CODE] Dec. 10, 1907, art. 934.

164. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 244 (1971).

165. *Id.* § 6.

166. SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW paras. 102–03 (2008).

been soundly criticized for their vagueness and their manipulability.[167] As with Leflar's choice-influencing considerations or the factors in any other multi-factor test, a court may choose to emphasize certain factors over others in order to ensure the desired outcome. For example, in the stolen art context, a court may choose to emphasize the forum state's purported governmental interest, one of Leflar's considerations and a factor under Section 6,[168] in applying its law to a foreign transaction. Hence, supplementing a totality-of-the-circumstances balancing test with a vague set of factors does not restrain judicial discretion, but enables it, by providing a variety of justifications for ideologically-driven judicial decisions.

While the drafters of the Second Restatement clearly wished to anchor the "most significant contacts" analysis with subject-specific rules and factors to consider,[169] such measures complicate the inquiry rather than simplifying it. They create characterization problems, and invite the uncertainty and manipulability inherent to multi-factor balancing tests. The problems of the unmoored "most significant contacts" test cannot be solved by such methods.

VI. CONCLUSION

Conflict of laws jurisprudence is too often reduced to a black-and-white dichotomy between the territorial methods that prevail in Europe and used to dominate in the United States and the vague balancing tests and broad judicial discretion that characterize modern American conflicts law. To adhere to pure manifestations of these ideological poles in the conflict of laws conversation, one must accept some level of unfairness and irrationality or arbitrariness and unpredictability. As a flexible but well-defined rules-based method, Professor Currie's interest analysis provides a nuanced middle approach to the choice of law problem. While it cannot satisfactorily resolve every conflicts problem a court might see, it neatly solves most of them by focusing on the states' interest in applying their determinative laws to the facts, and by limiting the inquiry to whether such interest exists. Its merits are particularly apparent in suits over stolen art, where by focusing on state interests in governing the determinative transaction, interest analysis checks arbitrary application of forum law. However, the simplicity and clarity of interest analysis ensures its suitability for the broad gamut of choice of law issues that confront courts every day, from car crashes to contract disputes, elegantly bridging the dismal swamp of conflicts law.

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167. *See, e.g.*, Mark Thomson, *Method or Madness?: The Leflar Approach to Choice of Law as Practiced in Five States*, 66 RUTGERS L. REV. 81, 140 (2013) ("[T]he Leflar method is so variable in application that it does not lead judges to reach a particular conclusion. Instead, the variability allows judges to use (or not use) the choice-influencing considerations to justify a conclusion arrived at by some other means."). Professor Leflar prescribed his five choice-influencing considerations as an alternative method to assist judges in making choice of law determinations. *Id* at 82. Because only a few states employ them, this Note does not discuss them in detail. *See id.* at 82–83 (noting that five states have adopted Leflar's choice-influencing considerations for torts and two states for contracts).

168. *Id.* at 86–87; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

169. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971).


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