THE ROLE OF THE CARIBBEAN COURT OF JUSTICE IN HUMAN RIGHTS ADJUDICATION: INTERNATIONAL TREATY LAW DIMENSIONS*

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TABLE OF CONTENTS

INTRODUCTION

In this lecture I propose to consider the role of the Caribbean Court of Justice (CCJ)[1] in human rights adjudication, placing particular emphasis on the possible influence of international human

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1. The Agreement Establishing the Caribbean Court of Justice 2001 was adopted in Bridgetown, Barbados on February 14, 2001, and entered into force on July 23, 2003. THE CARICOM SYSTEM: BASIC INSTRUMENTS 441 (Duke E. Pollard ed., 2003).

rights treaties in such adjudication. I do not propose to consider in any depth the origin or theoretical aspects of human rights.[2] Suffice it to say I will be speaking primarily against the background of first-generation rights which concerns basic civil and political entitlements such as the right to life, the right to due process and protection of law, the protection of private property, the right to privacy and family life, and freedom of association. These civil and political rights constitute the most widely accepted categories of human rights and are enshrined in a number of global and regional agreements as well as protected in the Bill of Rights provisions in Caribbean constitutions. Constitutional reform in some countries has given rise to constitutional codification of some second and third-generation rights (prominent among these is the right to engage in activities designed to improve the environment,[3] or more simply, the right to a clean and healthy environment[4]), but these categories of rights are yet to engage the courts in a sustained or meaningful way.[5]

A number of factors accentuate the challenge of deciding which perspective would be most appropriate for the CCJ to take with regard to international treaty statements of human rights. First, the Court is a recently established institution[6] and is still in the initial stages of delivering decisions from which its judicial philosophy may be studied and identified. Relatively few opportunities for human rights adjudication have presented themselves so far, but even so, it is already clear that decisionmaking on human rights will often be coupled with issues sounding in international law and constitutional law.[7] Secondly, the Court must pay due regard to relevant decisions of the Judicial Committee of the Privy Council (JCPC or Privy Council) which, for largely historical reasons, have shaped adjudication in common law countries, including those in the Caribbean. In one sense, therefore, there is no *tabula rasa* and the Court must justify its departures from pre-existing precedents.

Thirdly, there may be conflicting judicial objectives in human rights adjudication which the CCJ must somehow reconcile.

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2. These topics are covered in several books on the subject. *See, e.g.*, BRYAN GALLIGAN, RETHINKING HUMAN RIGHTS: LAW, ETHICS, AND PUBLIC AFFAIRS (Bryan Galligan & Charles Sampford eds., 1997); J.G. MERRILS & A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1992).

3. *See* CONST. OF THE CO-OPERATIVE. REPUBLIC OF GUYANA Feb. 20, 1980, art. 25.

4. *See* Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, § 13(1)(l)(2011) (Jam.).

5. *Cf.* Att'y Gen. v. Mohamed Alli, (1987) 41 W.I.R. 176 (Guy.).

6. The CCJ was inaugurated on April 16, 2005 (Queen's Hall, Port of Spain, Trinidad and Tobago) and has, therefore, been operational for just under six years.

7. *See e.g.*, Att'y Gen. v. Joseph, [2006] C.C.J. 3 (Barb.).

The Court naturally will strive to uphold international treaty obligations accepted by Caribbean States on the basis that the governments do not intend a breach of those obligations, but it is equally bound to uphold the constitutions as the supreme law of the land. Extreme difficulty arises where the treaty and the Constitution conflict or appear to conflict with each other. The CCJ will then be called upon to navigate between the conflicting edicts of constitutional supremacy and international responsibility. Recent decisions of Inter-American Court on Human Rights (IACHR) create special problems in this regard and are considered later in this lecture.

In order to provide some background on the CCJ and the Caribbean region, I propose to first say a few words about the Caribbean Community, the origin and nature of the CCJ, and the Court's two jurisdictions as they relate to human rights litigation. With regard to that relationship, an essential point of departure must be consideration of the general principles which control the competence of the CCJ to take account of international human rights treaties and the advances which the Court has made over traditional law in this field. Application of these general principles requires acknowledgment of the linkages between the Bill of Rights in Caribbean constitutions and international declarations and treaties on human rights. It will be seen that there are two points of connection: first, the Bills of Rights were inspired by developments in international human rights law; second, many Caribbean states have actively accepted and participated in international human rights agreements.[8] Application of international human rights norms might surface in several different contexts, such as the: (1) interpretation of the extent of existing civil and political rights; (2) creation of new rights not contemplated by the Constitution; and (3) recognition of rights which are or appear to be in conflict with the Constitution. In regard to the latter category, some recent decisions of the IACHR carry critical implications for the role of the CCJ in human rights litigation decisionmaking and must also be considered.

I. THE CARIBBEAN COMMUNITY

The CCJ was established against the background of a largely dysfunctional regional integration movement which was itself

8. However, in recent times two Caribbean States have actually denounced human rights treaties in order to preserve their domestic law on the death penalty. Jamaica withdrew from the Optional Protocol to the International Covenant on Civil and Political Rights in 1998, and Trinidad and Tobago withdrew from the Inter-American Convention on Human Rights and the Inter-American Court on Human Rights in 1998.

a product of 500 years of British colonial rule.[9] After World War II, when British colonial territories asserted the right to self-determination and won political independence from the United Kingdom, many believed that the ten Caribbean territories would become independent as one nation, hence the formation of the West Indian Federation in 1958.[10] For various reasons the Federation failed.[11] The departure of Jamaica in 1962 to pursue political independence marked the collapse of the regional enterprise, and the individual territories then gained independence on a national basis.[12]

The signing of the Treaty of Chaguaramas Establishing the Caribbean Community in 1973,[13] including an Annex which created the Common Market,[14] was an attempt to resurrect the regional project but limit it to functional and economic cooperation between politically independent states. The Revised Treaty of Chaguaramas, adopted in 2001,[15] sought to deepen regional integration by creating a CARICOM Single Market and Economy (CSME) among the 15 member states of the Community. Among other things, the CSME provides for the free movement of the factors of production and a community trade policy with rules against anti-competitive conduct.[16]

At first the Community was a "closed club" of common law countries. There were no civil law members in 1973, but just over twenty years later, in 1995, Suriname joined CARICOM and is now a full participant in the CSME. Haiti became a member of the Community in 2003, but is not yet a participant in the agreements on economic integration. Accordingly, CARICOM has both civil law and common law members, but it remains true that the 13 Commonwealth members[17] continue to form the core of the Community. The regional grouping is therefore characterized by the pres-

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9. *See generally* ERIC WILLIAMS, CAPITALISM AND SLAVERY (1994) (providing a history dating from the 15th to the 20th centuries).

10. HUGH W. SPRINGER, REFLECTIONS ON THE FAILURE OF THE FIRST WEST INDIAN FEDERATION 8-11 (1962).

11. *Id.* at 12-35.

12. The CARICOM nations gained independence as follows: Jamaica (6 August 1962); Trinidad and Tobago (31 August 1962); Guyana (26 May 1966); Barbados (30 November 1966); The Bahamas (10 July 1973); Grenada,(7 February 1974); Dominica (3 November 1978); St. Kitts and Nevis (19 September 1983); Saint Lucia (22 February 1979); St. Vincent and the Grenadines,(27 October 1979); Belize (21 September 1981); Antigua and Barbuda (1 November 1981).

13. *See* Pollard, *supra* note 1 at 184. To view the full text of the treaty, see *id.* at 186-95.

14. *Id.* at 196-223.

15. *Id.* at 472.

16. *Id.*

17. In addition to the 12 independent states (listed *supra* note 12), Montserrat, an Overseas Territory of the United Kingdom, is also a member of CARICOM but not yet a full participant in the CSME.

ence of small states that are adherents of the Westminster system of government emphasizing the allocation of governmental power among the Executive, Legislature and Judiciary and protecting that allocation of power by the constitutional doctrine of the separation of powers.[18]

Adoption of the Westminster system is not the only indication of the continuation of colonial influence on Caribbean governance arrangements. At the time of political independence, the countries retained the British Monarch as the Head of State and the Monarch's Privy Council as the final Court of Appeal. Several efforts to replace these British institutions with local institutions failed largely because, in the view of some, 500 years of British rule had cemented the idea of psychological subservience to colonial institutions.[19] Even so, three states (Guyana, Trinidad and Tobago, and Dominica) have removed the Queen as their Head of State and have a national as President. Discussions aimed at severing the links with the Privy Council are longstanding and echo the hostility of colonial courts and legislatures in the United States towards having appeals to His Majesty in Council which were finally abolished in the eighteenth century, prior to the effective establishment of the United States Supreme Court. in 1783.[20]

II. ESTABLISHMENT OF THE CCJ

The earliest record of Caribbean revolt against the Privy Council is an editorial published in *The Jamaica Gleaner* on March 6, 1901, opining that: "Thinking men believe that the Judicial Committee of the Privy Council has served its turn and is now out of joint with the condition of the times." At a 1947 meeting of colonial governors in Barbados, all Englishmen, the governors expressed that the Privy Council was far too removed from the social realities of the colonies to be effective as a court of last resort. The Organi-

18. Hinds v. The Queen, [1977] A.C. 195 (P.C.) 200, 205 (appeal taken from Jam.).

19. *See* Sidney W. Mintz, *The Caribbean Region*, 103 DAEDALUS 45 (Spring 1974).

> These Caribbean territories . . . are not like those in Africa and Asia, with their own internal reverences, that have been returned to themselves after a period of colonial rule. They are manufactured societies, labor camps, creations of empire; and for long they were dependent on empire for law, language, institutions, culture, even officials. Nothing was generated locally; dependence became a habit.

Id. at 45 (quoting Trinidadian novelist V.S. Naipaul); *see also* SIMEON C.R. MCINTOSH, CONSTITUTIONAL REFORM: RETHINKING THE WEST INDIAN POLITY 264 (2002).

20. U.S. CONST. art. III, §1 (providing for the vesting of the judicial power of the United States). The first Congress enacted the Judiciary Act of 1789, which established that the Supreme Court would comprise of a Chief Justice and five Associate Justices. Since 1869, the number of justices has been fixed at nine.

zation of Commonwealth Caribbean Bar Associations followed in 1970, recommending that the region establish a Court to replace the Privy Council as the final court of appeal in both civil and criminal matters. Also in 1970, Jamaica placed the matter on the agenda of the Sixth Conference of Heads of Government of the Caribbean Community. At the Eighth Meeting of the Conference in 1989, the Heads of Government agreed in principle to establish a Caribbean Court of Appeal. The West Indian Commission emphatically endorsed the idea in their 1992 Report: "*Time for Action.*"[21] Just under ten years later, in 2001, the Treaty establishing the Caribbean Court of Justice was adopted in Barbados and entered into force in 2003.[22] The Court became fully operational in 2005 and since then has heard and decided over 75 cases.[23]

The Court was established with two jurisdictions. Part II of the CCJ Agreement provides for the original jurisdiction of the Court with regard to treaty disputes between the States, and Part III contains provisions on appellate jurisdiction whereby the Court would replace the Privy Council as the final court of appeal for Caribbean countries.[24] That the primary driving force for establishment of the Court was the need to provide for binding judicial determination of disputes under the Revised Treaty of Chaguaramas is reflected in the fact that all Member States of CARICOM participating in the CSME are obliged to accept the original jurisdiction of the Court. By contrast, acceptance of the appellate jurisdiction is optional. States may choose to replace the Privy Council with the CCJ or may keep the Privy Council as their final court of appeal. For reasons still plaguing Caribbean cultural and legal identity, only three Member States have opted to replace the Privy Council with the CCJ so far: Barbados in 2005, Guyana in 2005, and Belize in 2010. However, the decisions of the CCJ will probably have persuasive value in other jurisdictions in the region that have not yet accepted the appellate jurisdiction of the Court.[25]

The twin jurisdictions of the CCJ make for interesting comparison with the United States Supreme Court. The establishment of the Supreme Court with final appellate jurisdiction in cases involving important questions about the Constitution or federal law ended the controversial system of appeals from the American colo-

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21. W. INDIAN COMM'N, TIME FOR ACTION: REPORT OF THE WEST INDIAN COMMISSION (1992).

22. In accordance with Article XXXV, the CCJ Agreement entered into force on ratification by three Member States on July 23, 2003. Pollard, *supra* note 1 at 456.

23. *About the Caribbean Court of Justice*, http://www.caribbeancourtofjustice.org/about-the-ccj (last visited Feb. 24, 2012).

24. Pollard, *supra* note 1 at 442, 448, 452.

25. Winston Anderson, The Reach of the Caribbean Court of Justice in Developing a Distinct Caribbean Jurisprudence (on file with author).

nies to the Privy Council in London. The Supreme Court also has original jurisdiction to hear disputes affecting relations between States, and cases affecting, for instance, diplomats and ambassadors. It is a little stated fact that the landmark case of *Marbury v. Madison* that established the doctrine of judicial review was brought and decided under original jurisdiction.[26]

III. ORIGINAL JURISDICTION AND HUMAN RIGHTS

Original jurisdiction would appear to be the natural home for the application of international treaty law on human rights. In the exercise of its original jurisdiction, the CCJ has "compulsory and exclusive" jurisdiction to interpret and apply the Revised Treaty of Chaguaramas Establishing the Caribbean Community and the CSME.[27] Exercise of original jurisdiction must be based on the application of such rules of international law as may be applicable to the case before the Court.[28] These rules are derived from treaties accepted by the contesting states, international custom as evidence of a general practice accepted as law, and general principles of law recognized by the States of the Community.[29] The CCJ has applied these sources in rendering the ten judgments that it has given to date under original jurisdiction.[30] Furthermore, upon satisfaction of certain pre-conditions, individuals may make applications to the Court to use its powers under original jurisdiction to protect their rights enshrined in the Revised Treaty.[31]

In at least one instance, the CCJ has cited the precedents of an international human rights tribunal in deciding a claim brought by a Community national against a CARICOM State,[32] but it is

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26. Marbury v. Madison, 5 U.S. (1 Cranch) 137 *passim* (1803).

27. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy art. 211, July 4, 1973, http://www.caricom.org/jsp/community/revised_treaty-text.pdf [hereinafter Revised Treaty].

28. Agreement Establishing the Caribbean Court of Justice art. XVII, Feb. 14, 2001, http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf [hereinafter CCJ Agreement]; Revised Treaty, *supra* note 27, at art. 237.

29. Statute of the International Court of Justice art. 38, ¶. 1, (1945), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

30. *See, e.g.*, Trinidad Cement Ltd. v. Guyana (No. 2), (2009) 75 W.I.R. 327.

31. *See* Revised Treaty, *supra* note 27, at art. 222; CCJ Agreement, *supra* note 28, at art. XXIV. Individual applications must satisfy the following pre-conditions: (1) The applicant must be a "community national" or a natural or juridical person of a member state; (2) The State parties must have intended that the right in the Revised Treaty should ensure to the benefit of the applicant directly; (3) The applicant must prove that he was prejudiced in the enjoyment of the right; (4) The contracting party entitled to espouse the claim must have "omitted or declined" to do so; or must have "expressly agreed" that the applicant can proceed with the claim; and (5) The interest of justice must require that the applicant be allowed to bring the proceedings.

32. *Trinidad Cement Ltd.*, (2009) 75 W.I.R. at 340 *(*citing Velasquez Rodriquez v. Honduras, Compensation, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 4 (July 21, 1989)).

doubtful that an applicant could bring a claim for protection of first-generation human rights under original jurisdiction. The fact is that the regime of human rights is conspicuous by its absence from the Revised Treaty of Chaguaramas, which is overwhelmingly preoccupied with regional economic integration and development. The rights conferred are all economic or financial in nature. The Court has ruled that the individual applicant may be entitled to "*core rights"* under Chapter 3 of the Treaty, including the right to migrate to seek employment, the right to establish business and provide services, and the right to move capital and goods freely throughout the territories of Member States.[33] The Court has also recognized that applicants may enjoy *"ancillary rights"*; that is, rights not expressly spelled out as such in the treaty but which could be inferred from obligations assumed by Member States, such as the right to have the common external tariff imposed on goods imported from outside the region. Additionally, certain rights under the World Trade Organization/General Agreement on Tariffs and Trade may be applicable.[34] In instances where the Court has cited judicial precedents in international human rights adjudication, the citation has helped to clarify the economic rights of the private litigant specified in the Revised Treaty rather than been accepted as the basis for independent human rights found in any of the constitutional Bills of Rights.[35]

The Revised Treaty makes a passing reference to the Charter of Civil Society adopted by the Heads of Government in 1997, but it is questionable whether the Charter provides any real opportunity for independent protection of civil and political rights. In accordance with the expressed desire of its founders, the Charter is not legally binding and it was only referred to in the preamble of the Revised Treaty, not in the dispositive sections of that document. In fact, it has now been recognized that a significant human rights deficit exists in the regional integration movement, and there have been proposals for adoption of a CARICOM Human Rights Treaty that would correspond with the European Convention on Human Rights.[36] If adopted, its enforcement would likely

33. *See id.* at 302, 319.

34. *See* Revised Treaty, *supra* note 27, at art. 116.

35. *See, e.g.*, *Trinidad Cement Ltd.,* (2009) 75 W.I.R. at 340.

36. *See* SHELDON MCDONALD, DRAFT FINAL REPORT – CONSULTANCY TO CONDUCT AND FORMULATE THE MOST SUITABLE ARRANGEMENTS TO PROVIDE FOR THE PROTECTION OF HUMAN RIGHTS IN THE CARIBBEAN (Sept. 16, 2005) (on file with CARICOM Secretariat); Hon. Justice Winston Anderson, *The Inter-American System and Its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ* 35 W. INDIAN L.J. 27, 45 (2010).

be the responsibility of the CCJ acting under its original jurisdiction authority.[37]

IV. APPELLATE JURISDICTION AND HUMAN RIGHTS

The CCJ's appellate jurisdiction is probably a more fertile area for human rights adjudication simply because there the CCJ acts as the final court of appeal overseeing the interpretation of the Constitution and laws of the State. A primary feature of Caribbean constitutions is a Bill of Rights, which catalogues certain fundamental rights and freedoms enjoyed by persons in the territory of the State.

Litigation on the Bills of Rights began shortly after independence in the early 1960s, and a preliminary issue therefore concerns the appropriate attitude for the CCJ to take towards previous decisions of English courts and the Privy Council regarding these rights and freedoms. The Court has opted to adopt a pragmatic approach by recognizing the English influence and the continuing validity of previous Privy Council decisions whilst indicating that it will depart from those decisions in the future where there are good reasons for doing so. In the leading judgment in *Attorney General of Barbados v. Joseph* the Court said:

> The main purpose in establishing this Court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came

37. A conceptual issue is whether such a CARICOM treaty would logically add anything of import to the Bills of Rights in Caribbean constitutions. Individuals (and groups supportive of such individuals) may at present presumably employ the Bill of Rights to vindicate allegations of breaches of human rights; these rights tend to cover all persons within the State leaving little room for one CARICOM State to sue in respect of injuries suffered by its nationals in the territory of another CARICOM State. It is unlikely that one CARICOM State would bring an action to protect the rights of the nationals of the "defaulting" State in circumstances short of a total breakdown of law and order which would raise more fundamental issues of membership in the Community.

> and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this Court.[38]

A. General Principles Governing Judicial Attitude to International Human Rights Treaties

In the exercise of its appellate jurisdiction, the CCJ takes into account that the relationship between international and domestic law has been conceptualized under two principal schools of thought: monism, whereby international law is *per se* part of domestic law without need to legislate it into law, and dualism, which requires actual enactment of international treaties into domestic law.[39] The English Court of Appeal reviewed the two theories in *Trendtex Trading Corp. v. Central Bank of Nigeria* and held that regarding international custom the monist approach was to be adopted;[40] that is to say, the custom automatically formed part of the common law and was applicable in domestic law except where the custom conflicted with statutory law[41] or established precedent of common law.[42] However, as regards international treaties, strict dualism is applied on the basis of the separation of powers doctrine; even if the Executive accepts a treaty, it cannot form part of local law unless and until incorporated by act of the Legislature.

It is now generally accepted that the uncompromising dualist approach to treaties originated in *The Parlement Belge*, even though the actual decision by Sir Robert Phillimore in that case seems more limited to rejecting the principle that Her Majesty could enter into a treaty to deprive a British subject of his legal rights without confirmation by Parliament.[43] In any event, the rationale of dualism was explained by Lord Atkin in *Attorney General for Canada v. Attorney General for Ontario* in the following broad terms: "[w]ithin the British Empire there is a well- established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the

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38. Att'y Gen. v. Joseph, [2006] C.C.J. 3, ¶ 18. *See also* Garraway v. Williams, [2011] C.C.J. 12 (AJ) at ¶ 26 (Justice Anderson delivering the judgment of the Court).

39. MARGARET DEMERIEUX, FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS 109-13 (1992) (using the labels "incorporationist" and "transformative" rather than monism and dualism).

40. Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] 2 W.L.R. 356, 364-65 (C.A.).

41. *See e.g.*, Mortensen v. Peters, (1906) 8 F.(J.) 93 (Scot.).

42. *See e.g.*, Chung Chi Cheung v. The King, [1939] A.C. 160 (H.L.) 168 (appeal taken from H.K.).

43. The Parlement Belge, (1879) 4 P.D. 129, 138, 149-55.

existing domestic law, requires legislative action."[44] More recently, Lord Oliver reaffirmed in *Maclaine Watson & Co. v. Dep't of Trade & Industry* that, "as a matter of . . . constitutional law . . . the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without intervention of Parliament."[45]

A further development relevant to determining the impact of treaty law within the domestic sphere was confirmed in *ex parte Brind*.[46] Whilst an unincorporated treaty cannot be applied as such, the courts could take notice of a treaty accepted by the Executive when provisions in legislation are ambiguous. In these circumstances the courts operate under the presumption that Parliament did not intend to breach treaty obligations undertaken by the Executive. Ambiguous provisions will then be interpreted to conform rather than conflict with the treaty.

In *Attorney General* v. *Joseph*, the CCJ affirmed that Barbados and the other Commonwealth Caribbean Member States of CARICOM are dualistic states following the British tradition.[47] There are, indeed, several reported decisions in which treaties have been denied effect in domestic proceedings precisely because no statute incorporated them into domestic law.[48] Caribbean courts seem not to have seriously analyzed whether the prohibition on recognizing treaty effects in domestic law is properly confined to treaties imposing obligations on citizens, and as a consequence, the opening left by Sir Phillimore in *The Parlement Belge* has been largely ignored.[49]

B. Contexts for Consideration of Human Rights Treaties

There are at least three separate contexts in which the CCJ, in its appellate jurisdiction, may be called upon to consider the impact of treaty-based human rights where the treaty has been accepted by the State but has not been incorporated into its domestic law by legislation. First, an applicant might seek to influ-

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44. Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326 (H.L.) 347 (appeal taken from Can.).

45. Maclaine Watson & Co. v. Dep't of Trade & Industry, [1989] 3 All E.R. 523, 545.

46. *Ex parte* Brind, [1991] A.C. 696 (H.L.) *passim*.

47. Att'y Gen. v. Joseph, [2006] C.C.J. 3 (AJ).

48. *See, e.g.,* Winston Anderson, *Implementing MEAs in the Caribbean: Hard Lessons from* Seafood and Ting, 10 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 227, 227 (2001); Winston Anderson, *Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation*, 8 CARIBBEAN L. REV. 75 (1998); Winston Anderson, *Treaty Implementation in Caribbean Law and Practice*, 8 CARIBBEAN L. REV. 185 (1998).

49. *See* Att'y Gen. v. Joseph, [2006] C.C.J. 3. Note, however, the judgment of Justice Wit, discussed *infra*.

ence the interpretation of the nature and extent of existing civil and political rights protected by a State's Bill of Rights. Second, an applicant might seek to create new rights which were not contemplated at the time when the State's Constitution was adopted. Third, an applicant might seek to have the CCJ recognize rights created by the treaty even though these rights in their content or effects conflict or appear to conflict with the State's Constitution. These are not necessarily water-tight categories, but they do provide useful bases for examining various aspects of the interface between the two systems.

1. International Human Rights and Purposive Interpretation of Bills of Rights

In *Attorney General v. Joseph*, the CCJ did not reflect on, and therefore did not rule on, a line of Caribbean cases that have considered the interpretation of Caribbean Bills of Rights in light of their relationship with international human rights treaties. However, it is generally accepted that the statements of human rights in Caribbean constitutions are based largely on the European Convention on Human Rights, which in turn was inspired by the United Nations Declaration on Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), together known as the International Bill of Rights. All 15 CARICOM Member States are signatories to the UDHR; of these, 12 have adopted the ICCPR and 10 have accepted the ICESCR.[50]

At the inter-American level, all 15 CARICOM States are members of the Organization of American States (OAS) and therefore adherents to the OAS Charter[51] and the American Declaration of the Rights and Duties of Man.[52] Also, by virtue of membership in the OAS, CARICOM Member States have agreed to accept the jurisdiction of the Inter-American Commission on Human Rights, which is competent to make recommendations and issue reports regarding alleged violations of human rights occurring in the territories of Member States. Six of the fifteen Member States have al-

50. Of the 15 CARICOM Member States, the following are not signatories to either the ICCPR or the ICESCR: Antigua and Barbuda, Montserrat, and St. Kitts and Nevis. Additionally, Haiti and St. Lucia are not signatories to the ICESCR.

51. Charter of the Organization of American States, Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3.

52. American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82, doc. 6 rev. 1 (1992).

so accepted the American Convention on Human Rights[53] and three (Barbados, Suriname, and Haiti) have opted to go further and accept the binding jurisdiction of the Inter-American Court on Human Rights.

A point worthy of emphasis is that although these treaties have been accepted by the Executive, they are not, as a rule of general practice, incorporated into domestic law by legislation in the Commonwealth Caribbean States as required under the dualist theory attributed to *The Parlement Belge*. Under traditional doctrine they can have no direct effect in domestic law except to the extent that they embody rules of customary international law. Equally, international declarations and resolutions on human rights may come to represent custom.

a. Early Cases

One of the earliest Caribbean cases to consider the impact of an international human rights document accepted by the Executive but not implemented by Parliament was *Trinidad Island-Wide Cane Farmers' Ass'n v. Seereeram*.[54] In deciding that the right of a cane farmer to freedom of association under the Trinidad and Tobago Constitution included the right *not* to join (or, indeed, to resign from) the Cane Farmers' Association, Justice Phillips referred to Article 20 of the UDHR, of which, he noted, Trinidad and Tobago was a member. Clause 1 of the UDHR recognized the right to freedom of peaceful assembly and association, and clause 2 provided that "no one may be compelled" to belong to an association. He opined that clause 2 "is a necessary concomitant of clause 1 and was inserted *ex abundante cautela*."[55] Based on Article 20 of the UDHR, Justice Rees thought that freedoms to associate and assemble or not were so inextricably bound that they ought to be considered as one integral freedom guaranteed by the Constitution, stating:

> [F]reedom of association, broadly speaking, connotes freedom of the individual to associate with whomsoever he desires in the pursuit of lawful objects. It seems to me, therefore, contrary to the submissions of counsel, that this right

53. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

54. Trinidad Island-Wide Cane Farmers' Ass'n v. Seereeram, (1975) 27 W.I.R. 329 (Trin. & Tobago).

55. *Id.* at p. 357.

> necessarily implies a right not to be compelled to associate with any particular group or organization.[56]

Another case of interest is *Bata Shoe Co. v. Commissioner of Inland Revenue,* which considered and condemned legislation creating retrospective criminal offences as being contrary to the Bill of Rights in the then-extant Guyana Constitution.[57] Article 10(4), which prohibited retrospective criminal legislation, was modeled on Article 11(2) of the UDHR and also Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In treating the international human rights instruments this way, the Guyanese courts showed that the domestic law reflected recognized rules in international human rights law and therefore added further credence to the domestic provisions.

The issue before the Privy Council in *Attorney General v. Antigua Times* was whether artificial persons could claim the protection of the Bill of Rights of the Constitution of Antigua and Barbuda.[58] This was important in the context of allowing a newspaper to enjoy a constitutional right to freedom of expression, including the right to disseminate ideas free from interference by the political directorate or the legislature. The Privy Council held that nothing in the context of the Constitution excluded artificial persons insofar as they were capable of enjoying the fundamental rights and freedoms protected by the Constitution. Thus the phrase "any person" in section 5 of the Constitution included a corporate body, and accordingly the applicant was entitled to apply to the High Court for redress under that section. In coming to this view, the Court drew support from the importance that corporate bodies play in the economic life and development of society. However, the foremost reason for its decision appears to have been the international lineage of the Antiguan Bill. The Court noted that the protection by the Antigua Constitution of fundamental rights and freedoms owed much to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was itself largely based on the UDHR. The Court then stated:

> The Universal Declaration, as its title suggests, is concerned mainly, if not exclusively, with *human* rights, that is with the rights of individual human beings, but the European Convention appears to apply to apply to artificial persons, at least in some of its articles . . .With that ancestry it

56. *Id.* at 356.
57. Bata Shoe Co. v. Comm'r of Inland Revenue, (1976) 24 W.I.R. 172, 208.
58. Att'y Gen. v. Antigua Times, [1976] A.C. 16 (P.C.) 24.

> would not be surprising if Chapter I of the Constitution of Antigua were to apply as well to natural persons . . . .[59]

In the unsatisfactory case of *Abbott v. Attorney General,* the applicant argued that Trinidad and Tobago, as an adherent to the UDHR, should have outlawed capital punishment in order to conform to UDHR's Article 5, which prohibits "cruel, inhuman or degrading treatment or punishment."[60] Justice Bernard in the High Court rather puzzlingly treated the Declaration as a treaty and cited the authority of *Attorney General for Canada v Attorney General for Ontario* to hold that legislation would be required to alter existing domestic law in order for the court to give effect to it.[61] In considering the applicability of Article 5 he referred to the common law rule that a convention or treaty "and such things" do not form part of the law of this country "until and unless it is reduced into legislation passed by Parliament," adding that "this principle hardly bears repetition."[62]

But the UDHR is obviously not a treaty, and therefore the rules in the *Parlement Belge* do not apply. If anything, to the extent that the UDHR can be taken to represent customary international law, the rules governing incorporation of custom as outlined in the *Trendtex* case[63] would seem to be those most applicable. As Margaret DeMerieux points out, the *Abbott* case might have been more wisely argued and judicially considered *not* as to the binding force of the UDHR on the courts of the country "but as to whether, being a body of principles or even aspirations in the area of fundamental rights, it should be seen (or not) as being reflected in the state's Bill of Rights."[64] In short, it seems safe to say that the international customary law status of the UDHR should have been considered.

b. Minister of Home Affairs v. Fisher

The case of *Minister of Home Affairs v. Fisher* represents a high point in the use of international human rights instruments to determine the appropriate judicial attitude towards interpretation of the fundamental rights in the Constitution. The issue before the Privy Council was whether the word "child" in section

59. *Id.* at 25.
60. Abbott v. Att'y Gen., 22 Trin. & Tobago L. Rep. 200 (1977).
61. Att'y Gen. for Can. v. Att'y Gen. for Ont., [1937] A.C. 326 (H.L.) 347 (appeal taken from Can.).
62. *Abbott*, 20 Trin. & Tobago L. Rep. at 218.
63. Trendtex Trading Corp. v. Cent. Bank of Nigeria, (1977) 2 W.L.R. 356, 364-65 (C.A.).
64. DEMERIEUX, *supra* note 39, at 114.

11(5)(d) of the Bermuda Constitution included illegitimate children of a Jamaican mother who had married a Bermudan.[65] The decision was important in relation to preventing the deportation of the children from Bermuda and securing their reinstatement in schools there. In deciding that illegitimate children were included, the Court ignored decisions to the contrary which had emphasized presumptions as to legitimacy arising in a line of statutes dealing with property, succession, or citizenship. Instead the court emphasized that the Constitution should be interpreted on broader principles, recognizing the protection of the family and rights of the child expressed in the UDHR, Article 8 of the ECHR, ECJ decisions on Article 8, the Universal Declaration of the Rights of the Child, and Article 24 of the International Covenant on Civil and Political Rights. Speaking for the Court, Lord Wilberforce offered that "[t]hese antecedents . . . call for a generous interpretation [of the constitution] avoiding what has been called 'the austerity of tabulated legalism.' "[66]

c. The Post-Fisher Era

Much of the case law after *Fisher* has been concerned with the impact of human rights decisionmaking on provisions in the constitutions dealing with the death penalty. *Fisher* gave deference to decisions of the European Court of Human Rights under the European Convention on Human Rights. Similarly, the Eastern Caribbean Court of Appeal (ECCA) used decisions of international human rights bodies as aids in deciding whether the mandatory death sentence was contrary to the constitutional prohibition against inhuman and degrading treatment in the landmark cases of *Spence v. The Queen*[67] and *Hughes v. The Queen*.[68] Departing from established assumptions in case law, the ECCA decided that the imposition of a mandatory death sentence for murder was, indeed, unconstitutional. In coming to this conclusion, the ECCA studied and adopted findings in complaints that had come before the Inter-American Commission and in which the Commission had found the mandatory death penalty to be unlawful because it proscribed individualized sentencing and did not take into account the personal culpability of the accused.

In delivering the leading judgment, Chief Justice Byron accepted that human rights agreements such as the American Con-

65. Minister of Home Affairs v. Fisher, (1979) 3 All E.R. 21 (P.C.).

66. *Id.* at 25.

67. Spence v. The Queen, (1999) 59 W.I.R. 216 (C.A.), *aff'd,* [2001] UKPC 35 (P.C.).

68. Hughes v. The Queen, (2001) 60 W.I.R. 156 (C.A.), *appeal dismissed* [2002] UKPC 12. (P.C.).

vention could not have the effect of overriding the domestic law or the Constitutions of the sovereign independent states of the Caribbean. However, the Chief Justice also accepted that these agreements, in the absence of clear legislative enactment to the contrary, could be used to interpret domestic provisions, whether in the Constitution or statute law, so as to conform to the state's obligations under international law. Accordingly, he felt able to rely on the jurisprudence developed in the Inter-American Human Rights System to decide the meaning of Section 5 of the Constitution of St. Vincent and the Grenadines, dealing with inhuman and degrading treatment. The Chief Justice said:

> Over the past two years the Inter-American Human Rights Commission has been considering the meaning of [the provision against inhuman and degrading treatment] and its impact on the mandatory death penalty in relation to cases coming from the Caribbean. The cases that are relevant to this issue have been *Downer and Tracy v. Jamaica* (2000) (unreported), *Baptiste v. Grenada* (2000) (unreported), and *Thompson v. St Vincent and the Grenadines* (2000) (unreported). I have studied these judgments and conclude that the principles they espouse are consistent with the provisions of s 5 of the Constitution. The principles that have emerged from these cases can be summarised by saying that the death penalty is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. The imposition or application of the death penalty must be subject to certain procedural requirements. It must be limited to the most serious crimes. Consideration of the character and record of the defendant and the circumstances of the offence which may bar the imposition of the penalty should be taken into account.[69]

In the context of traditional land rights, the Belize Supreme Court decided in *Cal v. Attorney General of Belize* in favour of traditional Mayan title because of the Inter-American Commission's findings for the Mayans and Belizean obligations to indigenous peoples under the OAS Charter.[70] According to Chief Justice

69. *Id.* ¶ 41, at 172. The approach taken by the ECCA in *Spence* and *Hughes* was expressly approved by the Privy Council, which referred with approval to developments in the Inter-American Human Rights System.

70. Cal v. Att'y Gen. of Belize, (2007) 71 W.I.R. 110 (Belize).

Conteh, the Inter-American norms "resonate[d] with certain provisions of the Belize Constitution."[71] Although not strictly falling within the category of adjudication on the Bill of Rights, the CCJ's original jurisdiction decision in *Trinidad Cement Ltd. v. Guyana* may be considered with similar effect.[72] The opinion referred to and relied upon the Inter-American Court's decision in *Velasquez Rodriquez v. Honduras*[73] that concluded punitive damages could be awarded against a State in an international proceeding in certain circumstances. Nonetheless, in *Trinidad Cement Ltd.*, the CCJ held that such an award would not be appropriate on the facts of the case. Additionally, there is every expectation that the Inter-American Human Rights standards expounded in *Gleaner Co. v. Abrahams*[74] will influence constitutional disputes concerned with whether the award of enormous sums in defamation suits could unreasonably stifle the fundamental right of freedom of expression.

Accordingly, it is probably uncontroversial to say that the CCJ can properly rely upon international human rights treaties as well as judicial decisions taken under those treaties in their interpretation of Caribbean Bills of Rights. The legal basis for this reliance probably requires restatement and clarification by the CCJ but is likely derived from the general propositions enunciated in *ex parte Brind*[75] coupled with the clear policy adopted in *Minister of Home Affairs v. Fisher*.[76] General or traditional statements of civil and political rights in Caribbean Bills of Rights are likely to be given an enlightened interpretation in accordance with modern development in international human rights adjudication. The end result tends to be the protection of fundamental human rights and freedoms in a more contemporary way and by more contemporary remedies than otherwise might have been the case.

2. Treaty Creation of New Domestic Rights

A different and more difficult situation arises when international human rights treaties are not being adduced to interpret and inspire provisions in the Bills of Rights, but rather to create

71. *Id.* ¶ 118, at 150.

72. Trinidad Cement Ltd. v. Guyana (No. 2), (2009) 75 W.I.R. 327 (citing Velasquez Rodriquez v. Honduras, Compensation, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 4 (July 21, 1989)).

73. Velasquez Rodriguez v. Honduras, Interpretation of the Compensatory Damages Judgment of 17 Aug. 1990, 95 I.L.R. 22.

74. Gleaner Co. v. Abrahams, [2003] UKPC 55, ¶.64, at 219; *See also* Stokes v. Jamaica, Case 12.468, Inter-Am. Comm'n H.R., Report No. 23/08 (2008).

75. *Ex parte* Brind, [1991] A.C. 696 (H.L.) *passim*.

76. Minister of Home Affairs v. Fisher, (1979) 3 All E.R. 21 (P.C.).

new rights that were never contemplated by the Constitution. Such rights are often derivatives of civil and political rights, such as an applicant's right to petition international human rights bodies to ensure respect for his civil and political rights. The right to petition these bodies is often enshrined in conventions adopted by the State after independence. Unfortunately, these conventions have never been incorporated into domestic law. In deciding whether the applicant has this procedural right, the CCJ and other domestic courts must consider whether it is possible to engraft the international human rights agreement onto domestic legal instruments without the benefit of parliamentary intervention.

Not surprisingly, the earliest decisions denied that the applicant had any such right and concomitantly rejected that the State needed to await the report of international human rights tribunals before imposing the penalty decreed by the domestic court. Two Bahamian cases illustrated this approach. In the 1998 case of *Fisher v. Minister of Public Safety & Immigration*, the Privy Council (by a majority of 3 to 2) denied that the carrying out of the death sentence while a petition was pending before the Inter-American Committee on Human Rights meant that execution became inhuman or degrading treatment.[77] The Privy Council affirmed this decision the following year by a similar majority in *Higgs v. Minister of National Security* when it restated the traditional law governing the application of international law in domestic court, relying upon the venerable *Parlement Belge* for the proposition that an unincorporated treaty could not change the law of the land.[78]

These decisions were reversed within a year by a 3-2 majority of a differently constituted Privy Council. The reasoning of the majority in *Thomas v. Baptiste*,[79] which was applied by the majority in *Lewis v. Attorney General of Jamaica*,[80] was that rights conferred on individuals by ratification of the American Convention on Human Rights became a part of the domestic criminal justice systems of Trinidad and Tobago (under the "due process of law" clause in Section 4(a) of its Constitution) and Jamaica (under the "protection of law" clause in Section 13 of its Constitution). These terms in the Constitution of Trinidad & Tobago were a "compendious expression . . . invok[ing] the concept of the rule of law itself and universally accepted standards of justice observed by civilised nations" and were as applicable to appellate processes as to trial pro-

77. Fisher v. Minister of Pub. Safety & Imm. (No. 2) (1998) 53 W.I.R. 27 at 35.
78. Higgs v. Minister of Nat'l Sec. (1999) 55 W.I.R. 10.
79. Thomas v. Baptiste, (1998) 54 W.I.R. 387 (Trin. & Tobago).
80. Lewis v. Att'y Gen., (1999) 57 W.I.R. 220 (Jam.).

ceedings.[81] These constitutional provisions "entitled a condemned man to be allowed to complete any appellate or analogous legal process that was capable" of reducing his sentence before that sentence was carried out by executive action.[82]

The minority entered a vigorous dissent in *Thomas*.[83] Lords Goff of Chieveley and Hobhouse of Woodborough started from the premise that the due process clause was part of the Constitution and therefore part of municipal law. They affirmed that the Executive lacked competence to make or change that law by virtue of its power to enter into international human rights treaties. It followed that the terms of these treaties were not capable of conferring upon the appellants any rights which domestic courts of the Republic were obliged or at liberty to enforce in suit.[84] By way of analogy, they made reference to unincorporated treaties that declared certain conduct to be criminal wherever committed; obviously, such declarations could not form the basis of criminal prosecutions in the State and any prosecution in respect of such conduct would be a clear breach of constitutional rights.[85] For them, the due process clause was similarly impervious to change by the Executive acting without legislative intervention.[86]

Lord Hoffman similarly dissented in *Lewis v. Attorney General of Jamaica*.[87] He first noted that there was an obligation on Members of Her Majesty's Privy Council to discharge their duty as enforcers of the laws and constitutions of the countries from which the appeals emanate without regard to their personal opinion on the death penalty. He then pointed out that the majority had engaged in a sleight of hand to arrive at their conclusion without paying regard to the consequential violation of dualist foundation of the Caribbean legal system.[88] He said:

> the majority have found in the ancient concept of due process of law a philosopher's stone, undetected by generations of judges, which can convert the base metal of executive ac-

81. *Thomas*, 54 W.I.R. at 394.

82. The majority in *Thomas* appears to have taken an interpretative approach, but the logic of this is difficult to accept where the effect is clearly to create a right that does not exist in the Constitution and was never contemplated by the Constitution. This point is brought home by the fact that in several instances CARICOM countries joined the international conventions decades *after* adoption of their constitutions.

83. *Thomas*, 54 W.I.R. at 429.

84. *Id.* at 431.

85. *Id.* at 433.

86. *Id.* Whether this approach is necessarily the same as that attributed to Sir Robert in *The Parlement Belge* is open to debate, a point alluded to *supra* text accompanying note 43.

87. Lewis v. Att'y Gen., (1999) 57 W.I.R. 220 (Jam.).

88. *Id.* at 307.

> tion into the gold of legislative power. It does not, however explain how the trick is done. *Fisher* and *Higgs* are overruled, but the arguments [in those cases] are brushed aside rather than confronted . . .
>
> If the Board feels able to depart from a previous decision simply because its members on a given occasion have a doctrinal disposition to come out differently, the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.[89]

a. The CCJ in Attorney General v. Joseph

The most authoritative decision on the use of unincorporated human rights treaties to create new rights in Caribbean domestic law is now the CCJ's decision in *Attorney General v. Joseph*.[90] In this case, the Court upheld the treaty right of the applicants to have their petition to the Inter-American Human Rights System heard before their death sentence could be carried out but rejected the reasoning of the Privy Council in *Thomas* and *Lewis* as infringing the rules of dualism and being vulnerable to the criticism leveled by Lords Hoffman, Goff, and Hobhouse. Delivering the leading judgment, Justices de la Bastide and Saunders said:

> Many of the trenchant criticisms of Lord Hoffmann in *Lewis* and Lord Goff and Lord Hobhouse in *Thomas* appear, with respect, to have merit. The majority judgments in those two cases did not explain how mere ratification of a treaty can add to or extend, even temporarily, the criminal justice system of a State when the traditional view has always been that such a change can only be effected by the intervention of the legislature, and not by an unincorporated treaty.[91]

Instead of simply adopting the majority decision of the Privy Council in *Thomas* and *Lewis*, the CCJ conducted a wide-ranging review of the relevant authorities. Placing significant reliance on the Australian case of *Minister for Immigration & Ethnic Affairs v. Teoh*, the CCJ found that the protections granted by the Privy Council were justified.[92] The treaty-compliant behavior of the Government of Barbados had given rise to an indefeasible legitimate expectation that the condemned men would not be executed until

89. *Id.*
90. Att'y Gen. v. Joseph,[2006] CCJ 3 (AJ).
91. De la Bastide v. Saunders, (2006) 69 W.I.R. 104, 141.
92. Minister of State for Imm. & Ethnic Affairs v. Teoh, (1995) 183 C.L.R. 273 (Austl.).

reasonable time was allowed for the Inter-American Human Rights system to run its course and the Barbados Mercy Committee to consider the results thereof under Section 78 of the Barbados Constitution. Such an expectation was in keeping with the increasing grant of rights to individuals under treaties and the corresponding promotion of universal standards of human rights.

The *Joseph* case was a seminal development in Caribbean law in that it seemingly placed the overlay between human rights treaties and domestic human rights adjudication on clearer footing than the vacillations and inconsistencies of Privy Council decisions. But the case also raised fundamental questions. In *Thomas*,[93] the Privy Council had also cited *Teoh* to emphasize that a legitimate expectation was not capable of creating binding rules of substantive law–about the only point on which the five Law Lords agreed.[94] In their view, to employ legitimate expectations to create substantive protections "would be tantamount to the indirect enforcement of the treaty."[95] There is also the logical argument that for an applicant to invoke the doctrine of legitimate expectation, he must first prove that he had a material expectation. This argument could be defeated by the contrary conduct of the Government, certainly with respect to prospective applicants.

The CCJ in *Joseph* was careful to limit application of the doctrine to consideration of specific acts of the Government of Barbados towards the applicants, in particular the issue of the death penalty. The emphasis placed on Government treaty-compliant behavior suggests that conduct to the contrary would, indeed, defeat such an expectation. Similarly, the Court refused to pronounce upon the question of whether the doctrine of legitimate expectation applies with respect to other human rights issues. Together, these considerations portend a consequence that could well limit the utility of the decision and relegate it to being little more than a case decided on its special facts.

b. The "Adoptionist" Approach

Another approach to the creation of rights by unincorporated treaties was adopted by Justice Wit in *Joseph*. The Justice disagreed with the majority for basing their decision on the concept of "legitimate expectation" if only because, "this construction is of course . . . highly artificial and . . . might easily be made ineffective

93. Thomas v. Baptiste, (1998) 54 W.I.R. 387 (Trin. & Tobago).
94. *See also Lewis*, 57 W.I.R. at 307 (Lord Hoffman dissenting).
95. *Thomas*, 54 W.I.R. at 425.

by the Executive."[96] Justice Wit advocated a departure from the traditional dualistic thinking on the subject so as to recognize that treaties adopted by the State could confer rights on individuals. Starting from the premise that international treaty obligations are binding upon the State as a whole, he reasoned that the three organs of the State have a responsibility for ensuring compliance with these obligations. In circumstances where the Executive and the Legislature had failed to carry out the obligation to comply, it then fell to the Judiciary, within the confines of the constitutional order, to ensure compliance.

Justice Wit claims to have found sufficient legal planks to support judicial recognition of treaties accepted by the State but not legislated by the Parliament. Relying on certain ambiguous provisions in the Constitution for the notion that "law" as used in the Constitution did not exclude international law,[97] the learned Justice, who hails from a monist tradition, found authority for suggesting the Legislature, though the most important creator of law, was not the sole creator and had competence to curtail the law-making activity of the other branches.[98] For him, adoption of treaties by the Executive gave rise to domestic rights in the individual *per se* subject to any contrary provisions in constitutions or legislation.

This seemingly radical approach may yet win broad judicial acceptance, although the best foundations are probably not to be found in reasoning that relies on judicial responsibility for compliance with treaty obligations–an alleged duty that many of the leading authorities on dualism have denied.[99] It could be argued that an individual's competence to enjoy treaty rights created for his benefit by the Executive is better founded simply upon the Executive's capability to create rights (as contrasted with obligations) for the citizen. *Thomas,* a Privy Council decision, recognized that domestic law could be made by the Executive, albeit under delegated powers.[100] For centuries domestic courts have accepted that the Executive, acting in the international realm, can create legally binding rights and obligations for the individual within the

96. *De la Bastide*, 69 W.I.R. at 233-34.

97. *Id.* at 237-38 (citing § 117 of the Barbados Constitution which defines law to *include* (and therefore not necessarily limited to): "(1) any instrument having the force of law and (2) any unwritten law").

98. *Id.* at 238.

99. *See, e.g.*, Att'y Gen. for Can. v. Att'y Gen. for Ont., [1937] A.C. 326 (H.L.) 347 (appeal taken from Can.); Maclaine Watson & Co. v. Dep't of Trade & Industry, (1989) 3 All E.R. 523 (H.L.) 545; *ex parte* Brind, [1991] A.C. 696 (H.L.). There could also be difficulties with this approach where the Executive deliberately accepts a treaty without undertaking the required domestic action knowing that its treaty partners are unlikely (for whatever reason) to mount legal challenges to the default.

100. *Thomas*, 54 W.I.R. at 431.

State.[101] Although frequently overlooked, one of the critically important implications of the rule that customary international law is applicable as part of the common law is that the conduct of the Executive thereby creates the common law. Generally speaking, it is the habitual practice and *opinio juris* of the Executive that participates in the making of international custom. Indeed, positive practice is not required; all that must be established is that the State, normally the Executive, was not a persistent objector—that is, an objector to the formation and continuation of the custom.

However, if implicit conduct can create law for the individual, then *a fortiori* explicit conduct must possess similar competence. After all, it is the conduct of the same entity that is involved in both cases. As further support for this argument, treaties ratified exclusively by the Executive may generate rules of customary law which are then regarded as common law in the normal way.[102] As just described, the ability of the Executive to create domestic rights for citizens by its treaty-making power was affirmed by the CCJ itself in *Joseph*, albeit by reference to the doctrine of legitimate expectation.

Judicial opposition to direct applicability of treaty rights is built upon the rather weak foundation of two nineteenth century cases. It is doubtful that *The Parlement Belge*[103] really stands in the way of a revised consideration of the nature of treaty rights conferred upon the citizen. Sir Phillimore was at pains to point out that he objected to the direct applicability of a treaty between Her Majesty and the King of the Belgians, which purported to grant immunity to a defendant foreign ship, out of concern that the Monarch might thereby be able to *take away* rights possessed by the subject (in this case, the right to sue the defendant ship) without intervention by Parliament.[104] He referred to Blackstone, but insisted that the "learned writer . . . must have known very well that there were [sic] a class of treaties the provisions of which were inoperative without the confirmation of the legislature."[105] Even

> the Declaration of Paris 1856, by which the Crown in the exercise of its prerogative deprived [the United Kingdom] of belligerent rights . . . did not affect the private rights of the subject; and *the question before me is whether this treaty*

101. Barbuit's Case, (1737) 25 Eng. Rep. 777, 777. *See also* Trendtex Trading Corp. v. Cent. Bank of Nigeria [1977] 2 W.L.R. 356 (A.C.) (Eng.).

102. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, (Feb. 20).

103. The Parlement Belge, (1879) 4 P.D. 129.

104. *Id.* at 150-55.

105. *Id.* at 150 (quoting Sir Phillimore).

> *does affect private rights, and therefore required the sanction of the legislature.*[106]

Nowhere was the judge purporting to deny that the State could *confer* rights pursuant to a treaty; indeed, the statement just quoted may suggest the very opposite.

The earlier case of *Rustomjee v. The Queen* represents a greater obstacle to the possibility being explored.[107] In the Treaty of Nanjing, Her Majesty and the Emperor of China agreed that the Emperor should pay into the hands of Her Majesty the sum of $3 million in respect of the debts due to British subjects from Chinese nationals and the Chinese government. An application by one of the subjects to recover from the sums received by the Crown was rejected, with all of the judges refusing the suggestion that the Queen could be the agent of any person. Such a notion was variously described as "too wild a notion to require a single word of observation beyond that of emphatically condemning it,"[108] "utterly unfounded,"[109] and a "proposition [that] startles one," not least of all because it was "derogatory to the sovereign's dignity."[110]

The continued relevance of these observations to contemporary jurisprudence could be questioned given the rise of judicial review and reform of rules governing civil proceedings that now allow actions in tort and contract against the Crown. Justice Blackburn's suggestion that to allow the suit would mean the courts' usurpation of Parliament's function of ensuring Executive responsibility[111] is suspect on similar grounds as well as on the consideration that in the Westminster system practiced in the Caribbean the Executive is in effective control of the Legislature. Chief Justice Cockburn's view that the effect of the treaty was to place the fund at the disposal of the Sovereign to distribute in her discretion[112] could be taken to suggest that he regarded the relevant treaty provisions as non-self-executing and a suggestion that strictly construed the treaty did not create directly enforceable rights.

Most problematic are the observations of Justice Lush that the agency argument was "repugnant to every constitutional principle" because:

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106. *Id.* (emphasis added).
107. Rustomjee v. The Queen, [1876] Q.B. 487 (Eng.).
108. *Id.* at 492 (quoting Cockburn, C.J.).
109. *Id.* at 493 (quoting Blackburn, J.).
110. *Id.* at 497 (quoting Lush, J.).
111. *Id.* at 496 (quoting Blackburn, J.).
112. *Id.* at 492 (quoting Cockburn, C.J.).

> In making, and negotiating, and perfecting that treaty the Crown acts of its own inherent authority, not by the authority, actual or supposed, of any subject; and I think all that is done under that treaty is as much beyond the domain of municipal law as the negotiation of the treaty itself; and when this money was received, it was received by the sovereign in her sovereign character, not at all, in any view of it, actual or constructive, as the agent of any subject whatever.[113]

The reference to the agency point suggests that the preoccupation was with that issue, but beyond this, the judgment is clearly steeped in the jurisprudence of the nineteenth century. Today it is commonplace for States to use treaties as mechanisms to specifically confer rights upon individuals. In several instances individuals are given procedural rights to sue in respect of breaches by the State of these rights, as is the case of rights secured by the Revised Treaty.[114] Human rights would appear to be the classic case for recognition of the competence of the State to confer enforceable rights upon the citizen. To disregard these developments could well add mistakes to ancient misconceptions.[115]

One attraction of recognizing that treaties may create rights for the citizen in domestic law is the retention of legislative autonomy in the Executive and Legislature. The Executive remains free to withdraw from the treaty, although the impact of such withdrawal on rights that have accrued requires consideration. The Executive effectively controls the Legislature and may use Parliament to effectively repeal or modify rights within Constitutional limits. As Justice Wit acknowledges, recognition of treaty rights always remains subject to any contrary constitutional provisions. In sum, it seems clear that the law is evolving in this area and awaits a further definitive ruling by the CCJ. Justice Hayton foreshadowed as much in *Joseph* when he said:

> [N]o argument was heard on the possibility of . . . developing a broad principle that rights conferred by international human rights treaties are part of domestic law, irrespective of any alleged "mediation" provided by "due process" or "protection of the law" clauses in Constitutions. It may be that the law will so develop but, before coming to any far-

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113. *Id.* at 497 (quoting Lush, J.).

114. Revised Treaty, *supra* note 27, at ch. 3.

115. *See* Liam Burgess & Leah Friedman, *A Mistake Built on Mistakes: The Exclusion of Individuals Under International Law*, 5 MACQUARIE L.J. 221 (2005).

> reaching conclusions, I consider that full detailed *inter partes* argument on these specific points is required.[116]

3. Treaty Rights In Conflict with the Constitution

The most difficult context for determining the appropriate judicial attitude to human rights treaties is where the treaty rights are considered to conflict with provisions in the Constitution. Adherence to the doctrine of constitutional supremacy would dictate that the constitutional provisions must prevail, but this runs counter to certain decisions of the Inter-American Court on Human Rights. Once fully appreciated, these decisions may be seen as offering seismic shocks to legal systems based on the Westminster model of governance.

a. The IACHR in Boyce v. Barbados

Following the CCJ decision in *Joseph,* which confirmed the commutation of their death sentences, the applicants nonetheless pursued further litigation in the IACHR regarding, among other things, the legality of the mandatory death sentence. The IACHR had little difficulty in finding the mandatory death penalty in Barbados inconsistent with the ratified, but unincorporated, American Human Rights Convention. Adopting the decision in *Hilaire v. Trinidad and Tobago*,[117] the Court reasoned that Article 4(2) of the American Convention allowed for the deprivation of the right to life by the imposition of the death penalty in those countries that have not abolished the death sentence while also establishing strict limitations.[118] First, the death penalty must be limited to the most serious crimes; second, the sentence must be individualized in accordance with the characteristics of the crime as well as the degree of culpability of the accused; and third, the procedural guarantees must be strictly observed. Obviously, the mandatory death penalty fell well short of these benchmark requirements.

For present purposes, the critical finding was that Section 2 of the Offences Against the Person Act (OAPA) (which imposed the mandatory death penalty) and Section 26 of the Constitution (the "savings clause" which "saved" the Act from being deemed "unconstitutional") were themselves incompatible with the American Convention. In coming to this conclusion the Court referred to Ar-

116. De la Bastide v. Saunders, (2006) 69 W.I.R. 104, 244..

117. Hilaire v. Trin. & Tobago, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 94 (2002).

118. Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 50 (Nov. 20, 2007).

ticle 2 of the American Convention, under which State Parties undertook to adopt "in accordance with their constitutional processes . . . such legislative or other measures as may be necessary to give effect to [the] rights or freedoms" enshrined in the Convention.[119] This obligation required adoption "of all measures so that the provisions of the Convention are effectively fulfilled in [the] domestic legal system."[120] Barbados was ordered to adopt such legislative or other measures as necessary to ensure that its Constitution and laws were brought into compliance with the American Convention, including, specifically, the removal of the immunizing effect of the saving of existing law clause in Section 26 of the Constitution.[121]

Similar decisions and orders were made in the subsequent case of *Cadogan v. Barbados* in which the High Court of Barbados had found the applicant guilty of murder and sentenced him to the mandatory death penalty under Section 2 of the OAPA. The Court of Appeal dismissed his appeal of his conviction and sentence[122] in what the CCJ described as a "well-researched" and "correct" judgment.[123] The CCJ dismissed an application for special leave to appeal this decision. The applicant next petitioned the Inter-American Commission, which filed the matter with the IACHR. That Court then considered whether Barbados had violated the applicant's right to a fair trial recognized under Article 8 of the American Convention in light of the fact that his mental health was not evaluated during his criminal trial.

In order to properly consider this allegation, the IACHR conducted an examination of the judicial proceedings that had taken place in the courts of Barbados. In doing so, the Inter-American Court made clear that it was not seeking to *review* the judgments of the domestic courts or of the CCJ.[124] However, it was concerned with *whether the state had violated precepts* in the American Convention relating to a fair trial.[125] As the courts were an arm of the state, it followed that it *was* necessary to examine the respective domestic judicial proceedings to establish their compatibility with the American Convention in order to decide whether the obligation to provide a fair trial had been violated.[126]

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119. *Id.* ¶ 80.

120. Further, this obligation meant that states "must also refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them." *Id.* ¶ 69 (citing Olmedo-Bustos v. Chile *("The Last Temptation of Christ")* IACHR, Feb. 5, 2001. Series C No. 73**,** ¶ 87).

121. *Id.* ¶ 138.

122. Cadogan v. R (No. 1), (2006) 69 W.I.R. 82 (Barb.).

123. Cadogan v. R (No. 2), (2006) 69 W.I.R. 249**,** ¶ 4 (CCJ).

124. *Id.* ¶ 24.

125. *Id.*

126. Cadogan v. Barbados, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204 (Sept. 24, 2009).

In deciding that Barbados had, in fact, breached Mr. Cadogan's rights under Article 8 of the American Convention,[127] the Court found that:

> [T]he State failed to order that a psychiatric evaluation be carried out in order to determine, *inter alia*, the existence of a possible alcohol dependency or other personality disorders that could have affected Mr. [Cadogan] at the time of the offence, and it also failed to ensure that Mr. [Cadogan] and his counsel were aware of the availability of a free, voluntary, and detailed mental health evaluation in order to prepare his defense in the trial.[128]

In its orders the IACHR repeated that Barbados "shall adopt within a reasonable time" legislative amendment of Section 2 of the OAPA and abolition of Section 26 of the Constitution.[129]

Even more critical than its substantive findings, were the IACHR's observations regarding the role of Caribbean courts in the enforcement of the American Human Rights Convention. In *Boyce v. Barbados* the IACHR chided the Privy Council for finding that the savings of existing law clause in the Constitution protected the Barbados Act.[130] The Inter-American Court considered that the Privy Council had conducted too narrow an examination of the validity of the Act and the savings law clause. The question for the Privy Council (and by extension other Caribbean courts) was not merely whether an Act alleged to be in breach of human rights was "constitutional" but rather whether it was "conventional": that is, whether it was consistent with the American Human Rights Convention.[131]

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127. *Id.* ¶ 90.

128. *Id.* ¶ 88.

129. *Id.* ¶ 128 ("In this regard, the State must adopt such legislative or other measures as are necessary to ensure that the Constitution and laws of Barbados, particularly Section 2 of the Offences Against the Person Act and Section 26 of the Constitution, are brought into compliance with the American Convention."). Another order required Barbados to "ensure that all persons accused of a crime whose sanction is the mandatory death penalty will be duly informed, at the initiation of the criminal proceedings against them, of their right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist." *Id.* These prescriptions have now been accepted by Barbados in a consent order in proceedings before the CCJ in Grazette v. The Queen, [2009] CCJ 2 (AJ) and CCJ Appeal No. CR 1 of 2009, 4th May, 2009 (Consent Order).

130. Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 78 (Nov. 20, 2007).

131. *Id.*

b. Some Juridical Difficulties

There are clearly deep-seated difficulties with the views taken by the IACHR. There is no easily identifiable juridical basis upon which the CCJ, as the highest domestic court, could properly undertake the task the IACHR assigned to apply the Inter-American Convention. Even the weak monist approach of Justice Wit in *Joseph* falls far short in providing the requisite foundation since the Judge acknowledged that rules in the "adopted" convention were subservient to legislation and the Constitution.[132] The decisions of the IACHR are consistent with the role of that court as an international tribunal which must necessarily apply international law to the disputes before it and with accepted international law notions that domestic courts form part of the State. Therefore any failure by these courts to apply the treaty amounts to breach by the State. There are already some indications of this in *Cadogan* where the IACHR reviewed the trial procedures before coming to the view that the applicant's treaty rights had been breached, even though the High Court, the Court of Appeal, and the CCJ found no such violation.[133] From this point it is a very short step to awarding damages in favour of a private litigant against the State with respect to entirely constitutional action by the judiciary but which the IACHR considers to constitute a breach of the Inter-American Convention.

The IACHR admonitions concerning the primacy of the American convention also raise fundamental questions concerning the place of the Constitution in human rights adjudication and in the legal system more generally. Generations of Caribbean law students, attorneys, and judges have been weaned on the trite legal principle that the domestic courts are the custodians of the supremacy of the Constitution and must declare *any* inconsistent law, to the extent of the inconsistency, void.[134] The most famous instance of this assertion is the case of *Collymore v. Attorney General of Trinidad & Tobago,* where Chief Justice Wooding reiterated that Caribbean courts were the guardians of the Constitution and of constitutional supremacy.[135]

As the ultimate interpreters of their Constitutions and of the rights and freedoms that they enshrine, Caribbean courts have found and punished violations of their Constitutions by the execu-

132. *Id.* ¶ 138.

133. Cadogan v. Barbados, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204 (Sept. 24, 2009).

134. *See e.g.*, CONST. OF BARBADOS, ch. 1.

135. Collymore v. Att'y Gen. of Trin. & Tobago, (1967) 12 W.I.R. 5, 9.

tive,[136] by the legislature,[137] and by the courts themselves.[138] In this way, the courts have not only reinforced their role as guardians of their Constitutions; they have also emphasized the status of their Constitutions, to use Kelsenian terms, as the *grundnorm* of the domestic legal order.[139] But this understanding does not sit well with the primacy given by the Inter-American Court to the American Convention over Caribbean constitutions.

A further difficulty relates to the judicial authority of the respective courts in human rights adjudication. The decisions by the IACHR in *Joseph* and *Cadogan* do not partner well with the traditionally understood role of Caribbean courts as the final arbiters of the jurisdiction conferred by Caribbean law upon international tribunals. In *Briggs v. Baptiste,* the Privy Council reaffirmed the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation.[140] Where the American Convention had not been incorporated, the recommendations of the Inter-American Commission and the orders of the Inter-American Court could not be directly applicable. Where, however, orders of the IAS *do* become directly enforceable, whether by virtue of the doctrine of "legitimate expectation" or by virtue of legislative incorporation, the Privy Council's position was that *national* courts should consider whether such orders were made within the limits of the jurisdiction conferred on the Inter-American Court by the American Convention. This is because, in the words of their Lordships:

> The interpretation of the Constitution is a matter for the national courts, and its scope and effect in domestic law cannot be enlarged by orders of an international court made outside the terms of the Convention to which the Government . . . assented. In determining such questions their Lordships would expect the national courts to give great weight to the jurisprudence of the Inter-American Court, but they would be abdicating their duty if they were to adopt an interpretation of the Convention which they considered to be untenable.[141]

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136. *See* Hochoy v. Nuge, (1964) 7 W.I.R. 174 (Trin. & Tobago); Hinds v. R, (1975) 24 W.I.R. 326 (Jam.); C.O. Williams Constr. Ltd. v. Blackman (1994) 45 W.I.R. 94 (Barb.).

137. *See Hinds*, 24 WIR 326; Indep. Jam. Council for Human Rights Ltd. v. Marshall-Burnett, (2005) 65 W.I.R. 268.

138. *See* Maharaj v. Att'y Gen. of Trin. & Tobago, (1977) 1 All E.R. 411.

139. Mitchell v. DPP, (1986) L.R.C. 35 (P.C.). *See generally*, SIMEON MCINTOSH, CONSTITUTIONAL REFORM AND CARIBBEAN POLITICAL IDENTITY (2002).

140. Briggs v. Baptiste, (1999) 55 W.I.R. 460, 471-72.

141. *Id.* at 472.

This statement by the Privy Council of the role of national courts, with the traditional understanding of Caribbean courts as sentinels to the Constitution, stands in stark contrast with the equally clear statement by the Inter-American Court of the role of those courts. The Privy Council's position is also consistent with the view that other streams of international law may become applicable in domestic law but remain subject to legislation and the Constitution of the State. A practical consequence of this difference arises in relation to the two IACHR decisions. In *Joseph* and *Cadogan* the IACHR seemed to require the deletion of Section 26 of the Barbados Constitution, but it is possible to argue that this ruling was far broader than was necessary to remedy the mischief of saving the mandatory death penalty.[142] Were this argument to be accepted, a further question arises concerning the extent of Barbados' obligation under the IACHR Order and whether domestic courts could properly make that determination.[143] Seemingly, further rationalization of the respective judicial roles is clearly required.

CONCLUSION

The original jurisdiction of the CCJ is of limited relevance to human rights litigation at the present time, but in its appellate jurisdiction the Court has the opportunity and responsibility to engage in human rights adjudication. The CCJ's interpretation of rights codified in each state's Bill of Rights will clearly be open to influence by international conventions on human rights as well as judicial decisions taken under those conventions. In some instances the state's Constitution mandates Caribbean courts to consider relevant international human rights norms. For example, Article 39(2) of the 2003 Amendment to the Guyana Constitution provides that "[i]n the interpretation of the fundamental rights provisions in this Constitution a court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights." The reference in Article 39 to "a court" clearly includes the CCJ as the highest court for Guyana.

Where the treaty creates new rights not recognized or contemplated by the Constitution there are good grounds to suggest that such rights should be recognized in domestic law. The time may be

142. An order to amend § 26 so as to remove the "saving" of the mandatory death penalty would seem to have been sufficient to remedy the mischief found by the IACHR.

143. The matter is complicated by the provision familiar in international law that in the event of a dispute as to jurisdiction the international tribunal decides whether it has jurisdiction. *See, e.g.*, Article 36(6), Statute of the International Court of Justice (the Statute is annexed to the United Nations Charter of which it forms an integral part).

ripe for a reconsideration of the nature and reach of British dualism derived from *Rustomjee* and *The Parlement Belge*. Modern developments that shed light on the nature of the State and the role of the Sovereign in the creation and conferral of rights on individuals must be brought into the deliberations. In these discussions an important requirement could well be the preservation of the essential elements of the governance arrangements by ensuring that judicially recognized, treaty-based rights remain subject to legislative acts and the Constitution.

The most difficult questions arise where the rights adopted in the conventions conflict, or appear to conflict, with those provided in the Constitution of the country from which the appeal arises. Adherence to the doctrine of constitutional supremacy would seem to require that the constitutional provisions trump the convention, and this is strengthened by consideration of the legislative deficit that exists in Caribbean treaty-making.[144] This must be contrasted with the judicial instinct to do not merely everything possible to ensure that the State does not act in breach of its international treaty obligations, but also the judicial inclination to enlarge the rights of the individual at every possible opportunity.

The CCJ has not yet been provided with sufficient materials upon which it may distill a full explication of its philosophy in human rights litigation. It is reasonable to expect greater volumes of cases in the future, but the Court can anticipate little guidance from the U.S. Supreme Court or the Supreme Court of Canada as these countries have not accepted important human rights agreements such as the Inter-American Convention on Human Rights or the jurisdiction of the Inter-American Court of Human Rights. The U.S. Supreme Court in particular seems increasingly disinclined to entertain debate that unincorporated treaties could be material to domestic law. In these circumstances the CCJ is likely to place disproportionate emphasis on the views and recommendations of academics, such as those at Florida State University, in better defining its role in human rights litigation.

Academic contributions on this subject should probably take into account the CCJ's responsibilities for the development of an indigenous Caribbean jurisprudence exemplified in the CCJ Agreement mandating that the Court play "a determinative role in the further development of Caribbean jurisprudence."[145] The bifur-

144. Winston Anderson, *Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation*, 8 CARIBBEAN L. REV. 75 (1998).

145. CCJ Agreement, *supra* note 28, at Preamble. *See also* CARIBBEAN COURT OF JUSTICE, *The 5th Anniversary of the Caribbean Court of Justice* (2010), stating the Mission of the Court:

cation of the twin jurisdictions of the Court has led to the assertion that the CCJ is both an international court (when discharging its original jurisdiction) and a domestic court (when exercising its appellate jurisdiction), and this is helpful in explaining the dual competencies of the Court. However, it might be misleading in that it tends to mask the fact that the fundamental mission of the Court is singular: giving legal distinctiveness to a single entity, to wit, the Caribbean Community comprised of its Member States. It may be useful to bear in mind that progress towards the definition of a distinct Caribbean legal identity means that approaches applicable to all Member States are more helpful that those applicable to only one or two states that have peculiar treaty obligations.

However, these are the musings of one who is increasingly steeped in the judging of individual cases, and I leave entirely to your imagination the recommendation of the perspectives that you consider most appropriate.

The Caribbean Court of Justice shall perform to the highest standards as the supreme judicial organ in the Caribbean Community. In its original jurisdiction it ensures uniform interpretation and application of the Revised Treaty of Chaguaramas, thereby underpinning and advancing the CARICOM Single Market and Economy. As the final court of appeal for member states of the Caribbean Community it fosters the development of an indigenous Caribbean jurisprudence.

GOLDSTONE RECONSIDERED

RICHARD D. ROSEN*

"The Gaza military operations were, according to the Israeli Government, thoroughly and extensively planned. While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole."[1]

"While the investigations published by the Israeli military and recognized in the U.N. committee's report have established the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted [by Israel] as a matter of policy."[2]

TABLE OF CONTENTS

*Professor of Law and Director, Center for Military Law and Policy, Texas Tech University School of Law. Colonel, U.S. Army (retired).

1. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶ 1883, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Conclusions*], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf.

2. Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes,* WASH. POST, Apr. 1, 2011, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html [hereinafter *Reconsidering the Goldstone Report*].

INTRODUCTION

Two weeks into Israel's 2008-2009 military operation in Gaza and nearly a week before the guns fell silent, the United Nations Human Rights Council (Human Rights Council) directed the dispatch of an "independent fact-finding mission" to investigate the conflict, specifically "violations of international human rights law and international humanitarian law" by Israel.[3] On April 3, 2009, "the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict,"[4] appointing South African Jurist Richard Goldstone to head the inquiry.[5] The Mission conducted field visits and interviews, including publicly broadcasted hearings in Gaza and Geneva.[6]

In September 2009, the Mission issued its findings and conclusions in a nearly 500-page report that contained a variety of Palestinian grievances against Israel, many of which had nothing to do with the Gaza conflict at all.[7] The Mission's most explosive finding,

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3. Human Rights Council Res. S-9/1, *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip*, 9th Sess., Jan. 9-12, 2009, ¶ 14, U.N. Doc. A/HRC/S-9/L.1, (Jan. 12, 2009) [hereinafter H.R.C. Res. S-9/1], *available at* www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/A-HRC-S-91-L1.doc.

I use the terms "international humanitarian law," "law of war," and "law of armed conflict" interchangeably. In this regard, the terms deal with the conduct of military operations (*jus in bello*) as opposed to the legality of a state's recourse to force (*jus ad bellum*). *See* Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 11, 13-14 (Dieter Fleck ed., 2d ed. 2008).

4. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict,* ¶ 131, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Report*].

5. *Id.* ¶ 132; Press Release, Human Rights Council, Richard J. Goldstone Appointed to Lead Human-Rights Council Fact-Finding Mission on Gaza Conflict, U.N. Press Release (Apr. 3, 2009), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E.

6. *Goldstone Report*, *supra* note 4, ¶¶ 5, 7, 141.

7. For example, the report deals with such subjects as the treatment of Palestinians on the West Bank (*id.* ¶¶ 1381-1440); the detention of Palestinians in Israeli prisons (*id.* ¶¶ 1441-1507); restrictions on Palestinian movement (*id.* ¶¶ 1508-49); Israeli settlements (*id.* ¶¶ 1538-39); and repression of dissent in Israel proper (*id.* ¶¶ 1692-1772). While the Human Rights Council mandate was sufficiently broad to cover these matters, the Mission's primary responsibility was to deal with the Gaza conflict. H.R.C. Res. S-9/1, *supra* note 3, ¶ 14; *see also* Trevor Norwitz, *An Open Letter to Richard Goldstone*, COMMENTARY, Oct. 19, 2009, http://www.commentarymagazine.com/viewarticle.cfm/an-open-letter-to-richard-goldstone-15284; David Landau, *The Gaza Report's Wasted Opportunity*, N.Y. TIMES, Sept. 20, 2009, at WK-10, http://www.nytimes.com/2009/09/20/opinion/20landau.html; Moshe Halbertal, *The*

however, was that Israel—*as a matter of state policy*—intended to kill Palestinian civilians and destroy their property,[8] thereby committing grave violations of the law of armed conflict.[9] The Mission predicated its conclusion upon the number of Palestinian civilian casualties,[10] statements by current and former Israeli officials about Israeli military objectives in Gaza and other conflicts,[11] and Israel's advanced targeting technology and proficiency.[12] By an October 16, 2009, resolution, the Human Rights Council endorsed the Mission's findings and conclusions.[13] The United Na-

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Goldstone Illusion, *in* THE GOLDSTONE REPORT 346, 354 (Adam Horowitz, Lizzy Ratner, & Philip Weiss eds., 2011).

The Report also criticizes as discriminatory Israel's "right-of-return" for Jews to maintain Israel's identity as a Jewish state. *Goldstone Report*, *supra* note 4, ¶ 207. The Report fails to mention, however, that the Hamas Covenant calls for a wholly Islamic Palestinian state to govern both the occupied territories and Israel proper. Hamas, *The Covenant of the Islamic Resistance Movement*, AVALON PROJECT, YALE LAW SCHOOL, art. 11, (Aug. 18, 1988), http://avalon.law.yale.edu/20th_century/hamas.asp (last visited June 4, 2012) [hereinafter *Hamas Covenant*]:

> The Islamic Resistance Movement believes that the land of Palestine is an Islamic Waqf consecrated for future Moslem generations until Judgement Day [sic]. . . .
>
> This is the law governing the land of Palestine in the Islamic Sharia (law) and the same goes for any land the Moslems have conquered by force, because during the times of (Islamic) conquests, the Moslems consecrated these lands to Moslem generations till the Day of Judgement [sic].

Similarly, the Palestinian Basic Law declares that Islam is the official religion of the Palestinian state and that "principles of Islamic[ ]*Shari'a* shall be a principal source of legislation." PALESTINIAN BASIC LAW, art. 4 (2003 as amended), *available at* http://www.palestinianbasiclaw.org/2003-amended-basic-law. The Palestinian Basic Law is consistent with the constitutions of surrounding Arab states, which declare that Islam is the official state religion and that they are Arab nations. *E.g.,* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 1980, March 26, 2007, arts. 1-2; Articles 1-3, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 3; CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, arts. 1-2; BASIC LAW OF THE SULTANATE OF OMAN (Royal Decree 101/96) arts. 1-2; BASIC LAW OF GOVERNANCE, art. 1 (Saudi Arabia); CONSTITUTION OF SYRIA, arts. 1, 3; CONSTITUTION OF THE UNITED ARAB EMIRATES arts. 6-7; CONSTITUTION OF THE REPUBLIC OF YEMEN, arts. 1, 3.

8. *Goldstone Report*, *supra* note 4 ¶ 1215; *Goldstone Conclusions*, *supra* note 1, ¶¶ 1877, 1881-95; U.N. Fact Finding Mission on the Gaza Conflict, Statement by Richard Goldstone on behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict before the Human Rights Council (Sep. 29, 2009), http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm.

9. *Goldstone Report*, *supra* note 4, ¶ 46; *Goldstone Conclusions*, *supra* note 1, ¶ 1935.

10. *Goldstone Report*, *supra* note 4, ¶¶ 360-62; *see infra* notes 123, 126-89 and accompanying text.

11. *Id.* ¶¶ 1179, 1192-1219; *see infra notes* 124, 190-216 and accompanying text.

12. *Id.* ¶¶ 576-78, 1185-91; *see infra* notes 125, 217-23 and accompanying text.

13. Human Rights Council Res. S-12/1, The Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem, 12th Sess., Oct. 15-16, 2009, ¶ B.3, U.N. Doc A/HRC/RES/S-12/1, (Oct. 16, 2009), *available at* http://unispal.un.org/UNISPAL.NSF/0/13A7589213CE095B85257657004239A1; *see also* Press Release, Human Rights Council, Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission Led by Justice Goldstone and Calls for Their Implementation, U.N. Press Release (Oct. 16, 2009),

tions General Assembly (U.N. General Assembly) followed suit on December 1, 2009.[14]

The Goldstone Report generated unprecedented editorial and academic criticism, challenging both the process by which the Mission operated and the substance of the Mission's findings and conclusions.[15] Most controversial was the Mission's finding that Isra-

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http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9532&LangID=E.

14. G.A. Res. 64/10, U.N. Doc. A/RES/64/10 (Dec. 1, 2009), *available at* daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/462/43/PDF/N0946243.pdf?OpenElement.

15. *E.g.,* Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law*, 104 AM. SOC'Y. INT'L. L. PROC. ANN. MEETING 79 (2010); Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279 (2010) [hereinafter Blank, *Finding Facts*]; Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT'L HUMANITARIAN L. 347 (2009) [hereinafter Blank, *Application of IHL*]; AMICHAI COHEN, JERUSALEM CTR. FOR PUB. AFFAIRS, PROPORTIONALITY IN MODERN ASYMMETRICAL WARS (2010), http://www.jcpa.org/text/proportionality.pdf; Irwin Cotler, *The Goldstone Mission—Tainted to the Core (Part I)*, JERUSALEM POST, Aug. 16, 2009, http://middleeastinfo.org/forum/lofiversion/index.php/t16511.html; Irwin Cotler, *The Goldstone Mission—Tainted to the Core (Part II),* JERUSALEM POST, Aug. 18, 2009, http://www.eyeontheun.org/assets/attachments/articles/6118The_Goldstone_Mission.doc; Alan Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias* (Harvard Pub. Law, Working Paper No. 10-26, 2010), *available at* http://www.alandershowitz.com/goldstone.pdf; Editorial, *War Unchecked*, WASH. POST, Nov. 15, 2009, at A22 [hereinafter *War Unchecked*]; Robert O. Freedman, *A Biased War Report*, BALT. SUN, Oct. 20, 2009, http://articles.baltimoresun.com/2009-10-20/news/0910190045_1_human-rights-council-israel-and-hamas-bias; Nile Gardiner, *The U.N.'s Anti-Israel Crusade Continues*, HUM. EVENTS, Sept. 21, 2009, http://www.humanevents.com/article.php?id=33618; Halbertal, *supra* note 7; Lt. Col. (ret.) Jonathan D. Halevi, *Blocking the Truth of the Gaza War: How the Goldstone Commission Understated the Hamas Threat to Palestinian Civilians*, JERUSALEM CTR. FOR PUB. AFFAIRS, (Sept. 18, 2009), http://jcpa.org/article/blocking-the-truth-of-the-gaza-war/; INTELLIGENCE & TERRORISM INFO. CTR., HAMAS AND THE TERRORIST THREAT FROM THE GAZA STRIP (2010) [hereinafter HAMAS AND THE TERRORIST THREAT], http://www.crethiplethi.com/hamas-and-the-terrorist-threat-from-the-gaza-strip/israel/2010/; Chris Jenks & Geoffrey Corn, *Siren Song: The Implications of the Goldstone Report on International Criminal Law*, 7 BERKELEY J. INT'L L. PUBLICIST, http://bjil.typepad.com/publicist/2011/03/publicist07-jenks-corn.html; Richard Landes, *Goldstone's Gaza Report: Part One: A Failure of Intelligence*, MIDDLE E. REV. INT'L. AFF. J., (2009) [hereinafter Landes, *Part One*], http://www.gloria-center.org/meria/2009/12/landes1-2009-12-01/; Richard Landes, *Goldstone's Gaza Report: Part Two: A Miscarriage of Human Rights*, MIDDLE E. REV. INT'L. AFF. J., (2009), http://www.gloria-center.org/2009/12/landes2-2009-12-02/; Ed Morgan, *The UN's Book of Judges*, 16 GLOBAL GOVERNANCE 160 (2010) [hereinafter Morgan, *U.N.'s Book of Judges*]; Ed Morgan, *Goldstone Report Undermines Faith in International Law*, TORONTO STAR, Oct. 22, 2009, http://www.thestar.com/comment/article/713921; Michael A. Newton, *Illustrating Illegitimate Lawfare,* 43 CASE W. RES. J. INT'L L. 255 (2010); Joshua Muravchik, *Goldstone*: *An Exegesis*, 173 WORLD AFF. J. 17 (2010), http://www.worldaffairsjournal.org/articles/2010-MayJune/full-Muravchik-Traub-MJ-2010.html; Norwitz, *supra* note 7; Melanie Phillips, *The Moral Inversion of Richard Goldstone*, SPECTATOR, Sept. 16, 2009, http://europenews.dk/en/node/26358; Richard D. Rosen, *The Protection of Civilians During the Israeli-Hamas Conflict*: *The Goldstone Report*, *in* PROTECTING CIVILIANS DURING VIOLENT CONFLICT (David W. Lovell & Igor Primoratz eds., forthcoming May 2012); Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts*: *The Need for a Proportionate Proportionality*, 22 STAN. L. & POL'Y REV. 93 (2011); Justus Reid Weiner & Avi Bell, *The Gaza War of 2009*: *Applying International Humanitarian Law to Israel and Hamas*, 11 SAN DIEGO INT'L L.J. 5 (2009).

The Report also has a considerable number of defenders. *E.g.*, Susan Breau, *An Assessment of the Gaza Report's Contribution to the Development of International Humanitarian Law*, *in* PROTECTING CIVILIANS DURING VIOLENT CONFLICT (David W. Lovell & Igor Primoratz eds., forthcoming May 2012); *The Goldstone Report*, *supra* note 4 (containing a num-

el's military operation was intended to punish Gaza's civilian population—a conclusion reached with only a superficial inquiry into the combat environment the Israeli Defense Force (IDF) faced during the conflict.[16]

A year and a half after the issuance of the Mission's report, Justice Goldstone reconsidered the Mission's conclusion, acknowledging for the first time that Israel may not have intentionally targeted Palestinian civilians and their property during the conflict.[17] His partial retraction came shortly after the Hamas leadership admitted that it suffered much higher combat losses than earlier reported,[18] calling into serious doubt the number of civilians actually killed during the conflict.

Justice Goldstone's reconsideration of the report's most important conclusion implicitly confirms the most serious criticism of the report: the Mission did not provide impartial assessments of the asymmetrical conflict in Gaza or explain how a modern armed force might successfully comply with international humanitarian law while at the same time achieving its military objectives.[19] That is, the Mission consciously failed to deal with the central issues surrounding the deaths of civilians and the destruction of civilian property during the conflict: determining the nature of Hamas's tactical and strategic doctrine, how it was actually employed, and whether IDF responded in a manner consistent with the principles of distinction and proportionality given the facts known to commanders at the time.[20]

In fact, the Mission's investigation and findings are so fundamentally flawed—both procedurally and substantively—that the

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ber of essays, all but one supporting the report); Richard Falk, *The Goldstone Report*: *Ordinary Text, Extraordinary Event*, 16 GLOBAL GOVERNANCE 173 (2010); Dinah PoKempner, *Valuing the Goldstone Report*, 16 GLOBAL GOVERNANCE 144 (2010); Milena Sterio, *The Gaza Strip: Israel, Its Foreign Policy, and the Goldstone Report*, 43 CASE W. RES. J. INT'L L. 229 (2010).

16. *See, e.g.,* Bell, *supra* note 15, at 6; COHEN, , *supra* note 15, at 16-19; Dershowitz, *supra* note 15, at 47-48; *War Unchecked, supra* note 15; Freedman, *supra* note 15; Halbertal, *supra* note 7, at 356-57; Jenks & Corn, *supra* note 15; Landes, *Part One*, *supra* note 15; Norwitz, *supra* note 7; Rubinstein & Roznai, *supra* note 15, at 105-07.

17. *Reconsidering the Goldstone Report*, *supra* note 2. Neither the Human Rights Council nor the other Mission members have reconsidered the Mission's conclusions. *See* Ed Pilkington & Conal Urquhart, *Goldstone's Gaza Report Stands, UN Insists*, GUARDIAN, Apr. 5, 2011, http://www.guardian.co.uk/world/2011/apr/05/goldstone-gaza-report-stands-un; Hina Jilani, Christine Chinkin, & Desmond Travers, *Goldstone Report*; *Statement Issued by Members of UN Mission on Gaza War*, GUARDIAN, Apr. 14, 2011, http://www.guardian.co.uk/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza.

18. *Palestine*: *Hamas Acknowledges Higher Casualties in Gaza War*, ISLAMIC NEWS (Nov. 1, 2010, 4:49 PM), http://theislamicnews.com/palestine-hamas-acknowledges-higher-casualties-in-gaza-war/.

19. *See, e.g.,* Halbertal, *supra* note 7, at 354-56; Landau, *supra* note 7; *War Unchecked*, *supra* note 15.

20. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 132; *see War Unchecked*, *supra* note 15; Norwitz, *supra* note 7; COHEN, *supra* note 15, at 27; Freedman, *supra* note 15.

Goldstone Report does nothing to advance the cause of protecting civilians in combat, the raison d'être of international humanitarian law.[21] Instead, the report does just the opposite: it condones a method of insurgent warfare that intentionally places civilians and their property at risk.[22] The Goldstone Report also demonstrates that the Human Rights Council lacks the impartiality (and perhaps even the ability) to investigate seriously alleged violations of international humanitarian law in connection with the Israeli-Palestinian conflict.[23]

An article of this length cannot cover all of the Report's alleged violations of the law of war arising out of the Israeli-Hamas conflict. Moreover, a law professor sitting in Lubbock, Texas cannot resolve the factual disputes that have arisen about the conflict. Nor does this paper discount the possibility (or even probability) that individual IDF members committed war crimes during the conflict. Rather, using open-source material, this article focuses on the Mission's findings that the IDF purposely targeted civilians. Part II provides a historical setting for the conflict; Part III deals with the process by which the Goldstone Mission was conceived. Part IV discusses what the Goldstone Mission found and concluded about the IDF operation, while Part V examines the critical issues the Mission did not explore: Hamas's strategic and tactical doctrines and the resulting operational environment confronted by Israel during the war. Finally, the paper concludes by briefly discussing some of the major institutional shortcomings in the current approach to international humanitarian law.

I. HISTORICAL BACKGROUND

Part of the British Palestine Mandate,[24] the Gaza Strip was captured by Egypt during the Arab-Israeli War of 1948.[25] Except

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21. *See, e.g.,* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,1996 I.C.J. 226, 257 (July 8); NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 4 (2009); *see also* MICHAEL IGNATIEFF, THE WARRIOR'S HONOR 119-20 (1998).

22. *See* Blank, *Finding Facts, supra* note 15, at 282, 289; Morgan, *U.N.'s Book of Judges*, *supra* note 15, at 161-62 (discussing the Council's prejudgment of Israeli actions before issuance of Goldstone Report), 168-69 (noting examples of lack of impartiality by HRC's Special Rapporteur on the Occupied Territories), 170 (noting the U.N.'s and the Council's lack of objectivity); Rubinstein & Roznai, *supra* note 15, at 105-07.

23. *See, e.g.,* John Bolton, *Israel, the U.S. and the Goldstone Report*, WALL ST. J., (Oct. 19, 2009, 9:34 AM), http://online.wsj.com/article/SB10001424052748704500604574480932924540724.html; Freedman, *supra* note 15; Morgan, *U.N.'s Book of Judges, supra* note 15, at 167.

24. Michael Dumper, *Forty Years Without Slumbering*: *Waqf Politics and Administration in the Gaza Strip, 1948-1987*, 20 BRIT. J. MID. E. STUD. 174, 175 (1993).

25. NATHAN SHACHAR, THE GAZA STRIP: ITS HISTORY AND POLITICS 57 (2010).

for a brief interlude following Israel's seizure of the Strip during the Suez War of 1956,[26] the Egyptians administered the territory from 1948 to 1967.[27] Israel captured the Gaza Strip during the 1967 Arab-Israeli War,[28] established a military administration,[29] and in 1971 began to build Jewish settlements in the Strip.[30]

In August 2005, as part of a policy of disengagement, Israel withdrew its military forces and civilian settlers from the Gaza Strip.[31] Among other objectives, Israel hoped that disengagement from Gaza would lead to better security and reduce friction with the Palestinian population.[32] In January 2006, Hamas won the Palestinian Legislative Council elections and, in June 2007, violently seized control of the Gaza Strip from the Palestinian Authority.[33] As the Goldstone Report notes, after Hamas took control of the Gaza Strip, Israel declared Gaza "hostile territory,"[34] and followed the declaration with "severe reductions in the transfer of goods and supplies of fuel and electricity to the Strip."[35]

The Mission neither provides context for Israel's declaration and subsequent blockade nor discusses the nature of Hamas or its abject refusal to recognize Israel or the peace process.[36] Instead,

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26. *Id.* at 63.

27. *Id.* at 58-68; Dumper, *supra* note 24, at 177-81.

28. SHACHAR, *supra* note 25, at 70; Dumper, *supra* note 24, at 182; *Goldstone Report*, *supra* note 4, ¶ 177.

29. Dumper, *supra* note 24, at 182; *Goldstone Report*, *supra* note 4, ¶ 177.

30. SHACHAR, *supra* note 25, at 84-85.

31. ELISHA EFRAT, THE WEST BANK AND GAZA STRIP: A GEOGRAPHY OF OCCUPATION AND DISENGAGEMENT 183-95 (2006); Mark S. Kaliser, Note, *A Modern Day Exodus*: *International Human Rights Law and International Humanitarian Law Implications of Israel's Withdrawal from the Gaza Strip*, 17 IND. INT'L & COMP. L. REV. 187, 219-20 (2007).

32. STATE OF ISRAEL, DISENGAGEMENT PLAN OF PRIME MINISTER ARIEL SHARON (Apr. 16, 2004), http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm (last visited June 4, 2012). The Israeli decision to withdraw from Gaza was not an easy one; some believed that Gaza would be used as a base for launching attacks against Israel. *See* Barry Rubin, *Israel's New Strategy*, 85 FOREIGN AFF. 111, 111 (2006); Mortimer B. Zuckerman, *Life After Gaza*, U.S. NEWS & WORLD REP., Sept. 5, 2005, at 69. In fact, disengagement did not bring peace—"[i]nstead, it was followed almost immediately by rocket fire." Jeffrey Goldberg, *Letter from Gaza: The Forgotten War*, NEW YORKER, Sept. 11, 2006, at 40-47; *see also Holiday Marks Anniversary of Yom Kippur War*, U.S. FED. NEWS, Oct. 6, 2008 ("Since Israel's Gaza withdrawal, Iran-backed Hamas and other terrorist groups in Gaza have fired more than 5,800 rockets and mortars into Israel."); Bren Carlill, *New World in Their Hands*, AUSTRALIAN, Sept. 13, 2008, at 24 (noting "dramatic increase" in rockets fired into Israel from Gaza since the Israeli withdrawal).

33. *Goldstone Report*, *supra* note 4, ¶ 190; Captain Gal Asael, *The Law in the Service of Terror Victims*: *Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?*, ARMY LAW., July 2008, at 6.

34. Carey James, Note, *Mere Words*: *The 'Enemy Entity' Designation of the Gaza Strip*, 32 HASTINGS INT'L & COMP. L. REV. 643, 645 (2009); ISRAEL MINISTRY OF FOREIGN AFF., SECURITY CABINET DECLARES GAZA HOSTILE TERRITORY (Sept. 19, 2007), http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm (last visited June 4, 2012).

35. *Goldstone Report*, *supra* note 4, ¶ 192.

36. Halbertal, *supra* note 7, at 355.

the Goldstone Report obfuscates Hamas's character and its goals, dealing with Hamas's political philosophy in one cryptic footnote. It notes that "Hamas subscribed to the so-called Prisoners' Document, a common political platform shared by Fatah, Hamas, Islamic Jihad, the Popular Front for the Liberation of Palestine (PFLP) and the Democratic Front for the Liberation of Palestine (DFLP)."[37] The Report suggests that because the Prisoners' Document refers to the right to establish an independent Palestinian state on all territories occupied by Israel in 1967,[38] it constitutes Hamas's implicit recognition of Israel.[39]

The Report's suggestion is indefensible and, given the centrality of Hamas's philosophy to Israel's Gaza policy, inexplicable. First, nothing in the Prisoner's Document remotely intimates recognition of Israel. Second, the Hamas leadership in Syria expressly rejected the document and—within weeks of the document's issuance—Hamas's military wing (*Izz ad-Din al-Qassam* Brigades) and two other groups attacked the IDF *in* Israel (apparently to express their displeasure with the document), killing two Israeli soldiers, wounding four, and kidnapping one (Corporal Gilad Shalit).[40] Third, even a cursory "Google search" of the Prisoners' Document readily reveals that the Hamas leadership, in fact, rejected and continues to reject recognition of and peace with Israel.[41] And despite the existence of a

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37. *Goldstone Report*, *supra* note 4, ¶ 188 n.25.

38. *See* Press Release, Miftah, Full Text of the National Conciliation Document of the Prisoners (May 26, 2006), http://www.miftah.org/display.cfm?DocId=10371&CategoryId=32 (last visited June 4, 2012).

39. *Goldstone Report*, *supra* note 4, ¶ 188 n.25.

40. JEREMY M. SHARP ET AL., CONG. RESEARCH SERV., RL33566, LEBANON: THE ISRAELI-HAMAS-HEZBOLLAH CONFLICT 32 (2006), *available at* http://www.fas.org/sgp/crs/mideast/RL33566.pdf.

41. *See, e.g.*, BENNY MORRIS, ONE STATE, TWO STATES 154 (2009) (indicating Hamas has never superseded or abandoned its covenant); Daniel Byman, *How to Handle Hamas: The Perils of Ignoring Gaza's Leadership,* 89 FOREIGN AFF.45, 45 (2010) ("Hamas seeks to undermine the peace process. Many Hamas members have not reconciled themselves to the Jewish state's existence."); *"We Will Never Recognize Israel"*: *Hamas Leader*, AL ARABIYA, Dec. 14, 2010, http://www.alarabiya.net/articles/2010/12/14/129619.html ("We said it five years ago and we say it now . . . we will never, we will never, we will never recognize Israel"); *Hamas Stands Firm: No Recognition of Israel*, AL JAZEERA, Jan. 23, 2010, http://www.aljazeera.com/news/middleeast/2010/01/20101230202291283.html ("Hamas political leader has said that his group will not recognise Israel despite new pressures and will give priority to building resistance to the Jewish state."); Khaled Abu Toameh, *Haniyeh: Hamas Will Liberate Palestine*, JERUSALEM POST, Dec. 14, 2009, http://www.jpost.com/MiddleEast/Article.aspx?id=163130 ("Hamas Prime Minister Ismail Haniyeh said that gaining control of the Gaza Strip was 'just a step toward liberating all of Palestine.' "); *Hamas Reiterates Non-Recognition of Israel*, MONSTERS & CRITICS (June 11, 2007, 1:13PM), http://www.monstersandcritics.com/news/middleeast/news/article_1242137.php/Hamas_reiterates_non-recognition_of_Israel (quoting Hamas spokesman that Hamas has not changed its policy with regard to recognition of Israel); *Own Worst Enemy*, TIMES (LONDON), June 14, 2007, http://www.timesonline.co.uk/tol/comment/leading_article/article1929366.ece (noting that Hamas still calls for "the destruction of Israel in its rhetoric"); *Hamas Resists Israel Recognition,* BBC NEWS (June 27, 2006, 9:45PM) http://news.bbc.co.uk/2/hi/middle_east/5122822.stm; Michael Herzog, *Can Hamas Be Tamed?*, 85 FOREIGN AFF. 83, 88 (2006) (cit-

ceasefire, at the time this article was written, Israel was still under attack from the Hamas.[42]

Hamas has its genesis in the Muslim Brotherhood, established in Egypt in 1928 "on the eve of the collapse of the Ottoman Empire."[43] The Muslim Brotherhood's objective is the establishment of individual Islamic states that will ultimately be united into a single Muslim nation.[44] Hamas itself formed in December 1987 during the first Palestinian *intifada* (rebellion).[45] By its founding charter, Hamas seeks the complete destruction of Israel by violent means[46] and the extermination of the Jews;[47] it absolutely rejects any

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ing Hamas leader Mahmoud al-Zahar that "any cease-fire along the 1967 borders would not come with a recognition of Israel or relations with it, but would be merely a step in the continued struggle"); *cf.* Efraim Inbar, *The Rise and Demise of the Two-State Paradigm*, 53 ORBIS 265, 274 (2009) ("At this historic juncture, Palestinian society, under the spell of a nationalist and Islamic ethos, is unable to do what is necessary to end the conflict: compromise with the Zionist movement.").

42. *See, e.g., Barrage of Rockets from Gaza Strike Israel; Sites in Gaza Targeted*, CNN (Aug. 22, 2011, 10:07 AM), http://www.edition.cnn.com/2011/WORLD/meast/08/21/israel.violence/index.html?iref=mpstoryview (describing multiple rocket attacks on Israel from Gaza); D.L., *Attacks in Israel: Terror Down Under*, ECONOMIST (Aug. 18, 2011, 5:05 PM), http://www.economist.com/blogs/newsbook/2011/08/attacks-israel (describing attack from Gaza on military and civilian targets in southern Israel); *EQB Declares Responsibility for Kfar Sa'ad Operation,* AL-QASSAM (July 4, 2011, 9:44 PM), http://www.qassam.ps/news-4391-EQB_declares_responsibility_for_Kfar_Saad_operation.html (stating that Hamas took credit for attack on Israeli civilian bus); Elad Benari, *Terrorists Fire Rockets at Southern Israel,* ISR. NAT'L NEWS, Apr. 25, 2012, *available at* 2012 WLNR 8779928 (over 200 rockets fired into Israel in a four day period in March 2012).

43. KHALED HROUB, HAMAS: A BEGINNER'S GUIDE 6 (2006).

44. *Id.* at 7.

45. *Id.* at 12; *see also* Bruce A. Arrigo, *Identity, International Terrorism and Negotiating Peace*: *Hamas and Ethics-Based Considerations from Critical Restorative Justice,* 50 BRIT. J. CRIM. 772, 778 (2010).

46. *Hamas Covenant*, *supra* note 7, art. 11; *see also* ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, THE "GAZA WAR": A STRATEGIC ANALYSIS 6 (2009) (Final Review Draft), http://csis.org/files/media/csis/pubs/090202_gaza_war.pdf (last visited June 4, 2012). The U.N. Secretary-General's Report on the May 31, 2010 Flotilla Incident acknowledges the serious threat Hamas and its allies pose to Israel, finding that Israel's naval blockade of Gaza is legitimate, although its method of enforcing the blockade in this instance was "unacceptable." U.N. Secretary-General, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, at 4, 39-40 (Sept. 2011), *available at* http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf [hereinafter *Palmer Report*].

47. *Hamas Covenant*, *supra* note 7, art. 7:

> [T]he Islamic Resistance Movement aspires to the realisation of Allah's promise, no matter how long that should take. The Prophet, Allah bless him and grant him salvation, has said:
>
> "The Day of Judgement [sic] will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him."

See also Irwin Cotler, *Global Antisemitism*: *Assault on Human Rights* 6 (Yale Initiative for the Interdisciplinary Study of Antisemitism, Working Paper No. 3, 2009).

peaceful settlement with Israel.[48] Hamas is considered a terrorist organization not only by Israel[49] but by other nations as well.[50]

Even before the seizure of Gaza, Hamas militants crossed into Israel and killed two Israeli soldiers and kidnapped a third.[51] And within only two weeks of coming to power, Hamas joined other armed groups and "resumed rocket fire against Israel."[52] Thereafter, Hamas and its allies fired thousands of rockets into Israel.[53]

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48. *Hamas Covenant*, *supra* note 7, art. 13:

> Initiatives, and so-called peaceful solutions and international conferences, are in contradiction to the principles of the Islamic Resistance Movement. Abusing any part of Palestine is abuse directed against part of religion. Nationalism of the Islamic Resistance Movement is part of its religion. Its members have been fed on that. For the sake of hoisting the banner of Allah over their homeland they fight. . . .
>
> There is no solution for the Palestinian question except through Jihad. Initiatives, proposals and international conferences are all a waste of time and vain endeavors. The Palestinian people know better than to consent to having their future, rights and fate toyed with.

See also Nadia Baranovich & Ravichandran Moorthy, *Terror Strategies in the Israeli-Palestinian Conflict: An Analysis of Hezbollah & Hamas*, 5 INT'L PROCEEDINGS OF ECON. DEV. & RES. 229 (2011) http://www.ipedr.net/vol5/no2/51-H10155.pdf; Mortimer B. Zuckerman, *Waiting for War in Gaza*, U.S. NEWS & WORLD REP., Nov. 11, 2006, at 68, http://www.usnews.com/usnews/opinion/articles/061105/13edit.htm; Andrea Levin, *The Truth About Hamas's Mission*, BOSTON GLOBE, Jan. 17, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/01/17/the_truth_about_hamass_mission/.

49. *See* HCJ 9132/07, Al-Bassiouni Ahmed v. Prime Minister, unpublished, ¶ 22 [2008] (Isr.) *available at* http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

50. *See, e.g.,* U.S. Dep't of State, Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations* (Jan. 27, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm; *Listing of Terrorist Organizations*, AUSTRALIAN GOVERNMENT, http://www.ema.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument (listing Hamas's Izz al-Din Al-Qassam Brigades as terrorist group and renewed listing in September 2009); Ministry of Public Safety Canada, *Currently Listed Entities*, PUBLIC SAFETY CANADA (Aug. 24, 2011), http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx; Council Decision 2005/930/EC, *available at* http://eur-lex.europa.eu/lex/LexUriServ/site/en/oj/2005/l_340/l_34020051223en00640066.pdf; United Kingdom Home Office, *Proscribed Terrorist Groups*, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, (Nov. 11, 2011), http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary (listing Hamas's Izz al-Din Al-Qassam Brigades).

51. *See* SHARP ET AL., *supra* note 40 and accompanying text; Thomas Omestad, *The Flames of War, and Small Hopes for Peace*, U.S. NEWS & WORLD REP., July 24, 2006, at 12-14; Larry Cohler-Esses, *Hamas Wouldn't Honor a Treaty, Top Hamas Leader Says,* JEWISH DAILY FORWARD, Apr. 19, 2012, http://forward.com/articles/155054/hamas-wouldn-t-honor-a-treaty-top-leader-says/.

52. SHACHAR, *supra* note 25, at 177; *see also* HCJ 9132/07, Al-Bassiouni Ahmed, ¶ 2. *See generally supra* note 32 and accompanying text.

53. *See, e.g.,* Ed Blanche, *Behold, The Humble Qassem*, THE MIDDLE E., Apr. 2008, at 18; *A Riddle of Rockets; The Gaza Strip,* ECONOMIST, Oct. 13, 2007, at 50; David Eshel, *Military Confrontation with Hamas in Gaza Unavoidable*, MILITARY TECH., no. 31, 2007, at 5. From 2000 to 2008, Israel sent dozens of letters to the President of the Security Council and the High Commissioner for Human Rights describing the rocket attacks, with no apparent effect. ISRAEL MINISTRY OF FOREIGN AFF., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS 19-21 nn.29-31 (July 29, 2009) [hereinafter *Operation in Gaza*], http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf.

The Mission took considerable time to examine all aspects of Israel's relations with the Palestinians, including matters well outside the 2008-2009 Gaza conflict.[54] Its failure to explore—even briefly—Hamas's stated policy towards Israel is puzzling at best. One can only assume that an accurate description of Hamas did not fit within the Mission's preconceived narrative about the conflict.[55]

In June 2008, Egypt brokered a six-month ceasefire between Israel and Hamas.[56] Although periodically violated,[57] the truce brought a period of relative calm until November 2008. On November 4, 2008, Israeli ground and air forces attacked Hamas militants to destroy a 250-meter tunnel being built under the Israeli-

54. *See supra* note 7 and accompanying text.

55. The Mission's failure to give context to Israel's Gaza blockade and its conflict with Hamas is not unique; it exhibits the same shortcoming throughout the report. For example, in criticizing Israel's "separation wall" between Israel and the West Bank, the Mission never once acknowledges Israel's stated justification for the wall—to prevent terrorist attacks from the West Bank into Israel. *Goldstone Report*, *supra* note 4, ¶ 185. *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 I.L.M. 1009, 1079 (July 9, 2004) (separate opinion of Judge Buergenthal). Likewise, in citing Israel's Operation Defensive Shield in 2002, the Mission describes the impact of the operation on Palestinians, but it never mentions the terrorist attacks against Israeli civilians that triggered the operation, including March 27, 2002, suicide bombing of a Passover Seder in Netanya, Israel, in which thirty people were killed and 120 wounded. *Goldstone Report*, *supra* note 4, ¶ 193. *See also* Press Release, Israel Ministry of Foreign Affairs, Passover Suicide Bombing at Park Hotel In Netanya (Mar. 27, 2002), *available at* http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/3/Passover%20suicide%20bombing%20at%20Park%20Hotel%20in%20Netanya; Robert A. Caplen, *Mending the "Fence": How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 743-44 (2005) (noting the U.N. General Assembly's failure to condemn Palestinian terrorist attacks on Israeli civilians).

56. INTELLIGENCE & TERRORISM INFO. CTR. AT THE ISR. INTELLIGENCE & COMMEMORATION CTR., THE SIX MONTHS OF THE LULL ARRANGEMENT 2 (2008) http://www.terrorism-info.org.il/data/pdf/PDF_08_300_2.pdf [hereinafter SIX MONTHS LULL]; *see also* Rory McCarthy, *Israel and Hamas Agree Ceasefire as Strikes Kill Six Palestinian Fighters*, GUARDIAN, June 17, 2008, http://www.guardian.co.uk/world/2008/jun/18/israelandthepalestinians.egypt.

57. *See, e.g., Rockets 'Violated Gaza Ceasefire,'* BBC NEWS, (June 24, 2008, 10:27 PM), http://news.bbc.co.uk/2/hi/middle_east/7470530.stm (two rockets fired into Israel from Gaza); Hisham Abu Taha, *Israel Seals Border with Gaza After Rocket Firing*, ARAB NEWS, Aug. 27, 2008, *available at* 2008 WLNR 18496925 (two homemade rockets from Gaza fired into Israel); *VOA News: Israel Shuts Gaza After Rocket Strike,* U.S. FED. NEWS, Oct. 21, 2008, *available at* 2008 WLNR 20181725 (concerning Gaza militants firing rocket into Israel); Colin Rubenstein, *Obstacles to Israeli-Palestinian Peace*, JAKARTA POST, Sept. 16, 2008, at 7, *available at* 2008 WLNR 17537737 (noting that, in spite of the ceasefire, rockets continue to fall on Israeli towns, "albeit much more sporadically"); SIX MONTHS LULL, *supra* note 56, at 6 (From June 19 to November 4, 2008, a total of 20 rockets and mortar shells were fired from Gaza; three of the rockets and five of mortar shells fell into Israel.). Some observers suggest that Hamas used the ceasefire to build its arsenal. *See* Karin Laub, *Gaza Tunnels: Covert to Overt*, CHI. TRIB., Oct. 10, 2008, *available at* 2008 WLNR 19310959; SIX MONTHS LULL, *supra* note 56, at 20-27.

Gaza border intended to enable abductions of Israelis by Hamas.[58] Hamas, in turn, fired dozens of rockets into Israel.[59]

Thereafter, the ceasefire was never fully restored. Hamas continued to fire rockets and mortars into Israel[60]—deliberately targeting its southern cities[61]—while Israel attempted to stop these attacks by striking at militants[62] and periodically closing its border with Gaza.[63] Although the truce had been repeatedly violated, Israeli officials expressed their desire to extend the six-month ceasefire; however, Hamas refused.[64] The ceasefire expired on December 19, 2008,[65] and

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58. SIX MONTHS LULL, *supra* note 56, at 9; James Hider, *Back in the Line of Fire*: *Rocket War Resumes After Raid on 'Kidnap Plot Tunnel*,' TIMES (LONDON), Nov. 6, 2008, at 44, *available at* 2008 WLNR 21173188; CORDESMAN, *supra* note 46, at 52.

59. Nidal al-Mughrabi, *Israel-Hamas Violence Disrupts Gaza Truce*, REUTERS (Nov. 5, 2008, 5:08 PM), http://www.reuters.com/article/2008/11/05/us-palestinians-israel-violence-idUSTRE4A37B520081105; Diaa Hadid, *Israel Launches First Airstrike on Gaza Since June*, CHARLESTON GAZETTE & DAILY MAIL, Nov. 5, 2008, at 15A, *available at* 2008 WLNR 21144545; Ethan Bronner & Taghreed El-Khodary, *Hamas Rockets Hit Israel, Sending 18 to Hospital*, N.Y. TIMES, Nov. 15, 2008, at A7, *available at* 2008 WLNR 21812926.

60. SIX MONTHS LULL, *supra* note 56, at 9-10; Isabel Kershner & Taghreed El-Khodary, *Airstrike Kills Four Palestinian Militants*, PITTSBURGH POST-GAZETTE, Nov. 17, 2008, at A4, *available at* 2008 WLNR 21928051; Ethan Bronner & Taghreed El-Khodary, *Rocket Barrage into Israel Heightens Gaza Tensions,* GLOBE & MAIL, Nov. 15, 2008, at A21, *available at* 2008 WLNR 21816760.

61. ISRAEL MINISTRY OF FOREIGN AFF., VIOLATIONS OF CALM: ROCKETS STRIKE SDEROT, ASHKELON, WESTERN NEGEV (Dec. 18, 2008) http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Rockets_strike_Sderot_Ashkelon_western_Negev_16-Nov-2008.htm (last visited June 4, 2012); Diaa Hadid, *Israeli Airstrikes Imperil Gaza Truce with Hamas*, SEATTLE TIMES, Nov. 6, 2008, at A11 *available at* 2008 WLNR 21280555; *Gaza*: *Rocket Fire and Israeli Strike Disrupt Cease-Fire*, N.Y. TIMES, Nov. 6, 2008, at A19, *available at* 2008 WLNR 21173891; Diaa Hadid, *Rocket Attacks Escalate Gaza Violence*, DESERET MORNING NEWS, Nov. 15, 2008, at A04 *available at* 2008 WLNR 21837697.

62. SIX MONTH LULL, *supra* note 56, at 9.

63. *Israel Closes Gaza Crossings,* ALJAZEERA.NET, Nov. 18, 2008, *available at* 2008 WLNR 22000226.

64. *Goldstone Report*, *supra* note 4, ¶ 262; Yaakov Kaatz, Khaled Abu Toameh & Herb Keinon, *Hamas Divided Over Continuing Cease-Fire*, JERUSALEM POST, Dec. 15, 2008, at 1, *available at* 2008 WLNR 24598446; Yaakov Kaatz, *Why Israel Prefers the Cease-Fire in Gaza*, JERUSALEM POST, Dec. 15, 2008, at 2, *available at* 2008 WLNR 24598450; Taghreed El-Khodary & Isabel Kershner, *Hamas, Showing Split, May Extend Israel Truce*, N.Y. TIMES, Dec. 15, 2008, at A10, *available at* 2008 WLNR 23990603.

65. Richard Boudreaux, *Hamas Formally Ends Gaza Cease-Fire with Israel,* L.A. TIMES, Dec. 19, 2008, at 15, *available at* 2008 WLNR 24369458; *Hamas Refuses to Renew Gaza Truce*, EVENING STANDARD, Dec. 19, 2008, at 28, *available at* 2008 WLNR 24401760. The U.N. Special Rapporteur for the Palestinian Territories blames Israel for the collapse of the ceasefire in large part because of its November 4, 2008 incursion into Gaza that killed Hamas militants attempting to tunnel into Israel to kidnap Israeli soldiers. Special Rapporteur, *The Palestinian Territories Occupied Since 1967 for Presentation to the Special Session of the Human Rights Council on the Situation in the Gaza Strip*, U.N. HIGH COMMISSIONER FOR HUM. RTS. (Jan. 9, 2009), http://www.unhchr.ch/huricane/huricane.nsf/view01/14B004C3AE39004BC125753900599B5D?opendocument (last visited June 4, 2012) [hereinafter *Special Rapporteur*]; *see* SIX MONTHS LULL, *supra* note 56, at 9; James Hider, *Back in the Line of Fire*: *Rocket War Resumes After Raid on 'Kidnap Plot Tunnel*,' TIMES (LONDON), Nov. 6, 2008, at 44, *available at* 2008 WLNR 21173188; CORDESMAN, *supra* note 46, at 52. The Special Rapporteur's position seemingly assumes that (1) Israel had no right under international law to prevent Hamas from achieving its goal of kidnapping Israeli soldiers,

Hamas responded by firing more rockets into Israel, including into Israeli cities.[66]

Facing increasing domestic pressure from the incessant rocket and mortar attacks,[67] Israel issued warnings of imminent military action.[68] Hamas ignored the warnings, and on December 27, 2008, Israel launched Operation Cast Lead.[69]

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and (2) Hamas rocket and mortar attacks on Israeli civilians were appropriate responses under international law to the attack on its militants.

66. Yaakov Katz, Khaled Abu Toameh & Herb Keinon, *Gazans Fire Dozens of Rockets at Negev Towns as 'Truce' Ends*, JERUSALEM POST, Dec. 21, 2008, at 1, *available at* 2008 WLNR 25000385; *Gaza Rockets Hit Southern Israel*, ALJAZEERA.NET, Dec. 21, 2008, *available at* 2008 WLNR 24485745; Ben Lynfield, *Livni and Netanyahu Vow to Oust Hamas After Gaza Rocket Strikes*, INDEP. (U.K.), Dec. 22, 2008, at 20, *available at* 2008 WLNR 24502385; *Israel Hit by Rocket Fire from Gaza*, ALJAZEERA.NET, Dec. 24, 2008, *available at* 2008 WLNR 24663434; Matt Brown, *Hamas Unleashes Artillery Barrage on Israel*, AUSTL. BROADCASTING CORP., Dec. 25, 2008, *available at* 2008 WLNR 24691971; *Peace in Bethlehem as Hamas Fires on Israel*, AUSTL., Dec. 26, 2008, at 7, *available at* 2008 WLNR 24726004; Isabel Kershner, *Gaza Rocket Attack of Israel Intensifies*, PITTSBURGH POST-GAZETTE, Dec. 25, 2008, at A4, *available at* 2008 WLNR 24695964; Herb Keinon & Yaakov Katz, *IDF Poised for Limited Gaza Operation*, JERUSALEM POST, Dec. 26, 2008, at 1, *available at* 2008 WLNR 25046531.

Colonel Desmond Travers of Ireland, a member of the UN fact-finding mission as well as its military advisor, said in an interview subsequent to the issuance of the Mission's report that only two rockets had been fired from Gaza into Israel following the breakdown of the ceasefire on November 4, 2008. *See* Dr. Hanan Chehata, *Exclusive MEMO Interview with Colonel Desmond Travers*—Co-author of the UN's Goldstone Report, MIDDLE E. MONITOR (Feb. 2, 2010), http://www.middleeastmonitor.org.uk/downloads/interviews/interview-with-colonel-desmond-travers.pdf [hereinafter *Colonel Travers Interview*]. Colonel Travers statement is belied by the findings of human rights groups and independent media groups. *See, e.g.*, HUM. RTS. WATCH, ROCKETS FROM GAZA: HARM TO CIVILIANS FROM PALESTINIAN ARMED GROUPS' ROCKET ATTACKS 10 (2009), http://www.hrw.org/node/84868 (stating 203 rockets were fired from the end of the ceasefire to the commencement of Israeli military operations); *Israel Preparing for an Invasion of Gaza*, N.Y. TIMES, Nov. 25, 2008, http://www.nytimes.com/2008/12/25/world/africa/25iht-mideast.3.18922963.html (noting 80 rockets and mortars fired in single day); Isabel Kershner & Taghreed El-Khodary, *Airstrike Kills Four Palestinian Militants*, PITTSBURGH POST-GAZETTE, Nov. 11, 2008, at A4, *available at* 2008 WLNR 21928051 (noting 20 rockets over a weekend); Ethan Bronner & Taghreed El-Khodary, *Rocket Barrage into Israel Heightens Gaza Tensions,* GLOBE & MAIL, Nov. 15, 2008, at A21, *available at* 2008 WLNR 21816760 ("barrage of rockets"). Colonel Travers' statement is also contradicted by statements from Palestinian militant groups and the findings of the Report itself. *See, e.g.*, Ezzedeen Al Qassam Brigades—Information Office, Statements, Nov. 4, 2008-Dec. 18, 2008, http://www.qassam.ps/statements-page6.html (last visited June 4, 2012) (describing numbers and targets of mortars and rockets fired at Israel between November 4 through November 18, 2008); *Goldstone Report*, *supra* note 4, ¶¶ 257-59, 1601 (indicating 212 rockets fired between ceasefire and Israeli military operations).

67. Patrick Martin, *Israelis Question Reasons for Restraint*, GLOBE & MAIL, Dec. 22, 2008, at A11, *available at* 2008 WLNR 24514418; Editorial, *More Rockets from Gaza—Israel Must Protect Its Citizens—But can it do so by Military Action?,* WASH. POST, Dec. 23, 2008, at A16, http://www.washingtonpost.com/wp-dyn/content/article/2008/12/22/AR2008122201844.html; *see also* Khaled Abu Toameh, *Hamas Mocks Israel's Nonresponse to Rocket Attacks*, JERUSALEM POST, Dec. 25, 2008, at 2, *available at* 2008 WLNR 25046493; *Israel Issues an Appeal to Palestinians in Gaza*, N.Y. TIMES, Dec. 26, 2008, at A15, *available at* 2008 WLNR 24747964.

68. Orly Halpern, *Israel Vows Attack If Rockets from Gaza Don't Stop*, GLOBE & MAIL, Dec. 26, 2008, at A1, *available at* 2008 WLNR 24747079; Ashraf Khalil, *Israel Warns of Gaza Action*, CHI. TRIB., Dec. 26, 2008, at 18, *available at* 2008 WLNR 24751030.

69. Yaakov Katz, *225 Killed as Israel Rains Fire on Hamas in Bid to End Kassams*, JERUSALEM POST, Dec. 28, 2008, at 1, *available at* 2008 WLNR 25052442; Todd Venzia, *Hell*

II. THE PROCESS

A. Standards for Fact-Finding Missions

"[T]he United Nations has not provided comprehensive criteria for the guidance of fact-finding missions to be carried out under its auspices."[70] By a 1991 U.N. General Assembly resolution, however, it directed that such investigations be, *inter alia,* "objective" and "impartial."[71] In 1980, the International Law Association issued more complete guidance for international fact-finding missions, known as the Belgrade Rules,[72] which were intended to "curb serious abuses and departures from fundamental norms of due process."[73] While not binding on the Human Rights Council, the rules are certainly instructive, and several of the provisions are particularly relevant to the Human Rights Council's Gaza mission.

With respect to the "Terms of Reference" or "Mandate" for an international fact-finding mission, "[t]he organ of an organization establishing a fact finding mission should set forth objective terms of reference *which do not prejudge the issues to be investigated*."[74] In other words, "[t]he resolution authorizing the mission should not prejudge the mission's work and findings."[75] Moreover, "[t]he fact-finding mission should be composed of persons who are respected for their integrity, *impartiality*, competence and *objectivity*."[76]

Fire Rains on Gaza, N.Y. POST, Dec. 28, 2008, at 4, *available at* 2008 WLNR 25008702.

70. Nigel S. Rodley, *Assessing the Goldstone Report*, 16 GLOBAL GOVERNANCE 191, 191 (2010).

71. G.A. Res. 46/59, U.N. GAOR, 67th Plenary Sess., U.N. Doc. A/RES/46/59, ¶ 3 (Dec. 9, 1991), *available at* http://www.un.org/documents/ga/res/46/a46r059.htm; *see also id.* ¶ 25 ("Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way."). For a brief background of the resolution, *see* Rodley, *supra* note 70, at 201 n.1.

72. Rodley, *supra* note 70, at 191.

73. Thomas Franck, *The Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions,* 75 AM. J. INT'L L. 163, 163 (1981); *see* Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies,* 74 AM. J. INT'L L. 308, 309 (1980) ("if fact-finding is to become more than another chimera, the sponsoring institutions must develop universally applicable minimal standards of due process to control both the way the facts are established and what is done with them afterwards"). Franck and Fairley identified "five key indicators of procedural probity: (1) choice of subject, (2) choice of fact finders, (3) terms of reference, (4) procedures for investigation, and (5) utilization of product." *Id.* at 311.

74. Franck, *supra* note 73, at 163 (emphasis added); *see also* Franck & Fairley, *supra* note 73, at 316.

75. Franck, *supra* note 73, at 163.

76. *Id.* (emphasis added). The International Bar Association and Raoul Wallenberg Institute have published similar guidelines for non-governmental organization (NGO) human rights fact-finding missions, known as the Lund-London Guidelines. The guidelines are similar to the Belgrade Rules. For example, the "terms of reference [that create a fact-finding mission] must not reflect any predetermined conclusions about the situation under investigation." *Guidelines on International Human Rights Fact-Finding Visits and Reports*

As a related matter, the U.N. General Assembly created the Human Rights Council to replace the Commission on Human Rights because of the Commission's "declining credibility and professionalism" brought about by states who sought Commission membership "not to strengthen human rights but to protect themselves against criticism *or to criticize others*."[77] In establishing the Council, the U.N. General Assembly directed that the Council "be guided by the principles of universality, *impartiality*, *objectivity* and *non-selectivity*, constructive international dialogue and cooperation"[78] and that the Council's work be "transparent, *fair* and *impartial*."[79]

The Human Rights Council's Goldstone Mission failed to meet both the minimal standards for international fact-finding as well as its charter mandate for fairness and impartiality.[80]

(The Lund-London Guidelines), RAOUL WALLENBERG INSTITUTE OF HUMAN RIGHTS AND HUMANITARIAN LAW, ¶ 5 (2009), http://www.factfindingguidelines.org/ (last visited June 4, 2012). Furthermore, "[t]he mission's delegation should comprise individuals who are *and are seen to be* unbiased." *Id.* ¶ 8 (emphasis added). In this regard:

> If it transpires during the course of the mission that there is a conflict of interest or other circumstances involving any member of the delegation which might jeopardize their independence and impartiality, *or which might give the appearance that their independence and integrity is compromised*, the leader of the delegation should inform the NGO and that member should desist from participating in a particular meeting, or where necessary from the remainder of the mission.

Id. ¶ 32 (emphasis added).

77. U.N. Secretary-General, *In Larger Freedom, Towards Development, Security, and Human Rights for All: Rep. of the Secretary-General,* ¶ 182, U.N. Doc. A/59/2005 (Mar. 21, 2005) (emphasis added), *available at* http://www.unhcr.org/refworld/pdfid/4a54bbfa0.pdf; *see also* Christine Chinkin, *U.N. Human Rights Council Fact-Finding Missions*: *Lessons from Gaza*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 475, 482 (2010); Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council*: *A Promise to Be Fulfilled*, 7 HUM. RTS. L. REV. 41, 42-43 (2007); Ladan Rahmani-Ocora, *Giving the Emperor Real Clothes*: *The UN Human Rights Council,* 12 GLOBAL GOVERNANCE 15, 16-17 (2006); Anne Bayefsky, *The UN and the Jews*, COMMENTARY, Feb. 2004, at 42, 44-45.

78. G.A. Res. 60/251, ¶ 4, U.N. Doc. A/RES/60/251 (Apr. 3, 2006) (emphasis added).

79. *Id.* ¶ 12 (emphasis added).

80. Chinkin, *supra* note 77, at 484-85; Cotler, *supra* note 47, at 9. The Human Rights Council, like the Commission on Human Rights before it, has "had a long record of unfairness toward Israel. . . . [S]ome two-thirds of its resolutions have been against Israel," while the Council has ignored more serious human rights abuses elsewhere. Ambassador Stuart E. Eizenstat, *International Advocate for Peace Award Acceptance Speech,* 12 CARDOZO J. CONFLICT RESOL. 143, 146 (2010). In short, "it is already clear that the new Council shares all of the pathologies of the old Commission." William W. Burke-White & Abraham Bell, Debate, *Is the United Nations Still Relevant?*, 155 U. PA. L. REV. PENNUMBRA 74, 81 (2006), http://www.pennumbra.com/debates/pdfs/un-full.pdf (Bell, Rebuttal); *see also The Human Rights Council*: *Shortcomings and Prospects for Reform*: *Hearing before the Subcomm. on International Operations and Organizations, Democracy and Human Rights of the S. Comm. on Foreign Relations,* 110th Cong., 3 (2007) (statement of Hon. Kristen Silverberg, Asst. Sec'y, Bureau of International Affairs, Dep't of State); Scannella & Splinter, *supra* note 77, at 61-62; Ved P. Nanda, *The Protection of Human Rights Under International Law*: *Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make a Difference?,* 35 DENV. J. INT'L L. & POL'Y 353, 360 (2007); Ruth Wedgwood, *Zionism and*

B. Goldstone Mission's Terms of Reference/Mandate

The Council unquestionably prejudged the issues to be investigated: in spite of the deliberate Hamas rocket and mortar attacks against the Israeli civilian population that triggered the Gaza Conflict and the manner in which Hamas and its allies used Gaza's civilian population to shield their military operations, the resolution establishing the fact-finding mission limited the inquiry to Israeli violations of international law.[81]

By the same resolution, and well before the fact-finding mission was appointed, the Human Rights Council condemned Israel alone for its "massive violations of human rights" of Palestinian civilians.[82] Even prior to the ceasefire, the U.N. Special Rapporteur for the Palestinian Territories accused Israel of committing war crimes during its Gaza campaign.[83] And, a month before the Goldstone Mission submitted its findings, a report of the U.N. High Commissioner for Human Rights on the implementation of the Council's resolution determined that Israel breached international law during the conflict.[84] To his credit, Justice Goldstone expanded the scope of the fact-finding mission to include all "international human rights and humanitarian law violations related to recent

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Racism, Again, WORLD AFF., Spring 2009, at 84, 85.

81. H.R.C. Res. S-9/1, *supra* note 3, ¶ 14. By the resolution, the Human Rights Council

> dispatch[ed] an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law *by the occupying Power, Israel*, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission[.]

Id. (emphasis added). *See generally* Franck & Fairley, *supra* note 73, at 312 ("[N]ormativeness can be demonstrated only by showing that there exists a generalized practice, which, in turn, requires that all allegations of violations be examined factually and that violators be routinely, not selectively, held to account.").

82. H.R.C. Res. S-9/1, *supra* note 3, ¶ 1. *See Legal Memorandum in Opposition to Erroneous Allegations and Flawed Conclusions Contained in the UN Human Rights Council's Goldstone Report*, EUROPEAN CENTRE FOR LAW & JUSTICE, 13 (Jan. 26, 2010) http://www.eclj.org/pdf/ECLJ_MemoonGoldstoneReport_20100126.pdf [hereinafter *ECLJ Memo*] ("[T]he 'facts' to be ascertained by the fact-finding Mission were asserted as already established from the outset").

83. *Special Rapporteur*, *supra* note 65, ¶¶ 9-11.

84. U.N. High Comm'r for Human Rights, *Human Rights Situation in Palestine and other Occupied Arab Territories: Rep. of the United Nations High Commissioner for Human Rights,* U.N. Doc. A/HRC12/37 (Aug. 19, 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.37.pdf.

conflict in the Gaza Strip."[85] However, except for Hamas's rocket and mortar attacks against Israel, the Mission ignored breaches of international humanitarian law by Palestinian militants during their combat operations against Israel.[86]

The Mission's biased mandate, typical of others the Council has issued with respect to the Israeli-Arab conflicts, exposes the Council's inability to address the Israeli-Palestinian conflict in an objective and rational manner. For example, following the Israeli-Hezbollah conflict of 2006, the Council condemned only Israel for violating international law,[87] in spite of the fact that Hezbollah's attack on Israel triggered the hostilities[88] and Hezbollah fired between 4,000 and 5,000 rockets (many directed at civilian population centers) into Israel.[89] By the same resolution, the Council limited the scope of its fact-finding mission to alleged Israeli war crimes.[90] In this case, the Mission limited its inquiry to Israel's conduct during the conflict.[91] Similarly, in 2010, following the Is-

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85. Press Release, Human Rights Council, Richard J. Goldstone Appointed to Lead Human Rights Council Fact-Finding Mission on Gaza Conflict, U.N. Press Release (April 9, 2009) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E (last visited June 4, 2012).

86. *See infra* notes 349-360 and accompanying text.

87. Human Rights Council Res. S-2/1, The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations, Special Sess., ¶¶ 1-3 (Aug. 11, 2006) [hereinafter Grave Situation], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/index.htm (last visited June 4, 2012); *see also* Yvonne Terlingen, *The Human Rights Council*: *A New Era in UN Human Rights Work?*, 21 ETHICS & INT'L AFF. J. 167, 174 (2007).

88. On July 16, 2006, Hezbollah fighters ambushed an IDF convoy in Israel, killing eight soldiers and kidnapping two others. Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 ANN. SURV. INT'L & COMP. L. 61, 62 (2008).

89. DR. REUVEN ERLICH (LT. COL. RET.), INTELLIGENCE & TERRORISM INFO. CTR., HEZBOLLAH'S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS 11 (Overview), 1-34 (Part III) (Nov. 2006), http://www.jewishvirtuallibrary.org/jsource/arabs/hizreport.html; SHARP ET. AL., *supra* note 40, at 10-11. Hezbollah's leader, Hassan Nasrallah, publicly stated that Israeli population areas were the intended targets of Hezbollah rockets and missiles. Erlich, *supra*, at 13-14, 27-29, app. 2(iii) (Part III).

90. Grave Situation, *supra* note 87, ,¶ 7: The Council decided

> to establish urgently and immediately dispatch a high-level commission of inquiry comprising eminent experts on human rights law and international humanitarian law, and including the possibility of inviting the relevant United Nations special procedures to be nominated to the Commission: (*a*) To investigate the systematic targeting and killings of civilians *by Israel* in Lebanon; (*b*) To examine the types of weapons used *by Israel* and their conformity with international law; (*c*) To assess the extent and deadly impact of *Israeli attacks* on human life, property, critical infrastructure and the environment.

Id. (emphasis added).

91. Rep. of the Comm'n of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, 1014th Meeting, ¶¶ 5-7, U.N. Doc A/HRC/3/2 (Mar. 4, 1969) http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/CI-Lebanon/index.htm (last visited June 4, 2012). Specifically, the mission noted:

> A fundamental point in relation to the conflict and the Commission's man-

raeli interdiction of a ship attempting to blockade the Gaza Strip that resulted in the loss of life, the Council adopted a resolution that focused only on Israel's alleged transgressions of international law and attempted to circumscribe its fact-finding mission to determining Israeli wrongdoing.[92]

In this regard, the Human Rights Council is no different than its predecessor, the U.N. Commission on Human Rights, which was equally unable to deal objectively with the Israeli-Arab conflict. For example, in 2002, in the aftermath Palestinian terrorist attacks inside Israel and Israel's launching of Operation Defensive Shield in the West Bank, the U.N. Commission on Human Rights enacted a resolution that exclusively mentioned alleged Israeli violations of international law. It completely ignored the Palestinian terrorist attacks leading to the operation and the actions of Palestinian militants that contributed to—if not caused—Palestinian civilian casualties.[93] As early as 1969, the Commission evidenced bias in dealing with Israel when it adopted a resolution condemning Israel alone for actions in the Occupied Territories while at the

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> date as defined by the Council is the conduct of Hezbollah. The Commission considers that any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved. Thus an inquiry into the conformity with international humanitarian law of the specific acts of the Israel Defense Forces (IDF) in Lebanon requires that account also be taken of the conduct of the opponent.

Id. ¶ 6. Nevertheless, the Mission refused to consider Hezbollah's conduct because "[t]o do so would exceed the Commission's interpretative function and would be to usurp the Council's powers." *Id.* ¶ 7; *see also* James G. Stewart, *The UN Commission of Inquiry on Lebanon*, 5 J. INT'L CRIM. JUST. 1039, 1041 (2007).

92. Human Rights Council Res. 14/1, The Grave Attacks by Israeli Forces Against the Humanitarian Boat Convoy, 14th Sess., May 31–June 18, 2010, ¶¶ 1, 8, U.N. Doc. A/HRC/RES/14-1 (June 23, 2010), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/RES.14.1_AEV.pdf. The Council decided "to dispatch an independent, international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the *Israeli attacks* on the flotilla of ships carrying humanitarian assistance." *Id.* ¶ 8 (emphasis added). By contrast, the U.N. Secretary-General dispatched a fact-finding mission that impartially considered both sides of the incident. *Palmer Report*, *supra* note 46.

93. Comm'n on Human Rights Res. 2002/1, Situation of Human Rights in the Occupied Palestinian Territory, 58th Sess., Mar. 18-Apr. 26, 2002, U.N. Doc. E/CN.4/RES/2002/1 (Apr. 5, 2002), *available at* http://domino.un.org/unispal.nsf/0/f9a0f66f68-83325f85256b9c006b96cb?OpenDocument. The resolution requested that "the High Commissioner for Human Rights to head a visiting mission that would travel immediately to the area and return expeditiously to submit its findings and recommendations." *Id.* ¶ 3. A subsequent Human Rights Commission resolution likewise dealt solely with claims of Israeli violations of international law. Comm'n on Human Rights Res. 2002/8, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, 58th Sess., Mar. 18-Apr. 26, 2002, U.N. Doc. E/2002/23-E/CN.4/2002/200 (Apr. 15, 2002), *available at* http://unispal.un.org/UNISPAL.NSF/0/DF9CAA26E9BEB10485256BAB00666603. *See generally* Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?* 16 EMORY INT'L L. REV. 445, 502-03 (2002); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror*: *Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 753-57 (2009).

same time establishing a Working Group of Experts "[t]o investigate allegations concerning Israel's violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949."[94]

C. Goldstone Mission's Fact-Finders

In addition to working under a predisposed mandate,[95] the Mission's members also prejudged the conclusions of the investigation and did not enter the inquiry with open minds.[96] Both Justice Goldstone and a second Mission member, Ms. Hina Jilani, signed a letter a month before their appointment stating that "there is an important case to be made for an international investigation of gross violations of the laws of war, committed by all parties to the Gaza conflict[,]" and that the events in Gaza "shocked [them] to the core."[97]

Another member of the Mission, Professor Christine Chinkin, was more direct. On January 11, 2009, before implementation of the ceasefire, Professor Chinkin signed a letter published in the *Sunday Times*, asserting that Israel had violated international humanitarian and human rights law in its "invasion and bombardment of Gaza."[98] At the very least, Professor Chinkin's letter gave the appearance of a bias against Israel and a predisposition to finding that it was guilty of war crimes.[99]

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94. Comm'n on Human Rights, Res. 6(XXV), Question of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East, 25th Sess., ¶ 4, U.N. Doc. E/CN.4/RES/6(XXV), (Mar. 4, 1969), http://unispal.un.org/UNISPAL.NSF/0/A229BE99D7F567928025646C005B5FB9 (last visited June 4, 2012). *See* Theodore C. van Boven, *Fact-Finding in the Field of Human Rights,* 3 ISRAEL Y.B. HUM. RTS. 93, 95 (1973).

95. *See supra* notes 81-86 and accompanying text. *See also* Rodley, *supra* note 70, at 194 ("Few such resolutions contained as arrantly prejudicial language as that setting up the Goldstone Mission.").

96. Eizenstat, *supra* note 80, at 146.

97. *Gaza*: *World's Leading Investigators Call for War Crimes Inquiry*, AMNESTY INT'L UK (Mar. 16, 2009), http://www.amnesty.org.uk/news_details.asp?NewsID=18109.

98. Letter from Ian Brownlie et al., *Israel's Bombardment of Gaza Is Not Self-Defence—It's a War Crime*, SUN. TIMES, Jan. 11, 2009; *see also* Dershowitz, *supra* note 15, at 4; *UN Watch Request to Disqualify Prof. Christine Chinkin from UN Fact Finding Mission on the Gaza Conflict*, UN WATCH (Aug. 20, 2009), http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/2207UN_Watch_Request_to_Disqualify_Christine_Chinkin_from_UN_Goldstone_Mission_on_Gaza,_20_August_2009.pdf; *ECLJ Memo*, *supra* note 82, at 31-32.

99. *See* Dershowitz, *supra* note 15, at 4-5; Rodley, *supra* note 70, at 192; *see also* CHATHAM HOUSE, REPORT OF AN EXPERT MEETING WHICH ASSESSED PROCEDURAL CRITICISMS MADE OF THE UN FACT-FINDING MISSION ON THE GAZA CONFLICT (THE GOLDSTONE REPORT) 7 (2009), http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il271109summary.pdf (while expressing "complete confidence in the personal integrity of Professor Chinkin," the report notes that "fact-finding missions should avoid any perception of bias."). Professor Chinkin herself recognizes the need for fact-finders who do not appear to be biased. Chinkin, *supra* note 77, at 489 ("A significant issue of fact-finding is that of participation. Mission members should be unbiased *and seen to be so* . . . .")

The fourth Mission member, Irish Colonel Desmond Travers, joined in the letter signed by Justice Goldstone and Hina Jilani.[100] More revealing, however was an interview Colonel Travers gave after issuance of the Goldstone Report. In it, he intimated a certain degree of animus against Israel "because so many Irish soldiers [peacekeepers in southern Lebanon] had been killed by Israelis, (some too by Palestinians and/or their Lebanese cohorts), with a significant number who were taken out deliberately and shot."[101] Moreover, when asked about British military officers who defended Israeli conduct during the conflict, Travers' answer was tinged with anti-Semitism: "*Britain's foreign policy interests in the Middle East seem to be influenced strongly by Jewish lobbyists*. I find it interesting that the two former military officers quoted in the media in defence of Israeli military actions in Gaza are both British."[102] Travers also blamed *rabbis* for inciting Israeli troops to commit war crimes. When he was asked whether Israeli politicians and military leaders were culpable of war crimes, he responded in part:

> Do you realise now that *there is a very fervid Rabbinate in the military?* For the first time ever the Rabbis travelled with the combat troops and this is a new and troubling development. It is also reported that the Rabbis in the Israeli Defence Forces have on occasion challenged the authority of military commanders. This must surely be a development that has negative consequences for good order and respect for authority in the Israeli army.[103]

As a career soldier, Colonel Travers certainly knows that many nations (including his own) deploy chaplains to accompany combat troops in time of war.[104] One can only conclude that Colo-

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(emphasis added).

100. *See supra* note 97 and accompanying text.

101. *Colonel Travers Interview*, *supra* note 66.

102. *Id.* (emphasis in the original).

103. *Id.* (emphasis in the original).

104. For example, chaplains have served with the troops in the United States Army since the Revolutionary War. DEP'T OF THE ARMY, FIELD MANUAL 1-05: RELIGIOUS SUPPORT ¶ 1-7 (2003), http://www.globalsecurity.org/military/library/policy/army/fm/1-05/fm1-05.pdf. Today, Army chaplains are located at every echelon of command above battalion. *Id.* ¶ 1-19. Military chaplains and their assistants constitute Unit Ministry Teams (UMTs), which "*are assigned to units whose primary mission is warfighting*. *The UMT deploys with its unit and provides religious support for all units in the commander's area of responsibility during each stage of force projection*." *Id.* ¶ 1-27 (emphasis added). The Irish Army's chaplains similarly support Irish soldiers during deployments. *Overseas Service*, THE CHAPLAINCY SERV., http://www.militarychaplaincy.ie/overseas/index.html (last visited June 4, 2012). British Army chaplains also serve "wherever British soldiers have been sent. Korea, Suez, Aden,

nel Travers believes—without any evidence to substantiate it—that Jewish chaplains have an insidious effect on soldiers in combat. Ironically, while insinuating that rabbis were somehow responsible for instigating war crimes, Colonel Travers suggested that any assertions that Hamas used medical vehicles and religious facilities for military purposes constituted negative religious stereotypes and slurs.[105]

Whether Colonel Travers's beliefs were known before he served on the Mission is not known, but he did not come into the investigation as an impartial fact-finder.

D. Israel's Role in the Fact-Finding Mission

Israel refused to cooperate with the Goldstone Mission,[106] asserting that the Human Rights Council's resolution establishing the Mission was "inflammatory and prejudicial" and constituted a "one-sided mandate."[107] Even given the bias of the Mission's original mandate and composition, however, Israel seemingly blundered by declining to play a role in the inquiry.[108] By refusing to participate in the investigation, Israel permitted the Mission to discount Israel's evidence of Hamas's tactical doctrine and operations, which played into Hamas's strategic narrative of an "Israeli 'holocaust' in Gaza."[109] While the Mission might have ultimately

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Northern Ireland, The Falklands, Iraq, Sierra Leone, the former Yugoslavia and Afghanistan." *Army Chaplains' History*, BRITISH ARMY WEBSITE, http://www.army.mod.uk/chaplains/23350.aspx (last visited June 4, 2012). The Australian Army also has a similar system of religious support for its soldiers. *Chaplain: Defence Jobs*, DEF. FORCE RECRUITING (AUSTL.), http://www.defencejobs.gov.au/army/Jobs/Chaplain/?entryTypeId=5 (last visited June 4, 2012).

105. *Colonel Travers Interview*, *supra* note 66; *see* Alan Dershowitz, *An Anti-Israeli Extremist Seeks Revenge Through the Goldstone Report*, HUFFINGTON POST (Feb. 12, 2010, 12:02PM) http://www.huffingtonpost.com/alan-dershowitz/an-anti-israel-extremist_b_460187.html.

106. *Goldstone Report*, *supra* note 4, ¶¶ 8, 144, 162, 1179.

107. ISRAEL MINISTRY OF FOREIGN AFF., LETTER FROM AMBASSADOR LESHNO-YAAR TO GOLDSTONE, http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Issues/Letter_from_Israel_Ambassador_Leshno-Yaar_to_Goldstone_2-Jul-2009.htm (last visited June 4, 2012).

108. *Cf.* Muravchik, *supra* note 15 ("In sum, Goldstone's mission began with a mandate that categorically prejudged the issues, and a panel made up of four individuals who had done likewise. The outcome of its deliberations was thus predetermined from the outset. For this reason, Israel declined to cooperate.").

109. *See* MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT 259 (2010); Yoram Cohen & Jeffrey White, *Hamas in Combat: The Military Performance of the Palestinian Islamic Resistance Movement*, POL'Y FOCUS #97, WASH. INST. FOR NEAR EAST POL'Y 18 (2009), http://www.voltairenet.org/IMG/pdf/Hamas_in_Combat.pdf.; Lieutenant Colonel Michael D. Snyder, *Information Strategies Against a Hybrid Threat*: *What Recent Experiences of Israel Versus Hezbollah/Hamas Tell the US Army, in* BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD 103, 106 (Lieutenant Colonel Scott C. Farquhar, ed., 2009), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA498599. Dr.

ignored evidence offered by Israel,[110] Israel would at least have had the opportunity to set out its case on the world stage.

Compounding the error was Israel's decision to bar independent foreign media from the Gaza Strip during the conflict. Independent press reporters who were able to gain access to the Gaza Strip often supported Israel's contention that Hamas militants used the civilian population areas for their military operations.[111] Greater press access might have lent credibility to Israel's insistence that its forces did not violate the laws of war, and the absence of multiple media outlets for its information likely cost Israel the "information war."[112]

III. THE MISSION'S FINDINGS AND CONCLUSIONS

Operation Cast Lead began with an air campaign against Hamas targets in the Gaza Strip.[113] A week later, on January 3,

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Barry A. Feinstein, *Proportionality and War Crimes in Gaza under the Law of Armed Conflict.*, 36 RUTGERS L. REC. 224, 236 (2009).

110. There is reason to believe that it would. For example, the Mission generally discounted statements from Israeli sources unless the information was adverse to Israel. Muravchik, *supra* note 15. Colonel Travers refused to accept as probative Israeli photographic evidence of the use of mosques to store military equipment. *Colonel Travers Interview*, *supra* note 66.

111. *See, e.g.,* Ulrike Putz, *"Who Has Won Here?",* SPIEGEL ONLINE (Jan. 23, 2009, 4:30PM), http://www.spiegel.de/international/world/0,1518,603203,00.html (describing Hamas' use of civilian homes for military purposes); Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan. 19, 2009, at A1, http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html (describing Hamas' strategy of firing rockets from between houses); Dominic Lawson, *No, We Are Not All Hamas Now,* TIMES ONLINE, Jan. 11, 2009, http://mideasttruth.com/forum/viewtopic.php?t=8854 (describing Hamas' use of civilians as shields).

112. *See* Editorial, *Misguided Media Ban*, JERUSALEM POST, Feb. 27, 2009, *available at* 2009 WLNR 3996994:

> [Israel] insisted on keeping all Israel-based foreign journalists out of the conflict arena, thereby ensuring that the fighting would instead be reported by Palestinian stringers. Whatever concerns Israel may have had about the balances and biases of foreign reporters, it is impossible to imagine that they would be more hostile than their Palestinian counterparts.
>
> Israel should have learned from the bitter precedent of Jenin in 2002, during Operation Defensive Shield—when a false narrative of Israeli massacres and mass killings was allowed to fester—that a ban on the foreign press has a boomerang effect. To paraphrase a familiar quotation, the worst lies speed rapidly around the world to stand uncontested, and it's far too late by the time truth is allowed to get its boots on.

Israel was concerned about operational security. During the war with Hezbollah, "Hezbollah had the ability to anticipate Israeli actions simply by listening to the media." Snyder, *supra* note 109, at 124. Perhaps embedded reporters with restrictions on "real-time" reporting might have been a workable compromise between security and media access.

113. Matt M. Matthews, *Hard Lessons Learned*: *A Comparison of the 2006 Hezbollah-Israeli War and Operation CAST LEAD*, *in* BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD 27 (Lieutenant Colonel Scott C. Farquhar, ed., 2009).

2009, the IDF commenced ground operations in Gaza,[114] which lasted until a ceasefire was declared on January 18.[115] According to Israel, Operation Cast Lead had two objectives: (1) to stop the bombardment of Israeli civilians by destroying Hamas's mortar and rocket launching apparatus and infrastructure; and (2) to reduce the ability of Hamas and other terrorist organizations in Gaza to perpetrate future attacks against the civilian population in Israel.[116]

The Goldstone Mission determined that Israel had, in fact, another objective for its operation: to target the people of Gaza.[117] Considering its position to "be firmly based in fact,"[118] the Mission asserted that Israel pursued a "deliberate policy of disproportionate force aimed not at the enemy but at the 'supporting infrastructure.' In practice, this appears to have meant the civilian population."[119] Without seriously taking into consideration how Hamas's tactics affected the operational environment,[120] the Mission condemned Israel for its "repeated failure to distinguish between combatants and civilians," which it deemed to be "the result of deliberate guidance issued to soldiers."[121] The Mission concluded that "[w]hatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations."[122]

The Mission predicated its conclusions upon the number of civilian casualties inflicted during the conflict,[123] statements by current and former Israeli officials about Israeli military objectives in

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114. ISRAEL MINISTRY OF FOREIGN AFF., OPERATION CAST LEAD EXPANDED (Jan. 3, 2009), http://www.mfa.gov.il/MFA/Government/Communiques/2009/Second_stage_Operation_Cast_Lead_begins_3-Jan-2009.htm ("The objective of this phase of the operation is to intensify the heavy blow already dealt to Hamas and to take control of area from where most of the rocket attacks against Israel originate, in order to reduce those rocket attacks.") (last visited June 4, 2012).

115. Isabel Kershner & Michael Slackman, *Cease-Fire Holding as Israelis Pull out of Gaza,* INT'L HERALD TRIB., Jan. 20, 2009, at 5, *available at* 2009 WLNR 1106907.

116. ISRAEL MINISTRY OF FOREIGN AFF., GAZA FACTS—THE OPERATION AGAINST HAMAS IN GAZA: THE ISRAELI PERSPECTIVE http://www.mfa.gov.il/GazaFacts (last visited June 4, 2012).

117. *Goldstone Conclusions*, *supra* note 1, ¶¶ 1877, 1883, 1890, 1892; *Goldstone Report*, *supra* note 4, ¶ 1215.

118. *Goldstone Conclusions*, *supra* note 1, ¶ 1884.

119. *Id.* ¶ 1886.

120. *See infra* note 310 and accompanying text.

121. *Goldstone Conclusions*, *supra* note 1, ¶ 1889.

122. *Id.* ¶ 1895.

123. *Goldstone Report*, *supra* note 4, ¶ 362; *Goldstone Conclusions, supra* note 1, ¶ 1885.

Gaza and other conflicts,[124] and Israel's advanced targeting technology and proficiency.[125]

A. Number of Civilian Deaths

The Mission relied upon what it described as disproportionate deaths among civilians as indicia of Israeli intent to target civilians and their infrastructure. No consensus exists, however, about the total number killed in Gaza during the conflict; figures range from an Israeli-asserted 1,166[126] to about 1,400 claimed by Israeli and Palestinian NGOs.[127] The percentage of civilian casualties is also unclear: Israeli claims 60% of those killed were combatants,[128] while NGO figures range from 16% to 41%.[129] The Mission stated that, because it did not investigate all incidents involving the loss of life, it "[would] not make findings regarding the overall number of persons killed nor regarding the percentage of civilians among those killed."[130] Nevertheless, the Mission expressed concern about the "exceedingly high percentage of civilians among those killed,"[131] and—without explanation—accepted the highest casualty figures in its conclusion.[132]

Critics of Israel's Gaza campaign use hyperbolic adjectives such as "severe,"[133] "countless,"[134] "terrible,"[135] "catastrophic,"[136] "vastly disproportionate,"[137] and even "*unprecedented*,"[138] to describe the civilian casualties. *Really?* The Russians killed more than 25,000

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124. *Goldstone Report*, *supra* note 4, ¶¶ 63-64, 1192-1212, 1215-16; *Goldstone Conclusions*, *supra* note 1, ¶¶ 1877, 1894.

125. *Goldstone Report*, *supra* note 4, ¶¶ 61, 576-78, 1185-91; *Goldstone Conclusions*, *supra* note 1, ¶ 1893.

126. *Goldstone Report*, *supra* note 4, ¶ 359.

127. *Id.* ¶¶ 352-58.

128. *Id.* ¶¶ 354-59.

129. *Id.* ¶¶ 353-56.

130. *Id.* ¶ 360.

131. *Id.* ¶ 362.

132. *See generally Goldstone Conclusions*, *supra* note 1, ¶¶ 1885-91.

133. PoKempner, *supra* note 15, at 145.

134. Sterio, *supra* note 15, at 248.

135. *The True Picture of the Brutal Gaza Invasion Comes into Focus*, Editorial, INDEP., Oct. 23, 2010, http://www.independent.co.uk/opinion/leading-articles/leading-article-the-true-picture-of-the-brutal-gaza-invasion-comes-into-focus-2114267.html.

136. George E. Bisharat et al., *Israel's Invasion of Gaza in International Law,* 38 DENV. J. INT'L L. & POL'Y 41, 98 (2009).

137. NAT'L LAWYERS GUILD DELEGATION TO GAZA, ONSLAUGHT: ISRAEL'S ATTACK ON GAZA AND THE RULE OF LAW 35 (2009) [hereinafter ONSLAUGHT].

138. Reem Salahi, *Israel's War Crimes*: *A First Hand Account of Israel's Attacks on Palestinian Civilians and Civilian Infrastructure,* 36 RUTGERS L. REC. 201, 221 (2009) (emphasis added); *see also* AL MEZAN CTR. FOR HUM. RTS., CAST LEAD OFFENSIVE IN NUMBERS 2 (2009) (emphasis added), *available at* http://www.vho.org/aaargh/fran/livres9/castlead.pdf (describing the military offensuve as an "unprecedented in terms of the scale of grave and systematic violations of the rules of international humanitarian law").

Chechen civilians in the 1994 Battle of Grozny over a similar period of time;[139] Serb militias killed more than 8,000 Bosnian Muslims at Srebrenica in the month of July 1995.[140] In 1985, the Soviet Union murdered—in one day—more than 1,000 Afghan men, women, and children in raids against civilians supporting Islamic militants.[141] The U.S. Army killed between 500 and 1500 persons, many of them civilians, in a mere 17-hour span in a 1993 battle in Mogadishu, Somalia;[142] NATO killed at least 500 (the Serbs claim 1,200-5,700) civilians in seven weeks of bombing during the 1999 Kosovo conflict.[143] Iraq killed about 5,000 Kurds in merely twenty bombing missions against the city of Halabjah in March 1988.[144] In less than three weeks in 1982, the Syrians massacred between 5,000 and 25,000 persons in the city of Hama in its battle with the

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139. William G. Rosenau, *"Every Room Is a New Battle": The Lessons of Modern Urban Warfare*, 20 STUDIES IN CONFLICT & TERRORISM 371, 382 (1997). "Estimates of [total] deaths [in the Russo-Chechen War of 1994-1996] range from around 20,000 to 120,000; estimates by human rights groups tend to range up to 50,000." Johanna Nichols, *The Chechen Refugees*, 18 BERKELEY J. INT'L L. 241, 244 (2000); *see also* Svante E. Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51 EUR.-ASIA STUD. 85, 88 (1999) (noting Russians indiscriminate bombing of civilian areas); Brian Glyn Williams, *The Russo-Chechen War: A Threat to Stability in the Middle East and Eurasia?*, MIDDLE E. POL'Y, Mar. 31, 2001, at 128, *available at* 2001 WLNR 4516461; *The War in Chechnya: Russia's Conduct, the Humanitarian Crisis, and United States Policy before the S. Comm. on For. Rels,* 106th Cong. 11, 12 (2000) (statement of Mr. Peter Bouckaert, Investigator, Human Rights Watch).

140. David Gibbs, *The Srebrenica Massacre, After Fifteen Years*, FOREIGN POL'Y IN FOCUS, (July 10, 2010), http://www.fpif.org/articles/the_srebrenica_massacre_after_fifteen_years; Marko Attila Hoare, *Genocide in the Former Yugoslavia from the 1940s to the 1990s* 14 (Kingston Univ. Working Papers Series, No. 4, 2007), http://eprints.kingston.ac.uk/5536/1/Hoare-M-5536.pdf; Prosecutor v. Popovic, Case No. IT-05-88-T, Judgment, ¶ 664 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010).

141. Barry Renfrew, *Raids in Afghanistan Soviets Purportedly Kill 1,000*, PHILA. INQ., May 15, 1985, at A20, *available at* 1985 WLNR 230867. In its war against Mujahedeen *guerrillas*, the Soviets were indiscriminate in the use of force, leveling villages and cities, destroying food and water supplies, employing chemical weapons, and causing millions of civilians to flee. THOMAS T. HAMMOND, RED FLAG OVER AFGHANISTAN 160-62 (1984); *Mass Killings of Afghans Confirmed*, BOSTON GLOBE, May 15, 1985, at 1, *available at* 1985 WLNR 131769. By some estimates, over one and a half million people died. Svante E. Cornell, *The War Against Terrorism and the Conflict in Chechnya: A Case for Distinction*, 27 FLETCHER F. WORLD AFF. 167, 180 (2003).

142. Dr. RICHARD W. STEWART, CTR. FOR MILITARY HISTORY, THE UNITED STATES ARMY IN SOMALIA 1992-1994, 23 (2006), http://www.history.army.mil/brochures/Somalia/Somalia.htm. U.S. Ambassador to Somalia, Robert Oakley, estimated between 1500 and 2000 Somalis were killed during the battle. The Ambassador noted that "women and children were being used as shields and [in] some cases women and children were actually firing weapons, and were coming [at American troops] from all sides." Interview by PBS Frontline with Ambassador Robert Oakley, U.S. Ambassador to Somalia, http://www.pbs.org/wgbh/pages/frontline/shows/ambush/interviews/oakley.html.

143. ERIC V. LARSON & BOGDAN SAVYCH, MISFORTUNES OF WAR: PRESS AND PUBLIC REACTIONS TO CIVILIAN DEATHS IN WARTIME 64-65 (2006), http://www.rand.org/pubs/monographs/2006/RAND_MG441.pdf.

144. S. Taheri Shemirani, *The War of the Cities*, *in* THE IRAN-IRAQ WAR: THE POLITICS OF AGGRESSION 32, 33 (Farhang Rajaee, ed., 1993); *Whatever Happened to the Iraqi Kurds?*, HUM. RTS. WATCH (Mar. 10, 1991), http://www.unhcr.org/refworld/country,,HRW,,IRN,,47fdfb1b0,0.html.

Muslim Brotherhood[145] and the U.N. has estimated that it has killed more than 9,000 civilians during the ongoing uprising.[146] Coalition forces killed between 1,000 and 3,500 civilians in just over a month of bombing during the First Gulf War.[147] Depending on the source, the United States is purported to have killed between 1,700 and 45,000 civilians during its invasion of Iraq in 2003.[148] A U.N.-backed, Congolese military operation killed 1,400 civilians between January and September 2009.[149] And over the span of just 100 days in 1994, "the Rwandan government, assisted by tens of thousands of soldiers, militia, and ordinary citizens,"[150] most armed with primitive weapons,[151] killed between 500,000 and 800,000 Tutsis.[152] Ironically, at the same time Justice Goldstone and his Mission were investigating Israeli operations in Gaza on behalf of the Human Rights Council, the Council commended the Government of Sri Lanka for its defeat of the Tamil Tigers,[153] a

145. Seth Krummrich, Shaping Jihadism: How Syria Molded the Muslim Brotherhood (Mar. 2007) (Master's thesis approved for public distribution, Naval Postgraduate School), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA467079&Location=U2&doc=GetTRDoc.pdf (between 5,000 and 25,000 killed); *Massacre of Hama (February 1982): Genocide and a Crime Against Humanity*, SYRIAN HUM. RTS. COMM. (Feb. 2, 2006), http://www.shrc.org/data/aspx/d5/2535.aspx (over 25,000 killed); Marco Vicenzino, *Syria's Existential Crisis*, GLOBAL VIEWS: VIEWPOINTS, Oct. 26, 2005 (placing number of deaths at 10,000).

146. Louis Charbonneau & Michele Nichols, *UPDATE 3—UN Raises Civilian Death Toll to Over 9,000,* REUTERS, (Mar. 27, 2012, 1:17PM) http://www.reuters.com/article/2012/03/27/syria-un-idUSL2E8ERNGB20120327.

147. LARSON & SAVYCH, *supra* note 143, at 21-22.

148. *Id.* at 159-61; *see also* Colin H. Kahl, *In the Crossfire or the Crosshairs*: *Norms, Civilian Casualties, and U.S. Conduct in Iraq*, 32 INT'L SECURITY 7, 11 (2007); Peter Ford, *Surveys Point to High Civilian Death Toll in Iraq*, CHRISTIAN SCIENCE MONITOR, May 22, 2003, at 1, http://www.csmonitor.com/2003/0522/p01s02-woiq.html.

149. Stephanie McCrummen, *U.N. Urged to Cease Aid to Congo Regime Accused of Horrific Acts*, WASH. POST, Dec. 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/14/AR2009121401383.html. At least one NGO estimates that more than 5.4 million people have died as a result of the ongoing conflict in the Congo since 1998, about 45,000 every month. *Measuring Mortality in the Democratic Republic of Congo*, INT'L RESCUE COMM. (2007), http://www.rescue.org/sites/default/files/resource-file/IRC_DRCMortalityFacts.pdf.

150. *Rwanda: Tribunal Risks Supporting 'Victor's Justice,'* HUM. RTS. WATCH (June 1, 2009), http://www.hrw.org/en/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice.

151. Philip Verwimp, *Machetes and Firearms*: *The Organization of Massacres in Rwanda*, 43 J. PEACE RES. 5, 11 (2006) ("Most victims were hacked to death with traditional weapons such as machetes or clubs."), http://jpr.sagepub.com/content/43/1/5.full.pdf+html.

152. *Id.* at 10 (between 500,000 and 8,000,000 killed); *see also Rwanda*: *How the Genocide Happened*, BBC NEWS (Dec. 18, 2008, 9:53PM), http://news.bbc.co.uk/2/hi/1288230.stm (800,000 killed).

153. Human Rights Council Res. S-11/1, Assistance to Sri Lanka in the Promotion and Protection of Human Rights, 11th Sess., May 26, 2009, A/HRC/S-11/2 (May 27, 2009) (the Human Rights Council "*Welcom[es]* the conclusion of hostilities and the liberation by the Government of Sri Lanka of tens of thousands of its citizens that were kept by the [Liberation Tigers of Tamil Eelam] against their will as hostages, as well as the efforts by the Government to ensure the safety and security for all Sri Lankans and bringing permanent peace to the country . . . ."). *See* Louise Arbour, *Opinion*: *Sri Lanka Still Demands Justice*,

conflict costing the lives of more than 20,000 Tamil civilians during the government's final assault in the campaign.[154]

Thus, assume for the sake of argument that the Mission is correct: Israel deliberately targeted civilians. What is Israel to make of the fact that—with one of the world's most technologically lethal militaries and a mission of killing civilians in "one of the most densely populated tracts of land" on earth[155]—only 1,400 people were actually killed? To be facetious, the word "ineffective" comes to mind,[156] particularly when compared to the casualties inflicted by less modern militaries (and even civilians) in much more sparsely populated regions of the world.

Of course, not all Palestinians killed during the Israeli-Hamas conflict were civilians; many were combatants and legitimate targets under international humanitarian law.[157] The Gaza police

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GLOBAL POST (June 8, 2010, 9:29PM), http://www.globalpost.com/dispatch/worldview/100607/sri-lanka-war-government-tamil-tigers (contrasting the reaction of the Human Rights Council to conflicts in Gaza and in Sri Lanka).

154. Ben Farmer, *Sri Lankan Army Accused of Massacring 20,000 Tamil Civilians in Final Assault*, TELEGRAPH (U.K.), (May 29, 2009, 9:54AM), http://www.observatori.org/paises/pais_75/documentos/191%20War%20Crimes%20in%20Sri%20Lanka.pdf; Catherine Philip, *The Hidden Massacre: Sri Lanka's Final Offensive Against the Tamil Tigers*, SUNDAY TIMES (London), May 29, 2009; *see also Civilian Casualties Rising in Sri Lanka Conflict*, AMNESTY INT'L, (Apr. 21, 2009), http://www.amnesty.org/en/news-and-updates/news/civilian-casualties-rising-sri-lanka-conflict-20090421 (noting the death of 4,500 civilians in the northeastern region of the country); Lydia Polgreen, *Sri Lanka Forces Blamed for Most Civilian Deaths*, N.Y. TIMES, May 17, 2010, at A6, *available at* 2010 WLNR 10163605 ("United Nations workers counted about 7,000 dead in the last weeks of April, just before the last phase of the fighting, but diplomats, aid workers and human rights activists have long argued that those figures far underestimated the dead . . . ."); Rhys Blakely, *Tamil Death Toll "Is 1,400 a Week" at Manik Farm Camp in Sri Lanka*, SUNDAY TIMES (LONDON), July 10, 2009 (stating about 1,400 people are dying each day at internment camp set up by Sri Lanka to detain Tamil refugees). For a comprehensive report of alleged war crimes committed by Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), *see War Crimes in Sri Lanka*, INT'L CRISIS GRP. (May 17, 2010), http://www.crisisgroup.org/~/media/Files/asia/south-asia/sri-lanka/191%20War%20Crimes%20in%20Sri%20Lanka.pdf.

The United Nations did conduct an investigation of the Sri Lankan conflict, albeit under the auspices of the Secretary-General, not the Human Rights Council. *See* U.N. Secretary-General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. The Panel of Experts found credible allegations that the Sri Lankan army, using "large-scale and widespread shelling," caused large numbers of civilian casualties. *Id.* at ii. This included shelling of government-declared "No Fire Zones," where the government encouraged the civilian population to concentrate. *Id.* In spite of these findings, the Human Rights Council has yet to condemn Sri Lanka.

155. *Gaza Strip*: *Population*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm. The Gaza Strip is 360 square kilometers (about twice the size of Washington, D.C.), and has an estimated 2011 population of about 1.6 million. *Middle East: Gaza Strip*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html (last visited June 4, 2012); Salahi, *supra* note 138, at 207.

156. *See* Dershowitz, *supra* note 15, at 20; Norwitz, *supra* note 7.

157. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 52.2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; *see also Goldstone Conclusions*, *supra* note 1, ¶ 1886 (noting that not all collateral civilian casualties constitute law of war violations).

constituted the largest group of fatalities—between 18% and 21% of the total—over which a dispute exists as to combatant status.[158] The Mission asserted that the police were civilians and not subject to attack.[159] Since publication of the Mission's report, however, the Hamas leadership has admitted much greater combat losses than initially reported, and it recognized the police among its combatants killed.[160] In total, Hamas has stated that it lost between 600-700 men,[161] close to the figure provided by Israel immediately following the conflict.[162] Hamas's admission was one of the bases for Justice Goldstone's retreat from his report's conclusions.[163] Thus, the Mission's inclusion of police losses as civilian casualties was incorrect as a matter of fact.

Even had the Hamas leadership not made such an admission, the Goldstone Report findings were still factually and legally inaccurate. The Mission relied primarily upon *post-conflict* testimony from Gaza police authorities that the Gaza police did not engage in combat with the IDF, but instead dealt with matters of internal security and protecting the civilian population.[164] The Mission acknowledged, however, statements by senior police officials made *before* and *during* Operation Cast Lead that the police would assume a military role against any Israeli incursions into the Gaza Strip.[165]

The foundation of Gaza's police is the Executive Force created by Hamas after its election victory in 2006. Hamas did not initially

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158. *See Goldstone Report*, *supra* note 4, ¶ 393 (248 members of Gaza police killed). The ratio of police to the total number of Palestinians killed depends, of course, upon which figures are accepted as the total Palestinian deaths during the conflict.

159. *Id.* ¶¶ 34, 434; *Goldstone Conclusions*, *supra* note 1, ¶ 1923.

160. *Hamas Confirms Losses in Cast Lead for First Time,* JERUSALEM POST, Nov. 1, 2010, http://www.jpost.com/MiddleEast/Article.aspx?id=193521 (quoting Hamas Interior Minister Fathi Hammad that " '[o]n the first day of the war, Israel targeted police stations *and 250 martyrs who were part of Hamas and the various factions fell*.' [Hammad] . . . added that, 'about 200 to 300 were killed from the Qassam Brigades, as well as 150 security personnel.' " (emphasis added)).

161. *Hamas Admits 600-700 of Its Men Were Killed in Cast Lead*, HAARETZ (Sept. 11, 2010, 11:24AM), http://www.haaretz.com/news/diplomacy-defense/hamas-admits-600-700-of-its-men-were-killed-in-cast-lead-1.323776.

162. *Goldstone Report*, *supra* note 4, ¶ 359 (Israel claimed killing 709 Hamas combatants).

163. *Reconsidering the Goldstone Report*, *supra* note 2; *see also* Steven Stotsky, *Hamas's Revelation Undermines Key Conclusion of Goldstone Report*, COMMITTEE FOR ACCURACY IN MIDDLE E. REPORTING IN AM. (Nov. 19, 2010), http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1952.

164. *Goldstone Report*, *supra* note 4, ¶¶ 409-18, 420. The statements received by the Mission are inconsistent with other post-conflict comments made by Hamas officials about the military role of the police. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 271-73, 293-95; STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE ¶ 81 (2010), http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf (last visited June 4, 2012) [hereinafter *Gaza Operation Investigations: Second Update*].

165. *Goldstone Report*, *supra* note 4, ¶¶ 412, 416.

acquire control of the Gaza security services, so it created its own security organization—the Executive Force—filled with members of its military wing, the Al-Qassam Brigades.[166] When Hamas took control of the Gaza Strip, it established from the Executive Force a new police force in which members of the Al Qassam Brigade continued to serve.[167]

Both the Al-Qassam Brigades and the police are subordinate to the Ministry of the Interior.[168] The police are armed with Kalashnikov or M-16 assault rifles, hand-grenades, and anti-tank weapons—unusual armaments for a purely civilian police force.[169] The police train, patrol, share headquarters, and conduct joint operations with the Al Qassam Brigades, and they have been involved in military engagements with Israeli forces before and during Cast Lead.[170] Pronouncements made by Gaza officials before, during, and after the conflict confirm the military mission of the police force: it is part of the "resistance" under the direction and control of the Interior Ministry.[171]

The law of war does not require commanders to be omniscient; they are judged by the information they have at the time of an attack.[172] Thus, *post-conflict* assurances about the "civilian" character of the Gaza police received by the Mission are inconsequential. The question is what information did the IDF have on December 27 when it commenced Operation Cast Lead and struck Gaza po-

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166. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 273.

167. *Id.* at 274.

168. *Id.* at 273.

169. *Id.* at 276, 283; *Operation in Gaza*, *supra* note 53, at 30.

170. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 277-84, 288-92; INTELLIGENCE & TERRORISM INFO. CTR., HAMAS' MILITARY BUILDUP IN THE GAZA STRIP 7, 14 (Apr. 2008), http://www.jcpa-lecape.org/UserFiles/File/hamas_080408.pdf [hereinafter *Hamas' Military Buildup*]; Penny L. Mellies, *Hamas and Hezbollah*: *A Comparison of Tactics, in* BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD 45, 50 (Lieutenant Colonel Scott C. Farquhar, ed., 2009), *see also Goldstone Report*, *supra* note 4, ¶ 429 (noting obituary stating that one of the training courses being conducted at police headquarters in Gaza on December 27, 2008, was a " 'military refresher course' "). *See generally* GROSS, *supra* note 109, at 256 ("[I]n an asymmetric war, guerilla forces cannot fight effectively, if at all, unless they can call on armed police officers or specialized civilian personnel to aid them.").

171. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 271-73, 293-95; INTELLIGENCE & TERRORISM INFO. CTR., MOUNTING EVIDENCE INDICATES THAT DURING OPERATION CAST LEAD (AND IN ORDINARY TIMES) MEMBERS OF HAMAS' INTERNAL SECURITY FORCES SERVED AS COMMANDERS AND OPERATIVES IN HAMAS' MILITARY WING IZZ AL-DIN AL-QASSAM BRIGADES (Mar. 24, 2009), http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm; *Operation in Gaza*, *supra* note 53, at 90, 92; Dershowitz, *supra* note 15, at 17.

172. *See* Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice,* 16 J. CONFLICT & SEC. L. 105, 126-27 (2011); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 564 (1997); *see infra* notes 246-50 and accompanying text.

lice targets,[173] not what assurances the Mission received when it interviewed senior police operatives after the conflict ended.

Based upon the police forces' armaments and activities—together with declarations by Gaza authority officials about the force's mission—Israel had sufficient intelligence to conclude that the Gaza police force was an organized, armed group under the command of the Interior Minister who also commanded the military wing of Hamas—the Al-Qassam Brigades. As the Israeli government has noted,

> [e]xtensive information gathered by the IDF prior to the Operation substantiated the military function of the police force in Gaza based on its military, operational, logistic and administrative ties and cooperation with the military wing of Hamas, both as a matter of routine and particularly during a state of emergency, for instance during an Israeli military operation inside the Gaza Strip.[174]

As such, IDF commanders could reasonably conclude that the Gaza police constituted a lawful military target.[175]

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173. *See* Blank, *Application of IHL*, *supra* note 15, at 355-56.

174. *Gaza Operation Investigations: Second Update, supra* note 164, ¶ 80.

175. Commentary on Protocol I, Art. 43 states:

> [A]ll members of the armed forces [except medical and religious personnel] can participate directly in hostilities, i.e., attack and be attacked. . . . All members of the armed forces are combatants, and only members of the armed forces are combatants. . . . A civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant throughout the duration of the hostilities . . . .

CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1677, at 515 (1987); *see* INT'L COMM. OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 88 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) ("[T]he armed forces of a party to the conflict [consist of] all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates . . . .") [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW]; MELZER, *supra* note 21, at 71 ("Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function."); *see also* Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-A, Judgement ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, ¶ 39 (2000), http://www.icty.org/sid/10052 [hereinafter *Comm. to Review NATO Bombing Campaign*]; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 34-36, 104 (2010); *Operation in Gaza*, *supra* note 53, at 89-90.

Some have argued that under Protocol I, article 51(3), the Gaza police were civilians until they actually engaged in hostilities. David Luban, *Was the Gaza Campaign Legal?*, 31 ABA NAT'L SECURITY L. REP. 2, 5-6 (2009); *see also Goldstone Report*, *supra* note 4, ¶ 431

In addition, a study commissioned by Israel's prime minister indicated that many Gaza policemen killed during the conflict were also members of the Al-Qassam Brigades,[176] a fact the Mission acknowledged.[177] Thus, the Mission noted that the strike against the police raised the question of proportionality.[178] The Mission concluded, however, that even with the presence of combatants—because the police were engaged in civilian tasks in civilian facilities—Israel's attack "failed to strike an *acceptable balance* between the direct military advantage anticipated (*i.e.,* the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (*i.e.,* the other policemen killed and members of the public who would inevitably have been present or in the vicinity)."[179] Assuming, for the sake of argument, that the police force is a civilian entity, it is difficult to discern how the Mission reached such a conclusion without at least determining the number of police killed who were members of armed groups (versus those who were not) and the military advantage to be achieved by targeting members of the police force who were combatants.[180]

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n.289 and accompanying text. This argument assumes, however, that the police are not part of Hamas's organized military units. If the police are a component of Hamas's military, then they constitute a legitimate military target whether or not actually engaged in hostilities. *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 35 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 804 (2010); MELZER, *supra* note 21, at 71-73.

176. *Goldstone Report*, *supra* note 4, ¶ 422; Dershowitz, *supra* note 15, at 17 n.74.

177. *Goldstone Report*, *supra* note 4, ¶ 436.

178. *Id.* ¶ 435.

179. *Id.* ¶ 437 (emphasis added). The Mission's use of the term "acceptable balance" is inappropriate. The presence of civilians in or near a military objective does not render the objective immune from attack. *See* Protocol I, *supra* note 157, at art. 51(7); DINSTEIN, *supra* note 175, at 123; Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 120, 186-88 (Dieter Fleck ed., 2d ed. 2008); *infra* notes 239-43 and accompanying text. The test is whether, based upon information available to a commander at the time of an attack, DINSTEIN, *supra* note 175, at 132; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 97-98 (2d ed. 2004); Fenrick, *supra* note 172, at 564; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 175, at 331-34, the expected loss of civilian life, injury to civilians, and damage to civilian property "would be *excessive* in relation to the concrete and direct military advantage to be gained." Protocol I, *supra* note 157, at art. 57(2)(b) (emphasis added). If not, the attack is lawful and may proceed. DINSTEIN, *supra* note 175, at 135-36; KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 136 (2003); *see infra* notes 239-50 and accompanying text. The Rome Statute of the International Criminal Court requires more: the incidental loss of life or injury to civilians or damage to civilian objects must be "*clearly* excessive" to the overall military advantage anticipated. Rome Statute of the International Criminal Court (ICC), art. 21(b), July 17, 1998, 2187 U.N.T.S. 90, 95 (emphasis added), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm [hereinafter Rome Statute].

180. *See* COHEN, *supra* note 15, at 16-17; Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law*: *Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 825, 827 (2010); *see also supra* notes 18, 160-61 and accompanying text; *see also* LT. COL. (RET.) JONATHAN D. HALEVI, JERUSALEM CTR. FOR PUB. AFFAIRS, PALESTINIAN

Depending upon the total casualty figures used,[181] the percentage of Palestinian combatant deaths (including the police) during Operation Cast Lead was somewhere between 42% and 60% of the total number killed during the operation, with ratios of civilian to combatant deaths ranging from about 3:2 to 2:3. If the objective of the IDF was to kill Palestinian civilians, one would expect the number to be much higher.[182] "By the 1990's, 75% of all casualties resulting from armed conflicts were civilian, and in some cases the rate has allegedly reached as high as 90%."[183] For example, Professor Mary Ellen O'Connell claims that U.S. drone attacks in Afghanistan and Pakistan kill up to 50 civilians for every one intended target (a 50:1 ratio).[184] Thus, the Mission's finding that Israeli operations in Gaza caused "an *exceedingly high percentage* of civilians among those killed"[185] is mistaken when compared to

"POLICEMEN" KILLED IN GAZA OPERATION WERE TRAINED TERRORISTS, (Sept. 13, 2009) http://jcpa.org/article/palestinian-"policemen"-killed-in-gaza-operation-were-trained-terrorists/ (indicating that up to 91 percent of the civilian police were also members of Palestinian militant groups); *Operation in Gaza*, supra note 53, at 94.

181. Professor Dershowitz notes that the casualty figures from Palestinian sources are suspect because they count as civilians people who were clearly combatants and do not account for many of those killed. Dershowitz, *supra* note 15, at 18-19; *see also* Feinstein, *supra* note 109, at 244-46.

182. Norwitz, *supra* note 7; Halbertal, *supra* note 7, at 354; Dershowitz, *supra* note 15, at 20. A study conducted by the International Institute for Counter-Terrorism found that "63% to 75% of the Palestinians killed in Operation Cast Lead were "combat-aged males." Avi Mor et al., *Casualties in Operation Cast Lead: A Closer Look*, INT'L INST. FOR COUNTER-TERRORISM, 1 (2009), http://www.ict.org.il/Portals/0/Articles/ICT_Cast_Lead_Casualties-A_Closer_Look.pdf.

183. Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L.J. 453, 455 (2008). Professor Fellmeth states that these "figures are likely exaggerated by the inclusion of post-conflict casualties." *Id.*; *see also* Dershowitz, *supra* note 15, at 20.

184. Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* 1-3 (Notre Dame School Legal Stud. Res. Paper Series, No. 09-43, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144 (quoting David Kilcullen & Andrew McDonald, *Death From Above, Outrage Down Below,* N.Y. TIMES, Mar. 17, 2009); *see also War Unchecked, supra* note 15 (describing the U.S. launching at least 15 missile strikes to kill one Taliban leader, resulting in the death of 200-300 people, at least a quarter of whom were civilians). The accuracy of Professor O'Connell's claimed ratio of civilian to combatant deaths has been challenged. *See* Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once*: *Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1221 (2011).

185. *Goldstone Report*, *supra* note 4, ¶ 362 (emphasis added).

other contemporary conflicts.[186] Indeed, the percentage of civilians killed is substantially lower.

Finally, whether civilian casualties constitute violations of international humanitarian law depends in large measure upon the combat environment in which they lost their lives. The Mission should have considered civilian losses in the context of how Hamas conducted its military operations during the conflict. Civilian casualties alone—while always a tragedy—are not always a war crime,[187] particularly when a belligerent intentionally places itself in the civilian population.[188] Thus, neither the number of civilian casualties nor the ratio of civilian to combatant deaths alone establishes that Israel intended to target civilians.[189]

B. Statements by Current and Former Israeli Officials

The Mission cited statements made by current and former Israeli officials and military officers to demonstrate Israel's intent to kill civilians and destroy their property.[190] The Mission cherry-picked five comments that it asserted support its conclusion; none of the comments came from the Prime Minister, the Defense Minister, or any military official charged with implementing Israel's Gaza campaign plan.

In part, the Mission looked to writings of military officers—one active-duty general officer (Major General Gadi Eisenkot) and two retired officers (Major General (retired) Giora Eiland and Colonel

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186. *See* Feinstein, *supra* note 109, at 241 ("It is noteworthy that the extent of civilian casualties and concomitant damage was not far greater than it was, particularly given the incredibly dense urban environment of the tiny land area of Gaza." (footnote omitted)). One commentator states that the Goldstone Report did "not accuse[] Israel of killing as many civilians as it could—only that it "intended to inflict *substantial* civilian destruction." Jerome Slater, *The Attacks on the Goldstone Report, in* THE GOLDSTONE REPORT, *supra* note 7, at 360, 364-65. This statement is true; however, in reaching its finding that Israel deliberately targeted civilians, the Mission placed considerable reliance on the percentage of civilians killed. *Goldstone Report*, *supra* note 4, ¶ 362. The Mission concluded that the "principal focus in the aftermath of military operations [is] the people who have been killed." *Id.* ¶ 1885. Based on similar conflicts, the number of civilians killed certainly does not by itself prove that Israel intended, as a matter of national policy, to kill civilians.

187. *See* Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgement, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Laurie R. Blank, *A New Twist on an Old Story*: *Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT'L L. 707, 727 (2011); Judith Gail Gardam, *Proportionality and Force in International Law,* 87 AM. J. INT'L L. 391, 398 (1993); W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 177 (1990).

188. *See* GROSS, *supra* note 109, at 168; Johan D. van der Vyver, *Legal Ramifications of the War in Gaza*, 21 FLA. J. INT'L L. 403, 430-31 (2009); *infra* Part V.

189. Halbertal, *supra* note 7, at 354.

190. *See supra* note 124 and accompanying text. At the same time, the Mission dismissed statements by Hamas officials reflecting Hamas's intent to fight among the civilian population. *Goldstone Report*, *supra* note 4, ¶ 478; *see* Dershowitz, *supra* note 15, at 11; *infra* notes 293-301 and accompanying text.

(retired) Gabriel Siboni).[191] All of the officers' comments related to the Israel-Hezbollah War of 2006, not Operation Cast Lead.[192] Each officer advocated using "disproportionate force" in response to future Hezbollah attacks. The Mission interpreted their remarks to indicate an IDF intent to target civilians and their property during future conflicts with Hezbollah.

The Mission's analysis of the officers' statements is faulty on several levels. First, none of the officers advocated that civilians *qua* civilians should be the target of Israeli attacks.[193] Second and more significantly, the Mission misinterpreted the import of the statements. It construed the officers' comments to mean that Israel would dispense with *jus in bello* proportionality in a future conflict with Hezbollah, thereby causing excessive civilian casualties or damage to civilian objects. That is not what the officers said. The Mission's reading of their comments conflates the concepts of *ad bellum* and *in bello* proportionality.[194]

The question of proportionality in the *ad bellum* context is not whether the response will cause disproportionate "collateral damage," but whether the degree of force used in response to a *causus belli* is necessary, and if so, for what military objective.[195] The Israeli officers argued that Israel would not simply respond to Hezbollah attacks in a "tit-for-tat" manner; rather, regardless of the nature of the *causus belli,* if Israel were attacked again, it would use the force necessary (force far greater than that used by Hezbollah to attack Israel) to ensure that Hezbollah and its state sponsors (including Lebanon) did not attack Israel again.[196] Thus, for

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191. The Mission failed to provide any evidence that the retired officers spoke on behalf of the Israeli government. Instead, reflecting a considerable degree of circular reasoning, the Mission concluded that it did "not have to consider whether Israeli military officials were directly influenced by these writings. It is able to conclude from a review of the facts on the ground that it witnessed for itself that what is prescribed as the best strategy appears to have been precisely what was put into practice." *Goldstone Report*, *supra* note 4, ¶ 1199.

192. *Id.* ¶¶ 1192-97.

193. Dershowitz, *supra* note 15, at 10.

194. *See* Robert D. Sloane, *The Cost of Conflation*: *Preserving Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War,* 34 YALE J. INT'L L. 47, 100, 108-09 (2009); Michael J. Glennon, *The Fog of War*: *Self-Defense, Inherence, and Incoherence in Article 51 of the UN Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 551 (2002); PoKempner, *supra* note 15, at 147. Not all accept my interpretation of General Eisenkot's statement; *see* GROSS, *supra* note 109, at 174; Falk, *supra* note 15, at 177.

195. George P. Fletcher, *Is Justice Relevant to the Law of War?*, 48 WASHBURN L.J. 407, 422 (2009); *see also* Blank, *supra* note 187, at 713 ("The primary issue in analyzing *jus ad bellum* proportionality is whether the defensive use of force is appropriate in relation to the ends sought, measuring the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy."); Enzo Cannizzaro, *Contextualizing Proportionality*: Jus ad Bellum *and* Jus in Bello *in the Lebanese War,* 88 INT'L REV. RED CROSS 779, 781 (2006) ("In *jus ad bellum*, proportionality has a dual role: it serves to identify the situations in which the unilateral use of force is permissible; and it serves to determine the intensity and the magnitude of military action.").

196. Amos Harel, *Analysis/IDF Plans to Use Disproportionate Force in Next War,*

example, the United States used disproportionate force in reacting to the al-Qaeda attacks of September 11, 2001; it did not simply strike those directly responsible, but overthrew the government of Afghanistan.[197] This is not to suggest that the Israeli position is without controversy;[198] however, it does not constitute the grave

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HAARETZ (May 10, 2008, 12:00AM), http://www.haaretz.com/print-edition/news/analysis-idf-plans-to-use-disproportionate-force-in-next-war-1.254954; Giora Eiland, *The Third Lebanon War: Target Lebanon*, STRATEGIC ASSESSMENT, Nov. 2008, at 9, 16-17; *see also* Robert A. Caplen, *The "Charlie Brown Rain Cloud Effect" in International Law*: *An Empirical Case Study*, 36 CAP. U. L. REV. 693, 746-47 (2008); Zachary Myers, Note, *Fighting Terrorism*: *Assessing Israel's Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 328-30 (2008).

197. Sloane, *supra* note 194, at 109. Likewise, in responding to the Japanese attack on Pearl Harbor, the United States did not simply attempt to sink the Japanese fleet. Rather, it engaged in total war, destroying not only the Japanese military, but the Japanese homeland. Glennon, *supra* note 194, at 551.

198. Israel's position is seemingly inconsistent with the International Court of Justice decision in the *Oil Platforms* case. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6). The *Oil Platforms* case involved U.S. strikes on Iranian oil complexes and oil platforms following Iranian attacks on a Kuwaiti tanker and the collision between a U.S. warship and an Iranian mine in international waters. *Id.* at 175. The International Court of Justice held the U.S. reaction disproportionate, viewing self-defense as applying only to the response to the incident that triggered it. *Id.* at 198-99; *see also* Pieter H.F. Bekker, *The World Court Finds that U.S. Attacks on Iranian Oil Platforms in 1987-1988 Were Not Justifiable as Self-Defense, but the United States Did Not Violate the Applicable Treaty with Iran*, AM. SOC'Y INT'L L. INSIGHTS (Nov. 2003), http://www.asil.org/insigh119.cfm. In other words,

> [a] defensive strike is only *ad bellum* necessary, . . . if carried out, first, in *immediate* response to a particular attack and, second, against the attack's *direct* source. . . . [S]trategic strikes in self-defense carried out in an effort to deter future attacks of the same sort were per se unlawful.

Sloane, *supra* note 194, at 84; *see also* Solon Solomon, *The Great Oxymoron:* Jus in Bello *Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures Towards Gaza as a Case Study*, 9 CHINESE J. INT'L L. 501, ¶ 16 (2010).

Professor Sloane notes that "[t]his parsimonious, almost *lex talionis,* position leads to absurd results and does not conform to state practice." Sloane, *supra* note 194, at 109; *see also* Solomon, *supra* note 198, ¶ 17. Instead, an alternative view of *jus ad bellum* is inevitable:

> [S]elf-defense must be *ad bellum* proportionate to the *aggregate* attacks on a state rather than to the specific, atomized attack that ultimately instigated defensive force. *Ad bellum* proportionality, in this view, means that "force, even if it is *more* intensive than [the *casus belli*] is permissible so long as it is not designed to do anything more than protect the territorial integrity or other *vital interests* of the defending party."

Sloane, *supra* note 194, at 109 (quoting Frederic L. Kirgis, *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon*, AM. SOC'Y INT'L L. INSIGHTS, Aug. 17, 2006, http://www.asil.org/insights060817.cfm). Thus, the *Oil Platforms* case neither reflects customary international law, nor should it. Robert Ago, *Addendum to Eighth Report on State Responsibility*, 2 Y.B. Int'l L. Comm'n 13, 69 (1980); U.N. Doc. A/CN.4/318/Add.5-7 ("It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered."). *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 197-98, 208-12 (3d ed. 2001); JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 160-61 (2004); Glennon, *supra* note 194, at 551-53; Michael N. Schmitt, *"Change*

violations of international law caused by indiscriminate attacks on civilians or by attacks on military objectives that cause excessive civilian casualties.

Colonel Siboni made his position clear when he wrote:

> Israel does not have to be dragged into a war of attrition with Hizbollah. Israel's test will be the intensity and quality of its response to incidents on the Lebanese border or terrorist attacks involving Hizbollah in the north or Hamas in the south. *In such cases, Israel again will not be able to limit its response to actions whose severity is seemingly proportionate to an isolated incident.* Rather, it will have to respond disproportionately in order to make it abundantly clear that the State of Israel will accept no attempt to disrupt the calm currently prevailing along its borders.[199]

That Colonel Siboni did not mean that civilians would become the target of an Israeli counter-strike against Hezbollah and Hamas was made plain in an article by another retired IDF officer—Colonel (ret.) Giora Segal—whom the Mission chose to ignore. He described the notion of "disproportionate force" as a "concentrated effort" designed "to attain a significant operational achievement, a knock-out rather than a victory on points."[200] Segal noted "[t]he difficulty of military action requiring the concentration of operational effort among a civilian population[,]" arguing that the "battlefield must be prepared in advance. Preparing targets to be attacked and determining the objectives of the ground maneuver, *while making every effort to minimize the harm to civilians*

Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-Defense, 29 MICH. J. INT'L L. 127, 153-54 (2008); *see also* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 46-47 (1987); Samuel Estreicher, *Privileging Asymmetric Warfare? (Part II)?: The "Proportionality" Principle Under International Humanitarian Law*, 12 CHI. J. INT'L L. 143 (2011); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 728 (2008).

199. Gabriel Siboni, *Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War*, INST. FOR NAT'L SECURITY STUD. (Oct. 2, 2008) (emphasis added), http://www.inss.org.il/publications.php?cat=21&incat=&read=2222; *see also* MAJOR GENERAL (RES.) YAAKOV AMIDROR, JERUSALEM CTR. FOR PUB. AFF., MISREADING THE SECOND LEBANON WAR (Jan. 16, 2007), http://jcpa.org/article/misreading-the-second-lebanon-war/ ("The determination of Israel's government to respond and to retaliate is a very important factor in restoring deterrence. Now those around Israel understand that Israel has certain red lines, and that if these lines are crossed, Israel's retaliation will be intentionally disproportionate. As a small country, we cannot allow ourselves the luxury of reacting proportionally." Israel's military action sent a very important message to the people around us).

200. Giora Segal, *Trapped Between Maneuver and Firepower*: *Hamas and Hezbollah,* 1 MILITARY & STRATEGIC AFF., Apr. 2009, at 77, 79-80, http://www.inss.org.il/upload/(FILE)1272780093.pdf.

and the damage to residences and the greater environment."[201] Segal added that, with respect to Operation Cast Lead, the IDF's Department of International Law was involved in the operational planning, allowing the IDF "to prepare the battlefield in terms of its legal constraints."[202]

Major General (ret.) Eiland similarly argued for a disproportionate response, albeit in a somewhat different context. He believed that any future war with Hezbollah must involve Lebanon (among others), which Eiland claims has become Hezbollah's state sponsor.[203] Without involving Lebanon (which necessarily affects Lebanese civilians), Eiland asserts that Israel cannot defeat Hezbollah because Hezbollah will still be able to launch long-range missiles at Israel's civilian population from areas beyond its base in southern Lebanon.[204] In this respect, the situation in Lebanon is

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201. *Id.* at 80 (emphasis added).

202. *Id.* at 87 n.3.

203. Eiland, *supra* note 196, at 14:

> Today, the Lebanese president and government recognize not only Hizbollah's right to continue bearing its own arms, but also see these arms as a vital and legitimate means for achieving the national interests . . . . Moreover, recent remarks by the Lebanese president and prime minister likewise offer national support for Hizbollah's arguments regarding the need "to liberate Shab'a Farms" and its right to be a defensive shield that protects Lebanon from "Israeli aggression."

General Eiland's claim has a basis in fact. The UN Security Council, in several resolutions, calls for the disarmament of militias in Lebanon, but the Government of Lebanon has failed to take any action to implement the resolutions. *See* S.C. Res. 1559, ¶ 3, U.N. Doc. S/RES/1559 (Sept. 2, 2004); S.C. Res. 1680, ¶ 6, U.N. Doc. S/RES/1680 (May 17, 2006); S.C. Res. 1701, ¶¶ 3, 5, 10, 14, U.N. Doc. S/RES/1701 (Aug. 11, 2006); Bloom, *supra* note 88, at 79-81 (noting that the Lebanese government has consistently failed to respond to Hezbollah and that Hezbollah acts on behalf of the Lebanese government); Zachary Myers, Comment, *Fighting Terrorism: Assessing Israel's Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 311-12 (2008) (noting Lebanese government's inability or unwillingness to control Hezbollah); Keith A. Petty, *Veiled Impunity: Iran's Use of Non-State Armed Groups,* 36 DENV. J. INT'L L. & POL'Y 191, 195 (2008) (noting Lebanon's unwillingness to disarm Hezbollah); Major Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 AIR FORCE L. REV. 29, 44-46 (2007) (noting Lebanon's unwillingness or inability to prevent Hezbollah from carrying out its operations).

The Security Council has also directed the U.N. Interim Force in Lebanon (UNIFIL) to assist Lebanon with the disarmament of militias, but UNIFIL has failed to do so. S.C. Res. 1701, *supra* at ¶¶ 11, 14. *See, e.g.*, Burke-White & Bell, *supra* note 80 at 84 (noting failure of UN to implement Security Council resolution directing disarmament of Hezbollah); Wrachford, *supra* at 46 (noting UN's lack of success in meeting Hezbollah threat); Harry De Quetteville & Michael Hirst, *UN Force in Lebanon Will Not Intercept Weapons From Syria*, TELEGRAPH (London), Aug. 27, 2006, at 26, http://www.telegraph.co.uk/news/1527391/UN-will-not-stop-Syria-sending-weapons-to-Lebanon.html (describing UN's refusal to prevent Syria from re-arming Hezbollah in violation of Security Council Resolution 1701).

204. Eiland wrote:

> [I]t is not possible to defeat an effective and well-equipped guerrilla organization if three conditions exist: the organization operates from country A against country B; the organization enjoys the full support of country A; and country A, along with its army and infrastructure, is entirely immune to offensive attacks launched by country B. The State of Israel failed in the Second Lebanon War (and may also fail

sui generis and inapposite to the Gaza conflict. In any event, Major General Eiland seemingly expressed his personal views and not those of the Government of Israel; his comments are apparently part of an ongoing debate about the strategy in a future conflict with Hezbollah.[205]

The Mission noted comments made by one active duty officer, Major General Gadi Eisenkot, who spoke of a future war with Hezbollah in which Israel would wield "disproportionate force on . . . [villages from which shots are fired on Israel,] and cause great damage and destruction . . . From . . . [Israel's] standpoint, these are . . . military bases."[206] Like Siboni and Eiland, Major General Eisenkot certainly did not indicate that Israel would seek to inflict disproportionate civilian casualties; he stated that Israel's response would not be proportionate to the nature of the Hezbollah attack.

In addition, Eisenkot mentioned that villages from which Israel receives fire would be treated as military bases. There is nothing extraordinary about this statement: if Hezbollah uses a village as a base to attack the IDF or to strike Israel itself (a tactic extensively used by Hezbollah in 2006[207]), it becomes a legitimate military

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in a subsequent encounter) because it targeted the wrong enemy. Israel fought against Hizbollah instead of fighting against the Republic of Lebanon.

Eiland, *supra* note 196, at 9-10; *see id.* at 12-13. Eiland also noted that when the enemy is a country that is accountable to its population and responsible for its infrastructure, the battlefield will "be far removed from civilian population centers. This refers to both sides of the equation, that is, the battlefield is removed from both sides' civilian populations." *Id.* at 15. Hezbollah, however, does not fight this way and is "less sensitive to the pressue of public opinion and international pressure." *Id.*

205. For example, in the same issue of the journal in which Eiland presented his views appears an article, ignored by the Mission, by IDF Brigadier General (retired) Yossi Kuperwasser, who recommends against striking Lebanon in a future conflict with Hezbollah and disapproves of any suggestion that Lebanon's civilian population should be engaged during a future conflict with Hezbollah. Yossi Kupperwasser, *The Next War with Hizbollah*: *Should Lebanon Be the Target?*, 11 STRATEGIC ASSESSMENT 19, 22 (2008); *see also* Shlomo Brom, *Political and Military Objectives in a Limited War Against a Guerilla Organization, in* THE SECOND LEBANON WAR: STRATEGIC PERSPECTIVES 22 (Shlomo Brom & Meir Elran eds., 2007) ("In order to achieve the objectives of the war, it was important in the long term that Lebanon pay the price as a state without Israel exceeding the rules of international law and the war norms, and without the result being prolonged occupation of Lebanese territory that would enable Hizbollah to present itself as a movement resisting foreign occupation."). In fact, despite early "saber-rattl[ing]" towards Lebanon, Israel made it clear during its 2006 campaign against Hezbollah that its enemy was not Lebanon, and "Israel assiduously avoided striking Lebanese government facilities and equipment, at least absent an express link to Hezbollah." Schmitt, *supra* note 198, at 138-39; *see also* Eiland, *supra* note 196, at 9-10.

206. *Goldstone Report*, *supra* note 4, ¶ 1195.

207. ANTHONY H. CORDESMAN, LESSONS OF THE 2006 ISRAELI-HEZBOLLAH WAR 41-42 (2007); DR. REUVEN ERLICH (COL. RET.), INTELLIGENCE & TERRORISM INFO. CTR. AT THE CTR. FOR SPECIAL. STUD., HEZBOLLAH'S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS: THE EXTENSIVE MILITARY INFRASTRUCTURE POSITIONED AND HIDDEN IN POPULATED AREAS 6-7, 32-34 (2006), http://www.ajcongress.org/site/DocServer/Part1.pdf?docID=861 [hereinafter *Hezbollah's Use of Lebanese Civilians as Human Shields*].

objective even if civilians and their property are present.[208] Hezbollah has in fact built extensive military fortifications in southern Lebanese villages.[209] Moreover, Hezbollah's use of the civilian population during the 2006 war is particularly relevant because Hamas tried to emulate the tactic in its 2008-2009 war with Israel.[210]

Finally, the Mission referred to comments by two Israeli government officials: Eli Yishai, who at the time of Operation Cast Lead was the Minister of Industry, Trade and Labor,[211] and Tzipi Livni, then Israel's Foreign Minister.[212] The report cites two statements by Mr. Yishai, one made near the end of the conflict and one after the ceasefire. Notably, Mr. Yishai was not a member of Israel's Inner Security Cabinet,[213] and the Mission does not show that either statement reflected the policy of the Israeli government during the war. Moreover, both comments dealt with the

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208. Protocol I, *supra* note 157, at arts. 51(7), 52(2); THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 20 (2011) [hereinafter OP LAW HANDBOOK]; *Manual on International Law Applicable to Air and Missile Warfare,* PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES., 13 (2009), http://www.ihlresearch.org/amw/manual/; *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES., 108 (2010) ("The 'use' of an object relates to its present function, with the result that a civilian object can become a military objective due to its use by armed forces."); INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 6 (2006) [hereinafter MANUAL OF NON-INTERNATIONAL ARMED CONFLICT]; DINSTEIN, *supra* note 175, at 97-98.

209. CORDESMAN, *supra* note 207, at 42-43:

> One of the tactics that Hezbollah used to fortify its positions along the border was to prepare "friendly" villages in the south of Lebanon to use as safe havens and fortresses in the event of an Israeli assault . . . . Hezbollah] built its facilities in towns and populated areas, used civilian facilities and homes to store weapons and to carry out its activities, and embedded its defenses in built-up areas.

See also CONG. RES. SERVICE, LEBANON: THE ISRAELI-HAMAS-HEZBOLLAH CONFLICT 10 (2006), *available at* http://www.fas.org/sgp/crs/mideast/RL33566.pdf; *Hezbollah's Use of Lebanese Civilians as Human Shields*, *supra* note 207, at 6-7, 23, 28-30, 35-51.

Hezbollah continues to reinforce its military infrastructure in southern Lebanese villages, near schools and mosques and often inside homes. Yaakov Kaz, *IDF Reveals Hizbullah Positions*, JERUSALEM POST (July 7, 2010, 5:23PM), http://www.jpost.com/Israel/Article.aspx?id=180733; Anshel Pfeffer, *IDF Reveals Intel on Huge Hezbollah Arms Stockpile in Southern Lebanon*, HAREETZ (Aug. 7, 2010, 12:54AM), http://www.haaretz.com/print-edition/news/idf-reveals-intel-on-huge-hezbollah-arms-stockpile-in-southern-lebanon-1.300656.

210. *See, e.g.,* Matthews, *supra* note 113, at 25; Mellies, *supra* note 170, at 59, 62-63, 69; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 48, 110, 122; *infra* notes 281-83, 289 and accompanying text.

211. ELIYAHU YISHAI, ISRAELI MINISTRY OF FOREIGN AFF., MK, DEPUTY PRIME MINISTER AND MINISTER OF THE INTERIOR (SHAS), http://www.mfa.gov.il/MFA/Government/Personalities/From+A-Z/Eliyahu+Yishai.htm (last visited June 4, 2012).

212. TZIPI LIVNI, ISRAELI MINISTRY OF FOREIGN AFF., MK, HEAD OF OPPOSITION (KADIMA) http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/2/Tzipi+Livni.htm (last visited June 4, 2012).

213. *Israel's Ministerial Committee for National Security Issues*, MIDDLE E. PROGRESS (May 19, 2009), http://middleeastprogress.org/2009/05/israel's-ministerial-committee-for-national-security-issues/.

level of force to be used against Hamas, and neither suggested the targeting of civilians.

On January 6, 2009, Mr. Yishai purportedly spoke in terms of the "complete destruction of terrorism and Hamas," including their homes, tunnels, and industries.[214] On January 13, 2009, less than a week before the ceasefire ended the conflict, Ms. Livni said that the military offensive had "restored Israel's deterrence . . . Hamas now understands that when you fire on . . . [Israel's] citizens it responds by going wild—and this is a good thing,"[215] which—aside from being pure political rhetoric—again referred to Israel's *jus ad bellum* response. Neither official ever suggested that civilians would be targeted; both officials spoke solely in terms of destroying Hamas and its terrorist infrastructure, unquestionably legitimate military objectives.[216]

C. Israel's Advanced Targeting Technology and Proficiency

The Mission found that because the IDF has high-technology targeting systems, is proficient in their use, and carefully planned the operation, the IDF must have intended to attack the civilians killed during the conflict.[217] Of course, the Mission should have recognized that the use of high-tech weapons—even by the most proficient sol-

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214. *Goldstone Report*, *supra* note 4, ¶ 1204. Although of doubtful relevance since the statement occurred after the conflict ended, Mr. Yishai advocated the destruction of 100 homes for every rocket fired even if the rocket "falls in an open air [sic] or to the sea." *Id.* ¶ 1205. Professor Dershowitz observes, however, that "the report omits that in the same speech Yishai clarifies that homes destroyed will be 'terrorists' homes, while informing them in advance—so as not to hurt the family members.' " Dershowitz, *supra* note 15, at 13, *quoting* Raanan Ben-Zur, *Yishai*: *Destroy 100 Houses for Each Rocket Fired*, YNET, (Feb. 2, 2009, 11:56PM), http://www.ynetnews.com/articles/0,7340,L-3665517,00.html (last visited Sep. 7, 2011). Mr. Yishai also added: "We're not doing this gladly or with pleasure; we are doing it in order to defend Israel's citizens. The situation in the south, if we don't act as we demand, will worsen as we are witnessing in day to day life." *Id.*

In any event, the Mission presents no evidence that Yishai's statements constituted Israeli policy or that the IDF attempted to achieve this result. To the contrary, the Mission found that more than 8,000 rockets and mortars had been fired at Israel since 2001, and 230 rockets and 298 mortars since June 18, 2008, nearly all of them fired after November 4, 2008. *Goldstone Report*, *supra* note 4, ¶ 103. Israel allegedly destroyed 2,400 houses. ONSLAUGHT, *supra* note 137, at 16; Goldstone Report, *supra* note 4, ¶ 67. This number falls considerably short of those purportedly advocated by Mr. Yishai. *See infra* note 299 and accompanying text.

215. Kim Sengupta & Donald Macintyre, *Israel Cabinet Divided Over Fresh Gaza Surge*, INDEPENDENT, Jan. 13, 2009, http://www.independent.co.uk/news/world/middle-east/israeli-cabinet-divided-over-fresh-gaza-surge-1332024.html.

216. Dershowitz, *supra* note 15, at 10-11; *see also supra* text accompanying note 208. Noting that the Mission found Israeli military and political leaders who "repeatedly announced" a military doctrine that "intentionally targeted civilians," one commentator stated that there are many such statements not mentioned in the report. Jerome Slater, *supra* note 186, at 364-65. He does not, however, provide any sources for his assertion.

217. *Goldstone Report*, *supra* note 4, ¶¶ 61, 576-78, 1185-91; *Goldstone Conclusions*, *supra* note 1, ¶ 1893.

diers—does not ensure that intended targets will be hit or that intelligence about the nature of a target is accurate.[218] Professor Dinstein notes that weapons can go awry because of human error,[219] technical malfunctions,[220] or inclement weather conditions.[221] Similarly, the intelligence about a particular target may be faulty, resulting in civilian casualties.[222] Of greater significance is the fact the Mission evaluated Israel's targeting without considering the other side of the equation: what were Palestinian forces doing and what were the Israelis shooting at?[223] The article addresses this question next.

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218. CORDESMAN, *supra* note 46, at 18 ("No matter how careful planners are, some targets will be empty or misidentified. No matter how careful pilots are, any large-scale use of ordinance will—and did—lead to significant numbers of misidentified targets, misfires, and weapons that do not hit their target with the intended precision."); Cohen & White, *supra* note 109, at 21 ("when modern weapons are employed near civilians in military operations, civilians will be killed"); *see, e.g., NATO Cites Errant Missile in Libya Civilian Deaths,* MSNBC (June 16, 2011. 4:09PM), http://www.msnbc.msn.com/id/43454221/ns/world_news-mideast_n_africa/t/nato-cites-errant-missile-libya-civilian-deaths/ (number of civilian casualties caused by NATO missile that did not hit its intended target); Joshua Partlow, *NATO Rockets Miss Target, Kill 12 Afghan Civilians*, WASH. POST, Feb. 14, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/14/AR2010021400593.html; DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 702-03 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf (describing U.S. attack on al-Amariyah bunker that killed 200-300 civilians during First Persian Gulf War); Steven Lee Myers, *Chinese Embassy Bombing*: *A Wide Net of Blame,* N.Y. TIMES, Apr. 17, 2000, *available at* 2000 WLNR 3277999 (NATO bombing of Chinese Embassy during Kosovo conflict). Indeed, nearly half of the IDF fatalities during the conflict were due to so-called "friendly fire;" *see* Stuart A. Cohen, *The Futility of Operation Cast Lead* 4 (Begin-Sadat Ctr. for Strategic Stud., Perspectives Papers, No. 68, Feb. 16, 2009), *available at* http://www.biu.ac.il/SOC/besa/docs/perspectives68.pdf.

219. DINSTEIN, *supra* note 175, at 135. For example, in January 2000, when I was the Staff Judge Advocate of III Armored Corps and Fort Hood, I served as a legal advisor to an investigation of a Paladin 155-millimeter self-propelled howitzer that bombarded an off-post ranch for over an hour. *See Firing Practice on Hold as Army Probes Blasts*, HOUS. CHRON., Jan. 29, 2000, *available at* 2000 WLNR 9390196. The investigation revealed that, when the howitzer's digital system went down, the howitzer's commander made the simple error of failing to determine in which direction the tube was pointed. In fact, the tube was pointed 180 degrees in the wrong direction. This incident occurred in peacetime on an Army installation in Texas; the probability of human error necessarily increases in the urgency and "fog of war."

220. DINSTEIN, *supra* note 175, at 135; *see also* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING I-11 (Apr. 13, 2007) ("Effects [of targeting] often spill over to create unintended consequences, which may be counterproductive or may create opportunities. An example of a counterproductive consequence entails injury or collateral damage to persons or objects unrelated to the intended target.").

221. DINSTEIN, *supra* note 175, at 135.

222. *Id.* at 135; Michael N. Schmitt, *Precision Attack and International Humanitarian Law,* 87 INT'L REV. RED CROSS 445, 447 (2005); OP LAW HANDBOOK, *supra* note 208, at 11 (describing attack on al Firdus bunker in Baghdad during First Gulf War); *see also supra* text accompanying note 218.

223. Peter Berkowitz, *The Goldstone Report and International Law*, POL'Y REV., Aug. 1, 2010, http://www.hoover.org/publications/policy-review/article/43281 ("Whether Hamas used water-wells, sewage treatment plants, flour mills, and residential homes, along with mosques, hospitals, and police officers, as part of its combat operations are factual questions bound up with questions about Hamas's strategy and tactics. Answering them accurately is crucial to determining whether Israel crafted a strategy and adopted tactics consistent with the principles of distinction and proportionality."); *see also* Muravchik, *supra* note 15.

IV. WHAT THE MISSION IGNORED

A. Introduction

Members of the Israeli military may well have violated international humanitarian law during the Gaza conflict, and some of the violations may constitute war crimes.[224] If so, Israel must bring them to justice.[225] The Goldstone Mission identified 34 (out of between 470 and 700) Palestinian civilian deaths allegedly deliberately caused by Israeli fire.[226] The Mission used these deaths, to-

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224. Not every violation of the law of armed conflict is a war crime. Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 37 (2011). Even if an act is not a war crime, however, it may violate domestic law. *See, e.g., infra* note 225 (discussing the al-Samouni family deaths).

225. A United Nations Committee of Independent Experts reported in March 2011 that "the Government of Israel has conducted some 400 command investigations in relation to Operation Cast Lead. Reports indicate that the Israeli Military Advocate General (MAG) has opened 52 criminal investigations into allegations of wrongdoing. Of these 52 investigations, thus far three cases have been submitted to prosecution; two have resulted in convictions, while the trial of one case is still ongoing." Hum. Rts. Council, Rep. of the Comm. of Indep. Experts in Int'l Humanitarian & Hum. Rts. Law Established Pursuant to Council Resolution 13/9, at 6, A/HRC/16/24 (Mar. 11, 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf [hereinafter UN Committee of Independent Experts].

226. *Goldstone Report*, *supra* note 4, ¶ 812. Among the civilian casualties specifically mentioned, the most serious were the deaths of at least 23 members of the al-Samouni family. *Id.* ¶¶ 706-44. Israeli soldiers instructed the family to take shelter in a house, which was later shelled at the direction of a brigade commander, who ostensibly misread drone images of the house and believed it was being used for military operations. Amira Hass, *What Led to IDF Bombing of House Full of Civilians During Gaza War*, HAARETZ, (Oct. 24, 2010, 1:57PM), http://www.haaretz.com/news/diplomacy-defense/what-led-to-idf-bombing-house-full-of-civilians-during-gaza-war-1.320816. The IDF initiated a criminal investigation into the incident. Amos Harel & Anshell Pfeffer, *IDF Probes Top Officers on Gaza War Strike that Killed 21 Family Members*, HAARETZ, (Oct. 22, 2010, 2:41PM), http://www.haaretz.com/print-edition/news/idf-probes-top-officers-on-gaza-war-strike-that-killed-21-family-members-1.320505; STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: AN UPDATE 34 n.109 (2010), http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf (last visited June 4, 2012). The UN Committee of Independent Experts did not receive an update of the investigation. UN Committee of Independent Experts, *supra* note 225, at 7; *see also* Goldstone, *Reconsidering the Goldstone Report, supra* note 2.

Whether the shelling of the al-Samouni household constitutes a war crime has yet to be determined because it is unclear if the requisite *mens rea*—the intent to kill civilians—existed at the time of the incident. Rome Statute, *supra* note 177, arts. 8.2(a)(i) (willful killing); 8.2(b)(i) ("intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities"), 8.2(b)(ii) (intentionally directing attacks against civilian objects, that is, objects which are not military objectives), 8.2(b)(v) (attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives). Under the statute, "a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." *Id.* art. 30.2. A mistake of fact is a "ground for excluding criminal responsibility only if it negates the mental element required by the crime." *Id.* art. 32.1. Regardless of whether the specific intent required of a war crime was committed, under U.S. military law, a soldier might be tried under the circumstances

gether with claimed Israeli attacks against civilian property in Gaza,[227] to bolster its conclusion that Israel intentionally targeted Gaza's civilian population.[228]

The underlying problem with the Mission's conclusions is that they do not result from an analysis of the combat environment in which civilians were killed and their property damaged or destroyed. The Mission mentions but ignores the significance of the challenge the IDF faced in confronting an enemy that deliberately entrenched itself in civilian population centers and for whom civilian casualties—even their own—are a critical part of their strategic objective. As Professor Abraham Bell wrote, the Mission:

> Repeatedly . . . stated that Israeli criminal intent could be presumed since (a) civilians died and (b) Israel had precision weaponry at its disposal. QED. Therefore, pace Goldstone Report, it was unnecessary to investigate Hamas's fighting practices, the rules of engagement actually given to Israeli forces, or any other facts that would shed light on Israeli intent.[229]

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for murder. UNIFORM CODE OF MILITARY JUSTICE (UCMJ) art. 118(a)(4); 10 U.S.C. § 911(a)(4) (2003); Manual for Courts-Martial (MCM) part IV, ¶¶ 43.b(3), 43.c(4) (2008) (killing while engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life); or involuntary manslaughter, UCMJ art. 119(b)(1), 10 U.S.C. § 119(b)(1); MCM Part IV, ¶¶ 44.b(2), 44.c(2)(a) (killing by culpable negligence); or negligent homicide. UCMJ art. 134, 10 U.S.C. § 934; MCM part IV, ¶ 85.

227. *See Goldstone Report*, *supra* note 4, ¶¶ 596-652 (hospitals), ¶¶ 913-41 (flour mill), ¶¶ 942-61, 1018 (chicken farms), ¶¶ 962-74, 1022-25 (water and sewage installations), ¶¶ 975-89 (wells), ¶¶ 990-1007 (housing), ¶¶ 1008-11, 1019-20 (industry), ¶ 1012 (cement plant), ¶ 1021 (greenhouses).

228. *See supra* notes 117-25 and accompanying text.

229. Bell, *A Critique of the Goldstone Report*, *supra* note 15, at 6 (footnote omitted); *see also* Blank, *supra* note 187, at 727.

B. Legal Standards[230]

230. An issue in academic circles is what law applies to the Israel-Hamas conflict: international humanitarian law or human rights law. The dispute's predicate is whether Gaza remains an occupied territory and, if it is, whether Israel's treatment of Hamas is governed by human rights law as opposed to the law of war. The Goldstone Report and some scholars believe that, despite Israel's disengagement from the territory, Gaza remains occupied. *See* Goldstone Report, *supra* note 4, ¶¶ 302-03; Bisharat, *supra* note 136, at 46-50; James, *supra* note 33, at 643; Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT'L L. REV. 645, 664 (2006). *But see* Luban, *supra* note 175, at 3; *id.* at 7-8 (responding to the author's argument, Amos Guiora agrees with the author that "Israel does not occupy the Gaza Strip"). While the issue is beyond the scope of this paper, the question of the applicable law is relevant.

Professor George Bisharat makes an eloquent argument that Israel's operations in Gaza be evaluated by law enforcement standards. Bisharat, *supra* note 136, at 56. At the same time, however, Professor Bisharat asserts that the Israeli invasion of Gaza arguably constituted aggression. *Id.* at 68-70. He cannot have it both ways: to adhere to a law enforcement model of preventing Hamas attacks on Israel necessarily requires wholesale Israeli reengagement in the Gaza Strip, including assumption of police and judicial functions. *See* Luban, *supra* note 175, at 3 ("[I]f the point of declaring Gaza 'occupied' is to assert that Israel should be exercising governmental authority in Gaza, then Israel would have to re-engage rather than disengaging from Gaza. Nobody, especially Hamas and the Gazan people, wants that."). Moreover, if Protocol I applied to the conflict, I suspect Professor Bisharat would deem the conflict to be one in which Hamas and its allies are fighting against "colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," in which case international humanitarian law governs. Protocol I, *supra* note 157, at art. 1(4); *see* Bisharat, *supra*, note 136 at 68. Israel, however, is not a party to Protocol I, and article 1(4) does not constitute customary international law. *See* HCJ 769/02 Public Comm. Against Torture in Israel v. Government of Israel 2 IsrLR 459, ¶ 20, at 479 [2005]. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 249 (2008) [hereinafter MELZER, TARGETED KILLING]; OP LAW HANDBOOK, *supra* note 208, at 13.

Nevertheless, states, jurists, and academics alike have recognized that an armed conflict can exist between a state and a non-state actor, triggering the application of international humanitarian—rather than human rights—law. For example, the International Criminal Tribunal for the Former Yugoslavia has held

> an armed conflict exists whenever there is a resort to armed force between States *or protracted armed violence between governmental authorities and organized armed groups* or between such groups within a State. *International humanitarian law applies from the initiation of such armed conflicts* and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added). Likewise, the Rome Statute applies to hostilities between states and organized armed groups. Rome Statute, *supra* note 179, art. 8.2(f). The International Law Association has similarly found that armed conflicts can exist involving non-state actors satisfying "two essential minimum criteria": (a) "the existence of organized armed groups" (b) "engaged in fighting of some intensity." Int'l Law Ass'n, Use of Force Comm., *Final Report on the Meaning of Armed Conflict in International Law*, 32 (2010). Relevant factors for organized groups—all of which Hamas possesses—include the existence of a "command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; communications infrastructure; and space to rest." *Id.* at 29. In addition, the fighting must be

The protection of noncombatants, especially civilians, is the primary basis of international humanitarian law.[231] The law rests upon the twin principles of distinction and proportionality; that is, only combatants and military objects (as opposed to civilians and civilian objects) may be attacked[232] and even then not if the resulting harm to civilians and their objects is excessive to the military advantage to be gained.[233]

The principle of distinction requires belligerents "to engage only in military operations the effects of which distinguish between the civilian population . . . and combatant forces, directing the application of force solely against the latter."[234] The discrimination requirement applies to both sides of the conflict. All combatants must " 'distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces and other military objectives from civilian objects . . . but also other actions, such as wearing uniforms.' "[235]

In this regard, defending forces have an obligation to "endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives [and] avoid locating military objectives within or near densely populated areas."[236] "The presence or movements of the civilian population or individual civilians shall not be used to render cer-

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"more than a minimal engagement or incident," *id.* at 2, considering such factors as "the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of the Security Council . . . to broker cease-fire efforts." *Id.* at 30 (footnotes omitted). The 2008-2009 Gaza conflict unquestionably met all of the intensity criteria. *See also* HCJ 769/02, 2 IsrLR ¶ 18, at 477 (applying international humanitarian law to Israeli-Palestinian conflict). *See generally* ANDREA BIANCHI & YASMIN NAQVI, INTERNATIONAL HUMANITARIAN LAW AND TERRORISM 16 (2011); JIMMY GURULE & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 58-64 (2011); David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 34-35 (2009). Finally, the Goldstone Report, while noting Israel's responsibilities as an occupying power, applied the international humanitarian law to the conflict. Goldstone Report, *supra* note 4, ¶¶ 270, 304, 308, 326.

231. *See supra* text accompanying note 21.

232. Protocol I, *supra* note 157, at arts. 48, 51(4). The term "attacker" does not mean "aggressor." A nation can attack an adversary as a defensive measure. *See id.* at art. 49(1); MANUAL OF NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 7.

233. Protocol I, *supra* note 157, at art. 57(2)(b).

234. OP LAW HANDBOOK, *supra* note 208, at 12; *see also* Protocol I, *supra* note 157, at arts. 48, 51(2), 51(3), 51(4), 52(2); MANUAL OF NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 18-19, 20.

235. OP LAW HANDBOOK, *supra* note 208, at 12 (*quoting* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003)); *see also* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 251 (2010).

236. Protocol I, *supra* note 157, at art. 58(a)-(b); MANUAL ON NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 44. The Goldstone Mission never mentions article 58, which would have required Hamas and its allies to avoid civilian areas in the conduct of their military operations. *See infra* notes 353-55 and accompanying text.

tain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations."[237] Thus,

> [a]ny inquiry into whether the parties to an armed conflict have complied with the laws of war requires a two-stage inquiry: asking not only (1) whether attackers have transgressed the limits IHL places on attacks, *but also* (2) whether defenders have observed the limits IHL places on what fighters can do to defend themselves.[238]

The presence of civilians or civilian objects does not necessarily prevent a belligerent from attacking a military objective "in their midst."[239] For example, civilian objects or property used for military purposes—such as hospitals, churches, or mosques—may be legitimate targets for attack.[240] Whether the military strike may proceed depends upon whether the anticipated loss of civilian life and damage to civilian property incidental to the attack are "excessive in relation to the concrete and direct military advantage anticipated."[241] In other words, the anticipated civilian harm may not be disproportionate to the projected military goals to be achieved.[242] Thus, international humanitarian law does not "rule out altogether the possibility of civilian casualties and damage to civilian objects in wartime. In fact, some civilian casualties and damage are virtually taken for granted as long as they constitute

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237. Protocol I, *supra* note 157, at art. 51(7); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973 ("The presence of a protected person may not be used to render certain points or areas immune from military operations.") [hereinafter GC].

238. Samuel Estreicher, *Privileging Asymmetric Warfare? Part I*: *Defender Duties under International Humanitarian Law,* 11 CHI. J. INT'L L. 425, 435 (2011) (emphasis added); *see also* Kenneth Anderson, *A Public Call for International Attention to Legal Obligations of Defending Forces as Well as Attacking Forces to Protect Civilians in Armed Conflict*, KENNETH ANDERSON'S LAW OF WAR AND JUST WAR THEORY BLOG (Mar. 19, 2003), http://kennethandersonlawofwar.blogspot.com/2006/07/civilian-collateral-damage-and-law-of.html (posted on Jul. 21, 2006) (last visited June 4, 2012); Boutruche, *supra* note 172, at 124-25; Parks, *supra* note 187, at 59. Under Protocol I, the failure of a defending force to take appropriate action to protect civilians under its control does not relieve an attacker of its duty to minimize civilian casualties or refrain from an attack. Protocol I, *supra* note 157, at art. 51(8); *see also* SOLIS, *supra* note 235, at 285. The Protocol does not necessarily reflect customary international law. *See* DINSTEIN, *supra* note 175, at 155.

239. GROSS, *supra* note 109, at 236.

240. *See supra* notes 179, 208 and accompanying text.

241. Protocol I, *supra* note 157, at art. 51(5)(b).

242. DINSTEIN, *supra* note 175, at 129; MANUAL ON NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 22. Commanders must cancel or suspend an attack "if it becomes apparent that the objective is not a military one . . . or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. . . ." Protocol I, *supra* note 157, at art. 57(2)(b).

lawful collateral damage"[243]—that is, damage proportionate to the expected military advantage.

The military advantage to be attained is not limited to expected tactical gains, but includes the full context of war strategy. Thus, "[b]alancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives."[244] The proportionality analysis includes a variety of factors, including the security of the attacking force.[245]

Importantly, the determination of whether an attack has caused an excessive loss of civilian life or property is not predicated upon "the actual outcome of the attack *but* the initial expectation and anticipation . . . The linchpin is what is mentally visualized before the event."[246] The assessment of the attack must be made through the eyes of a "reasonable commander" acting under the facts *known at the time of the attack*.[247] Ultimately, "what is 'necessary' to achieve the submission of the enemy with a minimum expenditure of time, life and physical resources involves a complex assessment that is likely to be strongly influenced by subjective perceptions, particularly when determined with respect to individual operations against specific targets."[248] The evaluation must factor "the extreme nature and reality of armed conflict,"[249] including the confusion or "fog of war" that is endemic to any battlefield.[250]

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243. DINSTEIN, *supra* note 175, at 123. The Rome Statute uses the term "clearly excessive" as the measure of disproportionate civilian casualties versus the anticipated military advantage. Rome Statute, *supra* note 179, at art. 21(b).

244. OP LAW HANDBOOK, *supra* note 208, at 12; *see also* MANUAL ON NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 24.

245. OP LAW HANDBOOK, *supra* note 208, at 12; DINSTEIN, *supra* note 175, at 141; *but see* SOLIS, *supra* note 235, at 285 ("Force protection does not supersede the requirements of proportionality"); *see also* W. Michael Reisman, *The Lessons of Qana,* 22 YALE J. INT'L L. 381, 396-97 (1997) (noting that democratic nations "will seek to avoid elective military action[, and when they] cannot, will select and deploy weapons that provide maximum safety to [their] own forces," which will increase the unintended casualties to civilians).

246. DINSTEIN, *supra* note 175, at 132 (emphasis added).

247. *Id.* at 139; *see also* GURULE & CORN, *supra* note 230, at 81; Boutruche, *supra* note 172, at 126-27; Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT'L L. 255, 275-76 (2010); *see also* United States v. List (*The Hostage Case*), Case No. 7, XI TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 755, 1296 (1950) (whether a commander's action is criminal depends upon the situation as it appeared to the commander at the time of his action even if the conclusion he reached is ultimately deemed to be faulty).

248. MELZER, TARGETED KILLINGS, *supra* note 230, at 291. *See also Comm. to Review the NATO Bombing Campaign*, *supra* note 175, ¶ 50; GARDHAM, *supra* note 198, at 106; MELZER, *supra* note 21, at 80; Prosecutor v. Galic, No. IT-98-29-T ¶ 58 (Dec. 3, 2002).

249. MELZER, TARGETED KILLINGS, *supra* note 230, at 296.

250. DINSTEIN, *supra* note 175, at 127; *see also* Kahl, *supra* note 148, at 26 (stating that many of the real or perceived cases on noncompliance international law by U.S. after the invasion of Iraq was "at least partly attributed to the incredibly thick 'fog of war'"); SOLIS, *supra* note 235, at 255 ("On today's battlefields, combatants must sometimes make hard decisions instantaneously. Their decisions do not always cut against distinction and non-

Fulfillment of the principles of distinction and proportionality depends in large measure upon adherence to the law of war by both sides to a conflict; the law is based upon reciprocal responsibilities of the belligerents.[251] For example, to ensure that an attacker can distinguish combatants from civilians, belligerents differentiate their combatants from the civilian population,[252] such as by having them wear fixed, distinctive signs recognizable at a distance (*i.e.,* uniforms) and by carrying their arms openly at all times.[253] And because the presence of civilians or civilian objects near a military objective does not render the objective immune from attack,[254] conventional belligerents avoid locating military objectives or conducting their military operations within or near the civilian populations under their control so as not to place the civilians in danger of attack.[255] In a classic conventional conflict between parties who adhere to the law of war, the principles of distinction and proportionality minimize the conflict's effects on civilians and their property. Each party to a conflict distinguishes its combatants from civilians to ensure only combatants are attacked, and, to the extent possible, they conduct their military operations away from civilian populations and civilian objects.[256]

For conventional belligerents, the principles make good military sense: attacking civilians or their property serves no legiti-

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combatants.").

251. *See* Parks, *supra* note 175, at 772; COHEN, *supra* note 15, at 5; Feinstein, *supra* note 109, at 232; Daphne Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U.L. REV. 1001, 1012, 1025 (2007).

252. DINSTEIN, *supra* note 175, at 35: "[The law of international armed conflict] can effectively protect civilians from the prospect of attack in war *only if* and when the enemy can tell them apart from combatants." (Emphasis added)

253. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 4(a)(1-2), August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also* GURULE & CORN, *supra* note 230, at 72-73. Until Protocol I, wearing a uniform and carrying arms openly was the traditional prerequisite for prisoner of war status upon capture. S*ee, e.g., id.;* Hague Regulations (IV) of 1907 art. 1; Project of an International Declaration concerning the Laws and Customs of War. arts. 1,9 (Brussels, Aug. 27, 1874) ("Brussels Declaration of 1874").

Protocol I intentionally obscures the distinction between civilians and combatants by removing the distinctive-insignia requirement, Protocol I, *supra* note 157, at art. 44(3) (dispensing with need for a distinctive sign recognizable at a distance (*i.e.,* uniform) and limiting requirement that arms be carries openly to military deployments and attacks). *See* Samuel Vincent Jones, *Has Conduct In Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT'L L. 249, 270 (2006). Israel is not a party to Protocol I (nor is the United States), and art. 44 does not represent customary international law. Yoram Dinstein, *Comments on Protocol I*, INTL REV. OF THE RED CROSS, Oct. 31, 1997, at 515-19, http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNV5; OP LAW HANDBOOK, *supra* note 208, at 16.

254. *See supra* notes 239-243 and accompanying text.

255. *See supra* notes 235-238 and accompanying text.

256. Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 343 (2010).

mate military purpose,[257] namely, to destroy the enemy's military capabilities and its will to fight.[258] U.S. military doctrine recognizes ten fundamental Principles of War that "represent the most important nonphysical factors that affect the conduct of operations at the strategic, operational, and tactical levels . . . [T]hey summarize the characteristics of successful operations."[259] Targeting civilians—instead of military objectives—contravenes at least two of these basic principles. First, attacks on civilians violate the "Principle of Objective." Combat power is necessarily limited; "commanders never have enough."[260] The Principle of Objective "allows commanders to focus combat power on the most important tasks" and prevents commanders from undertaking "actions that do not contribute directly to achieving the objectives."[261] A related principle is "Economy of Force," which dictates that commanders "allocate only the minimum combat power necessary to shaping and sustaining operations so they can mass combat power for the decisive operation."[262] Both principles discourage commanders from using scarce combat power for purposes other than defeating the enemy's military, and attacking civilians necessarily squanders the resources needed to accomplish this central mission.[263]

Contemporary wars, however, are rarely fought between symmetrical, conventional belligerents; instead, conflicts are asymmetrical, generally between technologically advanced armies and military forces that are not.[264] To compensate for their inability to confront modern armies directly on the battlefield, less advanced forces—particularly insurgent and terrorist groups—often discard attempts to distinguish themselves from the civilian population and conduct their military operations from civilian population centers.[265] Many depend upon their adversaries' adherence with inter-

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257. MICHAEL WALZER, JUST AND UNJUST WARS 136, 154 (3d ed. 1977); Parks, *supra* note 187, at 150; C.B. Shotwell, *Economy and Humanity in the Use of Force*: *A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 U.S. AIR FORCE ACAD. J. LEGAL STUD. 15, 21 (1993).

258. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS V-13 TO V-14 (Sep. 16, 2006, with Change No. 2, Mar. 22, 2010) [hereinafter JP 3-0]; DEPARTMENT OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS ¶ A-2 (Feb. 2008) [hereinafter FM 3-0].

259. FM 3-0, *supra* note 258, ¶ A-1.

260. *Id.*

261. *Id.*

262. *Id.* ¶ A-10.

263. *See* HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS 161 (2008); Guy B. Roberts, *The New Rules for Waging War*: *The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 119 (1985).

264. JP 3-0, *supra* note 258, at xi, I-6. *See generally* Lawrence Freedman, *The Third World War?*, SURVIVAL, Winter 2001-2002, at 61, 64-65; Laurie R. Blank & Amos Guiora, *Teaching an Old Dog New Tricks*: *Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 45-47 (2010).

265. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 AIR FORCE L. REV. 1, 14, 18 (2008); Benvenisti, *supra* note 256, at 344; Blank & Guiora,

national humanitarian norms, believing the presence of civilians will either force their enemies to restrict the employment of technologically advanced weapons systems (such as air power) or to avoid targeting the groups altogether.[266]

Civilians not only afford a degree of protection to insurgent and terrorist groups, but their presence also serves the groups' greater strategic political objectives.[267] If insurgent or terrorist groups are attacked, any resulting civilian casualties are dutifully reported by the media whose news reports, particularly if Israel is involved, are followed by a knee-jerk condemnation of the IDF by the U.N. and its Human Rights Council.[268] Thus, insurgents win when an adversary refrains from attack in fear of causing civilian casualties, and they win if they are attacked and civilian casualties occur. Given the strategic and tactical advantages insurgents and terrorists obtain from noncompliance with the law of war and from their adversaries' observance of the law, they have absolutely no reason *not* to place civilians at risk.[269]

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supra note 264, at 47-48; *see also* Richemond, *supra* note 251, at 1026.

266. Gross, *supra* note 93, at 447; Schmitt, *supra* note 265, at 14-15, 18; Dakota S. Rudesill, *Precision War and Responsibility*: *Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 537 (2007).

267. Blank, *supra* note 187, at 735-36; Gross, *supra* note 93, at 456; Schmitt, *supra* note 265, at 14-15, 18; Rudesill, *supra* note 266, at 537.

268. *See, e.g.,* W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 305-06 (2006); Alan Baker, *Legal and Tactical Dilemmas Inherent in Fighting Terror: Experience of the Israeli Army in Jenin and Bethlehem (April—May 2002)*, *in* 80 ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 273 (Richard B. Jaques, ed., 2006); Gross, *supra* note 93, at 447, 467; Michael Y. Kieval, Note, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT'L L. 869, 897-98 (2005); Jeremy Rabkin, *The Fantasy World of International Law*: *The Criticism of Israel Has Been Disproportionate*, WEEKLY STANDARD (Aug. 21, 2006), http://weeklystandard.com/Content/Public/Articles/000/000/012/580uttca.asp; Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield*: *Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 AIR FORCE L. REV. 1, 35 (2005); Shotwell, *supra* note 257, at 34-35. *See generally* Richard H. Schultz, Jr., *The 21st Century Conflict Environment*: *Challenges Posed by a Multiplicity of Non-State Armed Groups* (NAT'L STRATEGIC INFO. CTR. (2011), http://www.strategycenter.org/wp-content/uploads/2011/07/Challenges-Posed-by-a-Multiplicity-of-Armed-Groups.pdf (last visited June 4, 2012).

269. *See* ROGERS, *supra* note 179, at 128. The focus of such a conflict is not the enemy's military forces, but its will to fight, using "methods that defy recognized standards of acceptable behavior in war." Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 U.S.A.F. ACAD. J. LEG. STUD. 71, 73 (1997-1998). *See generally* Jeremy Rabkin, *The Politics of the Geneva Conventions*: *Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169 (2003).

C. The Operational Environment

1. Overview

The Goldstone Report mentions—but never critically considers—Hamas's military doctrine and tactics during the conflict; however, any determination of whether the IDF violated international humanitarian law must take into account the combat environment Israeli soldiers actually faced on the ground.[270] As noted above, civilian casualties by themselves do not violate the law of armed conflict.[271]

The Mission received information about the Palestinians conducting both offensive and defensive combat operations from civilian population centers while dressed in civilian clothing.[272] While acknowledging the information, the Mission took no apparent steps to corroborate the reports. It neither interviewed members of Hamas or any other Palestinian armed group nor had any direct contact with Palestinian combatants involved in the conflict.[273] And when the Mission questioned the "Gaza authorities" about the conflict, the "authorities" denied any connection to Hamas's military arm, the Al-Qassam Brigades, or any other Palestinian armed organization.[274] Incredibly, the Mission generally took the "Gaza authorities" at their word.[275]

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270. *See, e.g.,* HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 111, 117.

271. *See supra* notes 187, 243 and accompanying text.

272. *Goldstone Report*, *supra* note 4. For example, the Mission had information about (1) Palestinian combatants firing at Israeli soldiers from the vicinity of a UN school (*id.* ¶ 446); (2) Palestinian combatants firing rockets from residential areas and near schools (*id.* ¶¶ 446-47, 449-50); (3) Palestinian combatants firing at Israelis from and operating in residential areas (*id.* ¶¶ 448, 451, 453-56); and (4) Palestinian combatants dressed in civilian clothes (*id.* ¶ 480).

273. *Goldstone Report*, *supra* note 4, ¶ 441 ("To gather first-hand information on the matter, the Mission requested a meeting with representatives of armed groups. However, the groups were not agreeable to such a meeting. The Mission, consequently, had little option but to rely upon indirect sources to a greater extent than for other parts of its investigation."); *see also id.* ¶ 1636.

274. *Id.* ¶ 441 ("The Mission also addressed questions regarding the tactics used by Palestinian armed groups to the Gaza authorities. They responded that they had nothing to do, directly or indirectly, with al-Qassam Brigades or other armed groups and had no knowledge of their tactics."); *see also id.* ¶ 1635 ("In response to questions by the Mission . . . the Gaza authorities stated that they had 'nothing to do, directly or indirectly, with al-Qassam or other resistance factions' . . . .").

275. *Id.* ¶¶ 441, 1635. The Mission never refers to the "Gaza authorities" as Hamas, as if the "Gaza authorities" are some disembodied entity wholly unconnected to Hamas or its military wing. Why the Mission would accept at all the assertion that the Gaza authorities and Hamas's military wing—the Al Qassam Brigades—were unrelated is difficult to comprehend. They are essentially one and the same. *See* Mellies, *supra* note 170, at 47; *see also* HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 4-8, 24-26; HROUB, *supra* note 43, at 121. In fact, in Hamas's 2008 governing body (Shura Council) elections, only four out of 23 representatives elected to the body were from the political wing of Hamas—"[t]he remainder were activists associated with the military wing of the movement." *BICOM Analysis: Hamas' Threat to the Peace Process*, BRIT. ISR. COMM. & RES. CENTER (March 3, 2010) http://www.bicom.org.uk/context/research-and-analysis/latest-bicom-analysis/bicom-

The Mission relied in large part upon the public testimony of Gaza residents, who were accompanied by Hamas officials and who were reluctant to speak openly—particularly about Hamas's misdeeds[276]—and the Mission did not ask the witnesses "whether Palestinian fighters were in the area of the incidents about which they were testifying."[277] When the Mission actually considered Hamas's conduct during the conflict, it either discounted the conduct,[278] minimized its impact on the IDF's ability to distinguish military targets from civilians and their property,[279] or applied improper legal standards in measuring Israel's response.[280]

2. Hamas's Military Doctrine and Tactics

In developing its defensive and offensive doctrine, Hamas took its cue from Hezbollah, which had achieved a measure of success against the Israeli military in its 2006 war.[281] Hamas's approach is not surprising given that both Hezbollah and Hamas receive funding, weapons, and training from Iran, which is reflected in their

analysis--hamas-s-threat-to-the-peace-process; *see also Iranians, Saudis Competing for Influence with Hamas,* WORLD TRIB., Oct. 17, 2008.

276. *Goldstone Report, supra* note 4, ¶¶ 440, 455; *Colonel Travers Interview*, *supra* note 66.

277. Muravchik, *supra* note 15; *see also* Halevi, *supra* note 15. Based on Justice Goldstone's remarks at the public hearings in Gaza, the hearings' purpose was not to determine the appropriateness of Israel's conduct in the context of the conditions it confronted on the ground; rather, their aim was "primarily to allow the face of human suffering to be seen and to let the voices of victims be heard." Statements of Richard Goldstone, *United Nations Fact-Finding Mission on the Gaza Conflict*, Gaza City Morning Session, June 29, 2009, Unofficial Transcript, 28-30, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm.

278. *See, e.g.*, *Goldstone Report, supra* note 4, ¶¶ 454-56 (dismissing as exaggerated the claim on a Palestinian militant group website that it engaged in such tactics such as " 'seizing houses as military positions for the purpose of staging ambushes against IDF forces' and 'employing explosive charges of various types (IEDs, penetrating, bounding, anti personnel etc.) in the vicinity of residences and detonating them', 'boobytrapping houses . . . and detonating the charges', and 'conducting fighting and sniper fire at IDF forces operating in the built-up areas'"); *id.* ¶¶ 466, 485 (stating that, despite the fact the Mission did not investigate Israeli claims of hospitals being used by Hamas for military purposes and could not make a finding with regard to the allegations, the Mission could not find any evidence that Gaza officials used hospital facilities to shield military activities.

279. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 119-20.

280. Blank, *Finding Facts, supra* note 15, at 282, 289.

281. Matthews, *supra* note 113, at 25; Guy Aviad, *Hamas' Military Wing in the Gaza Strip*: *Development, Patterns of Activity, and Forecast*, 1 MILITARY & STRATEGIC AFF., April 2009, at 3, 7-8; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 110, 121-23.

military strategy and tactics[282]—a fact the Mission never mentions except to note that Hamas had an Iranian-designed rocket.[283]

After Israel's military withdrawal from southern Lebanon in 2000, Hezbollah filled the resulting vacuum.[284] Unfettered by an Israeli military presence and supported financially and materially by Iran,[285] Hezbollah built an extensive military infrastructure, using in part civilian population centers for military depots and fighting positions.[286] During the 2006 conflict, it used this infrastructure to great effect, particularly in the villages of southern Lebanon such as Maroun al-Ras and Bint Jebeil.[287] Throughout the conflict, Hezbollah used the civilian population to screen its military operations and to provide a level of security for its forces.[288]

Hamas tried to emulate Hezbollah's success.[289] After Israel's disengagement from Gaza in 2005 and Hamas's violent takeover of the Strip in 2007, Hamas began to embed its military infrastructure into populated areas—using mosques, hospitals, schools, and residences for storage facilities, command and communication centers, and fighting positions.[290] It planned to fight and hide among

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282. *Hamas's Military Buildup*, *supra* note 170, at 5; Aviad, *supra* note 281, at 4, 7; Cohen & White, *supra* note 109, at ix; Bryan P. Schwartz & Christopher C. Donaldson, *Protecting the Playground*: *Options for Confronting the Iranian Regime*, 35 BROOK. J. INT'L L. 395, 396 (2010); Segal, *supra* note 200, at 77; Petty, *supra* note 203, at 203-05. Hamas also receives support from Syria. Ethan Corbin, *Principals and Agents*: *Syria and the Dilemma of Its Armed Group Allies,* 35 FLETCHER F. WORLD AFF. 25, 26, 30-31 (2011); Gary C. Gambill, *Sponsoring Terrorism*: *Syria and Hamas,* 4 MID. E. INTEL. BULL., Oct. 2002, http://www.meforum.org/meib/articles/0210_s1.htm.

283. *Goldstone Report*, *supra* note 4, ¶ 1621; *see* HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 103.

284. *See* MATT M. MATTHEWS, WE WERE CAUGHT UNPREPARED: THE 2006 HEZBOLLAH–ISRAELI WAR, COMBAT STUDIES INSTITUTE 16 (2008), http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/matthewsOP26.pdf.

285. Petty, *supra* note 203, at 194–203.

286. *See* CORDESMAN, *supra* note 207, at 42-43 (2007); AMOS HAREL ET AL., 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 47 (2008); Frank G. Hoffman, *Hybrid Warfare and Challenges,* 52 JOINT FORCE Q. 34, 37 (2009), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA516871&Location=U2&doc=GetTRDoc.pdf; Sarah E. Kreps, *The 2006 Lebanon War Lessons Learned*, 37 PARAMETERS 72, 78 (2007); Andrew Exum, *Hizballah at War*: *A Military Assessment*, POL'Y FOCUS #63, WASH. INST. FOR NEAR EAST POLICY 4 (2006), http://www.washingtoninstitute.org/templateC04.php?CID=260.

287. HAREL ET AL., *supra* note 286, at 131-43; Matthews, *supra* note 284, at 43–50; *Hezbollah's Use of Lebanese Civilians as Human Shields*, *supra* note 207, at 8, 32, 39, 48-51.

288. CORDESMAN, *supra* note 207, at 41:

> Israel's problems in fighting the political and perceptual battle were compounded by the fact that Hezbollah used Lebanon's people and civilian areas as both defensive and offensive weapons . . . . [Hezbollah] built its facilities in towns and populated areas, used civilian facilities and homes to store weapons and to carry out its activities, and embedded its defenses and weapons in built up areas."

289. Cohen & White, *supra* note 109, at 9; *see also* THANASSIS CAMBANIS, A PRIVILEGE TO DIE: INSIDE HEZBOLLAH'S LEGIONS AND THEIR ENDLESS WAR AGAINST ISRAEL 17 (2010).

290. Cohen and White, *supra* note 109, at x; HAMAS AND THE TERRORIST THREAT, *supra*

the civilian population[291]—a tactic at the very center of asymmetrical conflicts conducted by insurgents in urban environments,[292] and one in which the Mission showed remarkably little interest.

Early in 2008, a senior Hamas leader acknowledged that the employment of civilian population was integral to Hamas's strategy in a conflict with Israel:

> [The enemies of Allah] do not know that the Palestinian people has developed its [methods] of death and death-seeking. For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the *mujahideen* and the children. This is why they have formed

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note 15, at 110; *see also* Bruce Maddy-Weitzman, *The Israel–Hamas War*: *A Preliminary Assessment*, 154 ROYAL UNITED SERVS. INST. J. 24, 25 (2009).

291. Cohen & White, *supra* note 109, at 9–10; COL. (RET.) JONATHAN FIGHEL, HAMAS IN GAZA—URBAN WAR STRATEGY, INT'L INST. FOR COUNTER-TERRORISM, (2009), http://www.ict.org.il/NewsCommentaries/Commentaries/tabid/69/Articlsid/604/currentpage/1/Default.aspx; Matthews, *supra* note 113, at 25; Matt M. Matthews, *The Israeli Defense Forces Response to the 2006 War with Hezbollah*: *Gaza*, MIL. REV., July-Aug. 2009, at 41, 44; Carmit Valensi & Brigadier General Itay Brun, *The Revolution in Military Affairs of the "Other Side,"* YALE UNIVERSITY, 27, http://www.yale.edu/macmillan/fif/publications/OtherSide.pdf.

292. *See, e.g.*, DEP'T OF THE ARMY, FIELD MANUAL 3-06.11, COMBINED ARMS OPERATIONS IN URBAN TERRAIN ¶¶ 1-3b(2), 1-5f, 2-16e (2002), http://www.globalsecurity.org/military/library/policy/army/fm/3-06-11/ch1.htm#par3. Describing the threat posed by insurgents in urban areas to U.S. military forces, Field Manual 3-06.11 notes:

> Threat forces may use the population to provide camouflage, concealment, and deception for their operations. Guerilla and terrorist elements may look no different than any other members of the community. Even conventional and paramilitary troops may have a "civilian" look. . . . The civil population may also provide cover for threat forces, enhancing their mobility close to friendly positions.

Id. at ¶¶ 2-16e(1)(a) & (b). *See also* U.S. MARINE CORPS INTELLIGENCE ACTIVITY, URBAN WARFARE STUDY: CITY CASE STUDIES COMPILATION 23, 25, 28 (Apr. 1999), http://smallwarsjournal.com/documents/urbancasestudies.pdf (noting the PLO's use of civilian populations as shields during Israel's Operation Peace for Galilee in 1982); WALZER, *supra* note 257, at 184 ("[G]uerrillas don't merely fight *as* civilians; they fight *among* civilians."); Estreicher, *Part I*, *supra* note 238, at 427 ("The essential military theory of guerilla warfare is to strike the enemy and then merge back into the civilian population in the hope either of discouraging a counter-attack or, of even greater value to the cause, inviting a military response laying waste to civilian areas and their inhabitants."); A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INT'L REV. RED CROSS 165 (2000) (indicating that guerrillas "merge with the civilian population" and "prefer to launch attacks out of civilian anonymity"); Patrick D. Marques, Guerrilla Warfare Tactics in Urban Environments 29–30, 36–39, 43, 45–48, 53–54 (June 6, 2003) (unpublished Master of Military Art and Science thesis, U.S. Army Command & General Staff College) (on file with author), *available at* http://www.fas.org/man/eprint/marques.pdf (noting the failure of insurgent groups—including the Irish Republican Army, the Mujahedeen in Afghanistan, the Chechen rebels in Grozny—to distinguish themselves from civilian populations); HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 110 (noting insurgents use of densely populated areas to shield their operations and prevent an attack against them). *See generally* JENNIFER MORRISON TAW & BRUCE HOFFMAN, UNITED STATES ARMY, THE URBANIZATION OF INSURGENCY: THE POTENTIAL CHALLENGE TO U.S. ARMY OPERATIONS 7, 11–15 (1994) (describing the increasingly urban nature of insurgencies).

> human shields of the women, the children, the elderly, and the *mujahideen*, in order to challenge the Zionist bombing machine. It is as if they were saying to the Zionist enemy: 'We desire death like you desire life.'[293]

Similarly, on March 1, 2008, Damascus-based Hamas leader Khaled Mashal told a press conference: "If you are stupid enough to enter the Gaza Strip, we will fight you. You have to face not only thousands of fighters but a million and a half people who will fight you, out of their desire to die the deaths of martyrs."[294]

The Mission mentioned the Hammad speech (but not the others).[295] Interestingly (but not unexpectedly), the Mission discarded the speech as irrelevant: "Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. The Government of Israel has not identified any such cases."[296] Aside from the false assertion that such cases did not exist,[297] why the comments of a Hamas official are any less pertinent than varied statements by current and former Israeli civilian and military personnel about Israeli military doctrine is never explained.[298] The Mission failed to identify cases proving the more hyperbolic Israeli statements on which it relied.[299] Moreover, evidence did exist about the use of human shields; the Mission chose not to recognize or accept it.[300] Finally, the Mission purposely chose not to examine Hamas's doctrine and tactics during its investigation.[301] Not surprisingly, then, it "found" nothing to corroborate Mr. Hammad's comments.

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293. Fathi Hammad, *We Used Women and Children as Human Shields*, speech aired on Al-Aqsa Television (Feb. 29, 2008), http://www.memritv.org/newsletter/clip1710.htm (last visited June 4, 2012).

294. INTELLIGENCE & TERRORISM INFO. CTR., HAMAS EXPLOITATION OF CIVILIANS AS HUMAN SHIELDS 27 (Jan. 2009), http://www.terrorism-info.org.il/data/pdf/PDF_08_204_2.pdf; *see also Operation in Gaza*, *supra* note 53, at 29 (quoting 2007 statement by Abu Obeida, a spokesman for Hamas's Izz al-Din al-Qassam Brigades, that "[Hamas's] defence plan is based, to a great extent, on rockets which have not yet been used and *on a network of ditches and tunnels dug under a large area of the [Gaza] Strip*.") (emphasis added); HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 134 (quoting January 15, 2009, Al-Jazeera interview of Abu Nidal, commander of the military wing of the PFLP-GC in the Gaza Strip: "The resistance . . . understood from the beginning what the extent of the Zionist attack was, and defended itself. These areas do not present a problem *because of the population and building density, which provide the resistance with a shield* and enable it to move easily to strike blows at Zionist vehicles . . . which try to move in.") (emphasis in the original).

295. *Goldstone Report*, *supra* note 4, ¶ 477.

296. *Id.* ¶ 478.

297. *See, e.g., supra* notes 290-291, *infra* notes 302-08 and accompanying text.

298. *See* Dershowitz, *supra* note 15, at 11, 32, 45.

299. *See supra* note 214, discussing Eli Yishai's statements.

300. *See supra* notes 272, 290-91; *infra* notes 302-08 and accompanying text.

301. *See infra* note 310 and accompanying text.

In point of fact, Hamas and other Palestinian military groups did fight from civilian areas while dressed as civilians,[302] making it difficult for Israeli forces to identify them. They fired rockets from residential neighborhoods and engaged Israeli forces from or near houses, hospitals, mosques, schools, and U.N. compounds.[303] Seeking protection from Israeli attacks, Hamas established its major command post at Gaza's main hospital,[304] stored weapons and ammunition in civilian buildings,[305] and used civilians to shield combatants from attack.[306] In short:

> Hamas used the urban terrain to its advantage in terms of providing cover and operational and tactical shielding. It placed fighters and weapons caches inside schools, mosques, and other public buildings in addition to homes.

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302. Steven Erlanger, *A Gaza War Full of Traps and Trickery*, N.Y. TIMES, Jan. 11, 2009, http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html; Landes, Part One, *supra* note 15, at 8; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 196-201, 213-15.

303. *See supra* notes 272, 290 and accompanying text; AMNESTY INT'L, ISRAEL/GAZA OPERATION 'CAST LEAD': 22 DAYS OF DEATH AND DESTRUCTION 74 (2009); CORDESMAN, *supra* note 46, at 43-47, 49, 51-52, 54-55; GROSS, *supra* note 109, at 253; Abraham Cooper & Harold Brackman, Opinion, *The Threat of the Human Shield Strategy Hamas Uses Extends Beyond Israel, Gaza*, U.S. NEWS & WORLD REPORT, Jan. 9, 2009, http://www.usnews.com/articles/opinion/2009/01/09/the-threat-of-the-human-shield-strategy-hamas-uses-extends-beyond-israel-gaza.html; Bronner, *supra* note 111; Yaakov Katz, *Gazans Tell Israeli Investigators of Hamas Abuses*, JERUSALEM POST, Apr. 11, 2011, http://www.jpost.com/Home/Article.aspx?id=131380; Yaakov Katz, *"Shelled UN Building Used by Hamas,"* JERUSALEM POST, Jan. 15, 2009, http://www.jpost.com/Home/Article.aspx?id=129393; Yaakov Katz, *IDF Unveils Hamas Map Seized in Gaza*, JERUSALEM POST, Jan. 8, 2009, http://www.jpost.com/Home/Article.aspx?id=128484; Lawson, *supra* note 111; Rod Norland, *Hamas and Its Discontents*, THE DAILY BEAST/NEWSWEEK, (Jan. 19, 2009, 7:00PM) http://www.newsweek.com/2009/01/19/hamas-and-its-discontents.html; Putz, *supra* note 111; Sebastian Rotella, *Conflict in Gaza*: *Hamas' Weapon of Choice*, L.A. TIMES, Jan. 15, 2009, *available at* 2009 WLNR 775471; Andy Soltis, *"Hide Amid Kids" A Top Thug Tactic*, N.Y. POST, (Jan. 7, 2009, 7:05AM) http://www.nypost.com/p/news/international/item_4hi6JT6s4a0Mn8suEcc6tJ; Yoav Stern, *Gaza Reporter Caught on Tape Confirming Hamas Fired Rockets Near TV Offices*, HAARETZ, (Jan. 20, 2009, 9:00PM), http://www.haaretz.com/hasen/spages/1057129.html; Craig Whitlock & Reyham Abdel Kareem, *Gaza Clan Finds One Haven After Another Ravaged in Attacks*, WASH. POST., Jan. 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011503832.html.

304. Amos Harel, *Sources*: *Hamas Leaders Hiding in Basement of Israel-Built Hospital in Gaza*, HAARETZ, (Feb. 22, 2009, 2:22PM), http://www.haaretz.com/hasen/spages/1054569.html; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 164, 166-67; Norwitz, *supra* note 7. Oddly, the Mission did not investigate this matter even though the misuse of such a protected facility constitutes a war crime. *Goldstone Report*, *supra* note 4, ¶ 468; *see infra* note 357 and accompanying text; *see also* Blank, *Application of IHL*, *supra* note 15, at 360-62; Feinstein, *supra* note 109, at 236. *See generally* OP LAW HANDBOOK, *supra* note 208, at 24.

305. Steve Erlanger, *Weighing Crimes and Ethics in the Fog of Urban Warfare*, N.Y. TIMES, Jan. 16, 2009, http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 145-62 (mosques), 165 (medical facilities), 172-77 (ambulances), 179-94 (schools and universities), 202-11 (civilian houses).

306. Dore Gold, *The Dangerous Bias of the United Nations Goldstone Report*, US NEWS & WORLD REP., March 24, 2010, *available at* 2010 WLNR 6217934; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 141; Segal, *supra* note 200, at 81.

> In preparation, Hamas booby-trapped houses and buildings, placed IEDs in homes, and used its tunnel network to move and resupply, albeit not as effectively as Hezbollah. Hamas used Gaza's main hospital as a command center and defensive fighting position.[307]

Any resulting civilian casualties caused by Israeli attacks, no matter how discriminate and proportional, became part of Hamas's strategic narrative of Israel's disproportionate response and war crimes.[308]

D. The Mission's Approach

The Goldstone Mission neither explored nor critically considered how Hamas's tactics might have affected the IDF's military operations. To illustrate, in October 2009, British Colonel Richard Kemp, the former commander of British forces in Afghanistan, testified before the Human Rights Council about Israel's conduct in Gaza:

> [T]he Israeli Defence Forces did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare. Israel did so while facing an enemy that deliberately positioned its military capability behind the human shield of the civilian population . . . . [O]f course innocent civilians were killed. War is chaos and full of mistakes . . . But mistakes are not war crimes. More than anything, the civilian casualties were a consequence of Hamas' way of fighting. Hamas deliberately tried to sacrifice their own civilians . . . "[309]

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307. Mellies, *supra* note 170, at 69; *see also* Jessica Elgot, *Col. Tim Collins*: *Hamas "Committing War Crimes,"* JEWISH CHRON. ONLINE (Jan. 20, 2010, 5:51PM) http://www.thejc.com/news/uk-news/26235/col-tim-collins-hamas-committing-war-crimes (inspection of bombed Gaza mosque revealed secondary explosions indicating storage of explosives); HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 110-19, 215-44; *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 146.

308. Cohen & White, *supra* note 109, at 18; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 141; Aviad, *supra* note 281, at 9; Snyder, *supra* note 109, at 106, 130; COHEN, *supra* note 15, at 4; Dershowitz, *supra* note 15, at 26; Tom R. Przybelski, Hybrid War: The Gap in the Range of Military Operations 13 (unpublished paper, Naval War College, Department of Joint Military Operations, 2011), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA546270&Location=U2&doc=GetTRDoc.pdf.

309. Statement of Colonel Richard Kemp, U.N. Human Rights Council, 12th Special Sess., Geneva (Oct. 16, 2009), *available at* http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409.

When asked about Colonel's Kemp's testimony, Justice Goldstone replied:

> I would also mention that there was no reliance on Col. Kemp mainly because in our Report *we did not deal with the issues he raised regarding the problems of conducting military operations in civilian areas and second-guessing decisions made by soldiers and their commanding officers "in the fog of war." We avoided having to do so in the incidents we decided to investigate*.[310]

One might have thought that the chief purpose of an inquiry into purported violations of the principles of distinction and proportionality would entail an investigation of operations on both sides of the battlefield.[311]

While correctly recognizing that Hamas and other Palestinian armed groups were bound by international humanitarian law,[312] on those occasions when the Mission acknowledged that Palestinian combatants fought from civilian areas or wore civilian clothing, it diminished the significance of such tactics by questioning whether the armed groups had done so intentionally or for the purpose of shielding themselves from attack.[313] What is one to make of such findings? That Hamas and other Palestinian combatants *accidentally* found themselves in civilian areas? Or that, as Professor Moshe Halbertal wondered, Palestinian militants did "not wear their uniforms because they were inconveniently at the laundry?"[314]

Furthermore, on what possible basis could the Mission possibly conclude that Palestinians did not deliberately fight from civilian

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310. E-mail from Judge Richard Goldstone to Maurice Ostroff, International Coalition of Hasbara Volunteers (Sep. 21, 2009, 22:34:29), http://maurice-ostroff.tripod.com/id233.html (emphasis added); *see also* Dershowitz, *supra* note 15, at 23.

311. *See supra* notes 19-20, 235-38, 251-55, 265-69 and accompanying text; *see also* Berkowitz, *supra* note 223.

312. *Goldstone Report*, *supra* note 4, ¶ 304. *See* Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004):

> [I]t is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws. It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are "responsible for the conduct of their members" and may be "held so responsible by opposing parties or by the outside world."

313. *See Goldstone Report*, *supra* note 4, ¶¶ 452-53, 482-83, 493-98.

314. Halbertal, *supra* note 7, at 347.

areas or in civilian garb? The Mission made absolutely no effort to study Hamas's combat doctrine or the means by which it was employed,[315] and it disregarded statements by Hamas leaders and their allies that they would use populated areas to conduct their military operations.[316] While it took the opportunity to examine the entire spectrum of Israeli-Palestinian relations,[317] the Mission evidently could not find the time either to review open-source materials that would have laid out in detail how Hamas intended to fight Israel[318] or how insurgents fight in urban areas generally.[319] Finally, the Mission neither met with any Palestinian armed groups[320] nor asked those witnesses whom it did question about the presence or activities of the armed groups.[321] And the "Gaza authorities'" approach to the conflict mimicked *Hogan's Heroes'* "Sergeant Shultz": "We see nothing; we know nothing."[322]

How Hamas planned and conducted its combat operations during the conflict *is* exactly the issue the Mission should have examined. Civilian casualties by themselves do not establish either a violation of international law or a war crime.[323] Thus, the Mission should have given context to the Israeli military campaign.[324] What did the IDF commanders and soldiers on the ground know? What threats were they confronting? Where were Hamas and other Palestinian combatants situated? Did they distinguish themselves from the civilian population? Where were Hamas' command and control centers and its storage facilities? If Israeli soldiers deliberately targeted civilians, they must be punished.[325] But the rec-

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315. *See supra* notes 16, 229, 310 and accompanying text.

316. *See supra* notes 293-301 and accompanying text.

317. *See supra* note 7 and accompanying text.

318. *See, e.g.,* CORDESMAN, *supra* note 46; BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD (Lieutenant Colonel Scott C. Farquhar ed., 2009); *Hamas's Military Buildup*, *supra* note 170.

319. *See supra* note 292 and accompanying text.

320. *See supra* note 273 and accompanying text.

321. *See supra* note 276-77 and accompanying text. Even had it asked the witnesses about the activities of Palestinian militants, the Mission acknowledged that the witnesses would have been reluctant to answer. *See supra* text accompanying note 275.

322. *See supra* notes 274-75 and accompanying text; for Sergeant Schultz, *see* http://www.youtube.com/watch?v=34ag4nkSh7Q (last visited June 4, 2012).

323. *See* supra notes 187-88, 239-43 and accompanying text.

324. *See* Jones, *supra* note 253, at 277; Asa Kasher, *Operation Cast Lead and the Ethics of Just War*, AZURE, Summer 2009, at 9, http://www.azure.org.il/article.php?id=502; Newton, *supra* note 15, at 273.

325. Landes *Part One*, *supra* note 15, at 4. As noted above, I do not discount the possibility that Israeli soldiers may, in fact, have committed grave breaches of the law of war. *See supra* text accompanying note 225. The testimony of some witnesses before the Mission is compelling and heart-wrenching. *See, e.g.,* Testimony of Mr. Wail El-Samouni, Unofficial Transcript, June 28, 2009, *supra* note 277, at 3-19, (describing deaths of family members and destruction of property during the conflict); *see also supra* note 226; Testimony of Khaled Abed Rabbo, Unofficial Transcript, June 28, 2009, *supra* note 277, at 29-34 (describing killing of family members by Israeli forces). As noted, the Government of Israel has re-

itation of anecdotal incidents representing a small percentage of alleged civilian casualties does not warrant an indictment against the entire IDF or the Government of Israel.

Hamas and its allies intentionally added to the normal "fog of war" as their leaders said they would, and the conditions created by these groups' tactics necessarily made it much more difficult for the Israelis to distinguish military targets from civilians and civilian objects.[326] Israel took steps to minimize civilian casualties—not all of them successful.[327] For example, it gave warnings of impending attacks,[328] it chose (in some cases) weapon systems likely to cause the least collateral harm,[329] and it avoided targets where the resulting collateral damage would be too great;[330] however, "many Hamas targets were so deeply embedded in densely populated areas and located so close to civilian buildings that it was impossible to avoid collateral damage."[331]

Many of the anecdotal examples of alleged Israeli attacks on civilians cited by the Mission actually involved combat between the IDF and Palestinian armed groups. For example, the attack that the Mission claimed destroyed the Gaza Main Prison,[332] was in fact a strike against Hamas security force barracks[333]—

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portedly conducted some 400 command investigations in relation to Operation Cast Lead and opened 52 criminal investigations. *See supra* note 225; *see also Gaza Operation Investigations: Second Update, supra* note 164, ¶ 10. On the other hand, "Hamas authorities in Gaza have neither investigated nor disciplined anyone for ordering or carrying out hundreds of deliberate or indiscriminate rocket attacks into Israeli cities and towns during the fighting in December 2008 and January 2009." *Israel/Gaza: Wartime Inquiries Fall Shor*t, HUMAN RIGHTS WATCH (Aug. 10, 2010), http://www.hrw.org/en/news/2010/08/10/israelgaza-wartime-inquiries-fall-short.

326. According to the Government of Israel: "The Gaza Operation presented complex military challenges in protecting civilians from the hazards of battle. Urban warfare and the cynical choice made by Hamas to imbed itself in civilian urban areas and to use civilian structures as shields contributed to the great challenges for Israeli air and ground forces." *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 146; *see also* Dershowitz, *supra* note 15, at 21; Landes, *supra* note 15, at 4.

327. Erlanger, *Weighing Crimes and Ethics, supra* note 305.

328. Interview, Colonel Richard Kemp, former commander of British forces in Afghanistan, BBC NEWS, Jan. 18, 2009, http://www.youtube.com/watch?v=LrLfiMm86tA (last visited June 4, 2012); *see also* CORDESMAN, *supra* note 46, at 17 (describing IAF's "systematic effort[s] to limit collateral damage"). Evidence exists that Hamas used Israeli warnings of impending strikes on particular targets to "organize" civilians into human shields to deter the attacks. Gold, *supra* note 306; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 254-56; *see also* Erlanger, *Weighing Crimes and Ethics, supra* note 305; Matthews, *supra* note 113, at 33.

329. *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 85; CORDESMAN, *supra* note 46, at 17. Professor Cordesman noted that "the use of these lighter weapons sometimes had to be mixed with the use of the equivalent of larger bombs in order to strike successfully at larger, hardened and sheltered targets." *Id.*

330. Statement of Colonel Richard Kemp, *supra* note 309.

331. CORDESMAN, *supra* note 46, at 17.

332. *Goldstone Report*, *supra* note 4, ¶¶ 32, 336, 366-70, 380-81.

333. *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶¶ 89-91.

unquestionably a legitimate target.[334] Similarly, purported casualties and damage caused by the IDF to the United Nations Relief and Works Agency (UNRWA) compound,[335] the UNRWA school,[336] the Sawafeary Chicken Coops,[337] the Abu Jubbah Cement-Packaging Plant,[338] the al-Wadiyah factories,[339] and the El-Bader Flour Mill[340] all occurred in connection with military operations against Palestinian combatants.[341]

The Mission placed considerable emphasis on the Palestinian deaths that resulted from an IDF strike against Palestinian combatants in the vicinity of an UNRWA school. In fact, Israeli soldiers took mortar fire from Palestinian combatants, who were situated about 80 meters from the facility.[342] The IDF responded with mortars.[343] The Mission acknowledged that the IDF may have come under fire from Palestinian mortars,[344] but nevertheless concluded that the Israeli commander was reckless in his choice of weapon.[345] As was its practice throughout the investigation, the Mission was wholly indifferent to actions of the Palestinian militants who placed the school in jeopardy by embedding their mortars near the school. The Mission also (contrary to Justice Gold-

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334. *See, e.g.,* DINSTEIN, *supra* note 175, at 96, *see also supra* notes 163-80 and accompanying text.

335. *Goldstone Report*, s*upra* note 4, ¶¶ 543-95.

336. *Id.* ¶¶ 653-73.

337. *Id.* ¶¶ 942-61.

338. *Id.* ¶¶ 1012-17.

339. *Id.* ¶¶ 1018-21.

340. *Id.* ¶¶ 913-41.

341. *Operation in Gaza*, *supra* note 53, at 128-30; *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶¶ 61-66, 92-97, 118-45.

342. *Operation in Gaza*, *supra* note 53, at 128. *See generally* HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 177-94 (describing Hamas's use of educational institutions for military operations).

343. *Operation in Gaza*, *supra* note 53, at 128.

344. *Goldstone Report*, *supra* note 4, ¶ 690. The Mission faulted Israel for giving conflicting versions of what happened at the school. *Id.* ¶¶ 676, 679-81, 686, 702. The Mission says nothing, however, about UNRWA's false claim that Israel had targeted the school itself, an assertion it had persisted in making for a month. Tovah Lazaroff & Yaakov Katz, *UN*: *IDF Did Not Shell UNRWA School,* JERUSALEM POST, Feb. 1, 2009, http://www.jpost.com/MiddleEast/Article.aspx?id=131379:

> A clerical error led the UN to falsely accuse Israel of shelling one of its Gaza schools in the Jabalya refugee camp during Operation Cast Lead, the international organization admitted this week. For close to a month, the UN accused the Israel of hitting the educational compound ran by its Relief and Works Agency for Palestine Refugees, which was sheltering more than 1,300 Gazans as the IDF battled Hamas in the camp on January 6.

See also Amos Harel, *UN Backtracks on Claim that Deadly IDF Strike Hit Gaza School,* HAARETZ, (Feb. 3, 2009, 5:39PM), http://www.haaretz.com/news/un-backtracks-on-claim-that-deadly-idf-strike-hit-gaza-school-1.269314.

345. *Goldstone Report*, *supra* note 4, ¶¶ 41-42, 697-700.

stone's later claim[346]) attempted to second-guess the decision of the Israeli commander without examining his options,[347] what information he had at the time of the attack, or the danger created by the Palestinian mortars to his soldiers.[348]

What is more, except for Hamas rocket attacks against Israeli civilians,[349] unless the Mission was investigating purported Israeli violations of international law, it consciously closed its eyes to possible war crimes committed by Palestinian militants in the conduct of their military operations. The Mission claimed that it "necessarily had to be selective in its choice of issues and incidents for investigation[,]" but concluded that "the report is illustrative of the main patterns of violations."[350] With respect to the tactics employed by Palestinian combatants, this statement is simply not true.

The Mission had information that Hamas established its military headquarters in a hospital, stored weapons in mosques, and fought from civilian areas in civilian clothing, yet it did not investigate these allegations and generally minimized them.[351] In fact, in some instances it simply concluded that, because it could not confirm the incidents, they did not happen.[352]

Thus, the Mission completely missed the fact that Hamas and its allies violated Article 58 of Protocol I,[353] which requires combatants to take certain precautions with respect to civilians under their control so as not to place them in danger from military operations.[354] Indeed, "[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is a war crime.[355] Further, fighting in civilian garb to feign civilian or noncombatant status constitutes

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346. *See supra* note 310 and accompanying text.

347. For example, air support was unavailable to the unit at the time. *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶¶ 65. The mortars used by Israel contained "advanced target acquisition and navigation systems and was the most precise weapon available to Israeli forces at the time." *Id.*

348. *See* Jenks & Corn, *supra* note 15, at 4: "Critiquing targeting decisions as the Mission did distorted the findings of the Goldstone Report because the assessment was divorced from the military commander's operational requirements and relies on facts and circumstances that may have only come to light in the aftermath of events." *See also supra* notes 247-50 and accompanying text.

349. *Goldstone Report*, *supra* note 4, ¶¶ 103-10,

350. *Id.* ¶ 157.

351. *See supra* note 272 and accompanying text. The Mission, for example, only examined mosques and hospitals that were damaged during Israeli attacks. *Goldstone Report*, *supra* note 4, ¶¶ 464-65 (mosque), 596-652 (hospitals).

352. *Goldstone Report*, *supra* note 4, ¶¶ 468-69, 487, 495.

353. Blank, *Finding Facts, supra* note 15, at 301-02; Blank, *Application of IHL*, *supra* note 15, at 388-90.

354. *See also* GC, *supra* note 237, art. 28.

355. Rome Statute, *supra* note 179, art. 8.2(b)(xxiii).

perfidy,[356] and using hospitals emblazoned with the Red Crescent is a grave breach of the Geneva Convention.[357] The Mission did note that armed groups have an obligation "to protect civilians from the inherent dangers created by military operations[,]"[358] but it concluded with nothing more than the statement that, "*if*" the Palestinian armed groups failed in this obligation, "they would bear responsibility for the damage done to civilians living in Gaza."[359] On their face, the actions of Palestinian combatants constituted war crimes and—assuming a full and fair investigation—should have warranted further inquiry.[360]

Finally, and most fundamentally, the Mission should have addressed how a military committed to compliance with the law of war is supposed to deal with an insurgent or terrorist group that embeds itself into a civilian population either to deter an attack or to reap the strategic "benefits" of the inevitable deaths of civilians resulting from an attack.[361] While recognizing (at least to some extent) that Hamas and other militant groups used civilian areas for their combat operations,[362] the Mission placed the onus of avoiding civilian casualties entirely on Israel.[363]

The distinction between so-called "Hague Law," which traditionally governed the means and methods of warfare, and "Geneva Law," which deals with the treatment of combatants and civilians that fall into a belligerents hands, is important in this regard. A nation that captures combatants or detains civilians has plenary and exclusive control over them; "nothing prevents or excuses a nation's unqualified adherence to the law of war."[364] In the case of the appropriate means and methods of conducting operations,

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356. Protocol I, *supra* note 157, at art. 37(1)(c); Louis Rene Beres, *Israel, Lebanon, and Hizbullah*: *A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141, 147-48 (1997); Blank, *Application of IHL*, *supra* note 15, at 362-64; Weiner & Bell, *supra* note 15, at 22-23; OP LAW HANDBOOK, *supra* note 208, at 13.

357. Protocol I, *supra* note 157, at art. 85(3)(f).

358. *Goldstone Report*, *supra* note 4, ¶ 497.

359. *Id.* ¶ 498 (emphasis added).

360. *See* Rodley, *supra* note 70, at 196 (discussing Mission's failure to investigate Hamas's use of the Al-Shifa Hospital for its military headquarters); *cf.* Franck and Fairley, *supra* note 73, at 312-13 (discussing danger of selectivity in fact-finding).

361. Landes *Part One*, *supra* note 15, at 2. *See generally* Parks, *supra* note 187, at 179; Michael N. Schmitt, *The Principle of Proportionality in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 169 (1999); Reynolds, *supra* note 268, at 79; Jonathan Keiler, *The End of Proportionality*, PARAMETERS, Spring 2009, at 53, 58.

362. *See supra* note 272 and accompanying text.

363. An editorial written by Justice Goldstone after release of the report is illustrative: "Israel is correct that identifying combatants in a heavily populated area is difficult, and that Hamas fighters at times mixed and mingled with civilians. *But that reality did not lift Israel's obligation to take all feasible measures to minimize harm to civilians*." Richard Goldstone, *Justice in Gaza*, N.Y. TIMES, Sep. 17, 2009, http://www.nytimes.com/2009/09/17/opinion/17goldstone.html (emphasis added).

364. Rosen, *supra* note 93, at 692; *see also* Parks, *supra* note 187, at 181-82; OLASOLO, *supra* note 263, at 2.

however, the defender—in this case Hamas—picks the battlefield. It alone decides whether to fight among civilians.[365] The Mission blames Israel for civilian casualties even though Hamas and its partners selected the ground on which the battle would be fought, knowing (and perhaps hoping) that civilian lives and property would be jeopardized.[366]

CONCLUSION: THE WAY FORWARD

The Goldstone Report is illustrative of institutional shortcomings prevalent in the observance and enforcement of international humanitarian law generally, and to asymmetric conflicts specifically. The reactions of organizations such as the UN (particularly the Human Rights Council), NGOs, and the media to civilian casualties in asymmetrical wars involving Israel (and sometimes the United States) is *Pavlovian*—they make allegations ranging from the response was disproportionate (in the *ad bellum* sense), to the failure of Israeli or U.S. forces to prevent "needless" civilian casualties by not discriminating between military objectives and civilians or by not using proportionate force in attacking the military targets.[367] While occasionally acknowledging the failure of insurgent or terrorist groups to distinguish themselves from the civilian population or their use of civilian areas for combat operations, these groups almost invariably give insurgents and terrorists a "pass." And the opprobrium heaped upon Israel or the U.S. feeds the insurgents' or terrorists' strategy by delegitimizing their enemies. Ultimately, the international community's narrative affords insurgents and terrorists a tremendous incentive to continue to ignore the most basic obligations of international law.[368]

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365. Jones, *supra* note 253, at 271-72; Parks, *supra* note 185, at 28-29.

366. Nevertheless, the Government of Israel reports that it has implemented new procedures and doctrines to improve the protection of the civilian population, such as "advance research into and the precise identification and marking of existing infrastructure, including that pertaining to water, food and power supplies, sewage, health services, educational institutions, religious sites, economic sites, factories, stores, communications and media, and other sensitive sites as well as cultural institutions." *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 151. It also claims that it has a

> "new written procedures mandate . . . aimed at safeguarding the civilian population . . . [including] safe havens for civilians to take refuge; evacuation routes for civilians to safely escape combat areas; medical treatment for civilians; methods for effectively communicating with and instructing the population; and provisions for humanitarian access during curfews, closures and limitations on movement."

Id. ¶ 152.

367. *See* COHEN, *supra* note 15, at 16-19.

368. *See supra* note 269 and accompanying text; Parks, *supra* note 187, at 137; Jacob Turner, *Towards a Synthesis Between Islamic and Western Jus in Bello*, 21 J. TRANSNAT'L L. & POL'Y 165, 172 (2012) (footnotes omitted):

International humanitarian law does not (nor should it) create a system that awards a belligerent a "handicap" because it may be militarily weaker than its opponent.[369] The laws of armed conflict do not exist to ensure a "fair fight," only a fight according to basic rules that protect those who do not or cannot participate in the conflict.[370] To allow one party to a conflict to ignore its obligations under international law, or worse to benefit strategically and tactically from its enemy's compliance with the law, threatens the demise of the entire international humanitarian law system.[371]

> [T]he current state of IHL permits belligerents to claim the full rights of civilians, and avoid the liabilities of combatants . . . . Armies fighting against belligerents using such tactics are thus prone to accusations of having deliberately and indiscriminately targeted civilians. In an age where media support for or consternation with military tactics can have enormous bearing on military strategy, such behaviour on the part of belligerents may act as a powerful weapon in furthering their policy aims via the discrediting of the opposition in the eyes of world opinion.

Alan M. Dershowitz, *The Israel-Hezbollah War*, AMAZON SHORTS 5 (2006) (on file with the author) ("Whenever a democracy . . . chooses to defend its civilians by going after the terrorists hiding among civilians, the[] predictable condemners [international community and human rights organizations] can be counted on by terrorists to accuse the democracy of 'overreaction,' or 'disproportionality,' and 'violations of human rights.' In so doing, they play into the hands of the terrorists and cause more terrorism and more civilian casualties on both sides . . . . "); Editorial, *Hamas's Human Shields*, JERUSALEM POST, Mar. 5, 2008, at 13, *available at* 2008 WLNR 4446011 (arguing that "Hamas's brazen use of human shields is directly facilitated by the international community's reluctance to address the issue and denounce the premeditated endangerment of ordinary people"); Cooper & Brackman, *supra* note 303 ("The future of international humanitarian law could be at stake in Gaza. But the deadly menace stems not from the IDF but from Hamas's twin campaign of terrorism against both Israeli and Palestinian innocents. The Gaza terrorist state that turns its own people into human shields also threatens to strip the entire civilized world of the protections of international law.").

369. *See* Parks, *supra* note 187, at 169; Michael N. Schmitt, *Targeting and Humanitarian Law*: *Current Issues*, *in* ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 173 (Richard B. Jacques ed., 2006). *But see* Gabriel Swiney, *Saving Lives*: *The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733, 755 (2005) ("It is unfair to create a legal standard that handicaps insurgents.").

370. *See* Blank, *Application of IHL*, *supra* note 15, at 386; Rosen, *supra* note 93, at 726-27.

371. *See* Anderson, *supra* note 238:

> Th[e] emphasis on the need for strict compliance by all parties is of utmost importance, both in minimizing collateral damage in future conflicts and in buttressing the long-term viability of the entire armed conflict-related body of law. Any effort to accept or justify the proposition that the laws of war's strictures bind some parties more than others, or that non-compliance by some parties is somehow excusable or justifiable, would irredeemably erode the laws of war.

Newton, *supra* note 15, at 277: "Lawfare that creates uncertainty over the application of previously clear rules must be opposed vigorously because it does perhaps irrevocable harm to the fabric of the laws and customs of war. Illegitimate lawfare will marginalize the precepts of humanitarian law if left unchecked, and may serve to create strong disincentives to its application and enforcement;" *see also* Paul H. Robinson, Opinion, *Israel and the Trouble with International Law*, WALL ST. J., Sept. 22, 2009, at A25 ("A law seen as unjust promotes resistance, undermines compliance, and loses its power to harness the powerful forces of

The irony is that Israel and the United States (along with its allies) make adherence to the law of war a central component of their military doctrine and operations.[372] Most states that actually engage in conflict ignore the twin principles of distinction and proportionality. The same, of course, is true for non-state organized, armed groups. The 800-pound gorilla in the room is whether the international humanitarian law's most basic tenet—the preservation of civilian immunity—represents the practice (as opposed to the words)[373] of belligerents. A visitor from another planet assessing the devastation wrought on civilians in conflicts in the past 50 years would likely conclude that, on earth, civilians are lawful targets.[374]

Thus, Goldstone Report defenders who perceive concepts such as "asymmetrical war" or "lawfare" as antithetical to international humanitarian law and an excuse to harm or kill civilians have it backwards.[375] Only states that actually care about the preservation

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social influence, stigmatization and condemnation.").

Part of the problem is Protocol I itself. While Protocol I recognizes that both attackers and defenders have reciprocal responsibilities to protect civilians, it essentially gives little more than "lip service" to the duties of the defender. Jones, *supra* note 253, at 272; Parks, *Air War*, *supra* note 187, at 14, 28-29. The Protocol's emphasis on protecting defending forces must be considered in the context of its development. The Protocol was not drafted solely (or in some cases primarily) with the concern of protecting civilians and or combatants rendered *hors de combat*; instead, it represents an effort by developing nations, assisted by the Soviet Bloc, "to even the playing field" against more technologically advanced militaries. *See* Rosen, *supra* note 93, at 687-88, 716, 724-27; Parks, *supra* note 187, at 165, 218; Reynolds, *supra* note 268, at 58. For that reason, some western nations that actually fight wars—such as the United States and Israel—have decided not to become parties to the treaty. Daniel Bethlehem, *The Methodological Framework of the Study*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3, 6-7 (Elizabeth Wilmshurst & Susan Breau eds., 2007); *see also* Parks, *supra* note 187, at 112 (noting that the rules established by Protocol I "bear no relation to the way warfare has evolved over the past two centuries").

372. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60, JOINT TARGETING I-8, E-2 to E-3 (Apr. 13, 2007); DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶¶ 40-41 (Jul. 1956) (Change No. 1 July 15, 1976); U.S. NAVY, U.S. MARINE CORPS/U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, NCWP 5-12.1, COMDTPUB P5800.A, ch. 8 (2007); OP LAW HANDBOOK , *supra* note 208, at 10, 13; HCJ 769/02, Pub. Comm. Against Torture v. Gov't of Israel, ¶¶ 23, 26 [2005] (Isr.) (Barak, J.); ISRAEL MINISTRY OF FOREIGN AFF., BACKGROUND PAPER, RESPONDING TO HAMAS ATTACKS FROM GAZA—ISSUE OF PROPORTIONALITY (Dec. 2008), http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/GazaProportionality.pdf; *see also* Kieval, *supra* note 268, at 888-89; Steven R. Ratner, *Geneva Conventions,* FOR. POL'Y, Mar. 1, 2008, at 26.

373. W. Hays Parks, *The ICRC Customary Law Study*: *A Preliminary Assessment*, 99 AM. SOC'Y INT'L L. PROC. 208, 210 (2005); Leah M. Nichols, *The Humanitarian Monarchy Legislates*: *The International Committee of the Red Cross and Its 161 Rules of Customary International Law*, 17 DUKE J. COMP. & INT'L L. 223, 244 (2006); *see also* Reynolds, *supra* note 268, at 74 ("Despite convenient or timely accusations against any one state for an incident of collateral damage, the only states in a probable position to maintain the moral high ground are those states that have never been to war.").

374. Rosen, *supra* note 93, at 774-76.

375. *See, e.g.,* Naomi Klein, *Introduction*: *The End of Israeli Exceptionalism*, IN THE GOLDSTONE REPORT: THE LEGACY OF THE LANDMARK INVESTIGATION OF THE GAZA CONFLICT

of civilian immunity have real concerns about how to fight enemy forces that use civilians in their military operations.[376] Most states that fight wars, as well as insurgent and terrorist groups, are not at all concerned about the challenges of asymmetrical war: they simply target civilians and combatants alike without regard to the principles of distinction or proportionality or any other protections under international law.[377] Simply put, their approach is to "shoot everyone down and sort the civilians out on the ground."[378] Thus, in virtually every conflict, both international and non-international, in the past 50 years, combatants have ignored international humanitarian law's basic tenets.[379]

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xvi (Adam Horowitz et al. eds., 2010) ("When Israel and its supporters respond to Goldstone by waging war on international law itself, characterizing any possible legal challenge to Israeli politicians and military officials as 'lawfare,' they are doing nothing less than recklessly endangering the human rights architecture that was forged in the fires of the Holocaust."); Slater, *supra* note 186, at 366 (noting the term "asymmetrical warfare" is just "current jargon for age-old guerilla warfare," and to those who suggest it gives Hamas an "unfair advantage," "'What is it that Israel wants? Permission to fearlessly attack defenseless population centers with planes, tanks and artillery.'") (quoting Zerv Sternhall).

376. *See* GROSS, *supra* note 109, at 260:

> Hamas built its tactics around an implicit understanding that Israeli military actions were not entirely unrestrained. It is unlikely that Hamas would have placed their command centers in hospitals or used children to transport arms if they believed the Israelis would ruthlessly attack any of these targets. Israel's norms of conduct were precisely those that allowed Hamas to feel secure about adopting tactics that might easily invite catastrophe in other circumstances.

377. Nicolas Lamp, *Conceptions of War and Paradigms of Compliance*: *The "New War" Challenges to International Humanitarian Law,* 16 J. CONFLICT & SEC. L. 225, 244-45 (2011).

378. My apologies to the Army Air Defense Artillery. *See, e.g.,* HAROLD COYLE, SWORD POINT 217 (1988); *Murphy's Law of Combat Operations,* MILITARY QUOTES, #47, http://www.military-quotes.com/murphy.htm (last visited June 4, 2012).

379. Rosen, *supra* note 93, at 774-76 nn. 522-28 (describing modern conflicts in which states have failed to abide by the fundamental precepts of the law of armed conflict). Since the article was published, one can add Sri Lanka, Ivory Coast, Syria, Libya, Sudan (again), Somalia (again), and Yemen. *See supra* note 154 and accompanying text; Marlise Simons, *Ivory Coast: Hague Inquiry Is Sought*, N.Y. TIMES, June 23, 2011, http://www.nytimes.com/2011/06/24/world/africa/24briefs-Ivorycoast.html ("[D]uring the postelection violence at least 3,000 people were killed . . . ."); Monica Mark, *Ivory Coast Epilogue: The Fate of the Gbagos*, TIME, Aug. 22, 2011, http://www.time.com/time/world/article/0,8599,2089794,00.html (noting 3,000 people killed in postelection violence); S.C. Res. 2000, ¶ 7(a), U.N. Doc. S/RES/2000 (July 27, 2011) (condemning violence against civilians); S.C. Res. 1975, ¶ 5, U.N. Doc. S/RES/1975 (Mar. 30, 2011) (reiterating the U.N.'s "firm condemnation of all violence committed against civilians"); *see supra* notes 145-46 and accompanying text (noting Syrian armed forces attacks against protesters cause over 2,600 civilian deaths); C.J. Chivers, *Qaddafi Troops Fire Cluster Bombs into Civilian Areas*, N.Y. TIMES, Apr. 15, 2011, http://www.nytimes.com/2011/04/16/world/africa/16libya.html?pagewanted=all (describing attacks by Libyan armed forces using heavy weapons, including cluster bombs, against residential neighborhoods in Misurata); David D. Kirkpatrick & Kareem Fahim, *In Libya, Both Sides Gird for a Long War as Civilian Toll Mounts*, N.Y. TIMES, Mar. 5, 2011, http://www.nytimes.com/2011/03/06/world/africa/06libya.html?pagewanted=all (describing attacks on residential neighborhoods); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (condemning Libyan government's attacks on civilians); U.N. S.C. Rep. of the Panel of Experts on the Sudan established pursuant to Resolu-

An international legal regime that benefits belligerents who deliberately place civilians and civilian objects at risk cannot long be sustained. States can neither be expected to permit their citizens to be placed in jeopardy from insurgent or terrorist attacks, nor to endure severe combat losses because an insurgent or terrorist force discards the law and bases its strategy on its opponent's adherence to the law. Nations follow international law because it is in their interest to do so;[380] when it ceases to be in their interest, the law will no longer bind their actions.[381] While some in academia, NGOs, or the Human Rights Council may applaud the Goldstone Report's findings and conclusions, international law is not made in the parlors of academia, the offices of NGOs, or the halls of the Human Rights Council.[382] States, particularly those that actually engage in combat, make the law of armed conflict, and all the fulminations of academics, NGOs, or the Human Rights Council will not alter a state's obligation to protect its citizens or to minimize its combat losses, nor should they.

At the center of these asymmetrical conflicts are the civilians. When they are alive, civilians are integral parts of the insurgent or terrorist military arsenal—to be used to deter enemy attacks and to conceal military facilities and operations. When they are dead, they serve as props, used by insurgents and terrorists to delegitimize their enemies and gain the world's sympathy.[383] The real tragedy is that the strategy works.[384]

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tion 1591 (2005), ¶¶ 101-04, U.N. Doc. S/2011/111 (Mar. 8, 2011) (addressing attacks against civilians by Sudan and its allies); Joe DeCapua, *U.N. Humanitarian Official Says Somali Civilian Casualties Rise*, VOANEWS.COM, Apr. 14, 2010, http://www.voanews.com/english/news/africa/decapua-somalia-un-14apr10-90849259.html (describing attacks on civilians by Islamist militias and the Transitional Federal Government); Sarah Childress, *Civilian Casualties Dog Troops in Somalia*, WALL ST. J., July 29, 2010, http://online.wsj.com/article/SB10001424052748704895004575395111138942560.html (describing African Union attacks on civilian areas); Hakim Almasmari, *Activist Group*: *Dozens of Yemeni Civilians Killed*, CNN, July 9, 2011, http://articles.cnn.com/2011-07-09/world/yemen.unrest_1_abyan-province-civilian-deaths-yemeni-forces?_s=PM:WORLD (describing indiscriminate attacks by Yemeni armed forces on civilians); *UN Rights Official Calls for Investigation into Yemen Civilian Deaths*, VOANEWS.COM, Sept. 18, 2009, http://www.voanews.com/english/news/a-13-2009-09-18-voa47-68758287.html (noting an air strike by Yemeni warplanes that "killed dozens of citizens").

380. COHEN, *supra* note 15, at 5. *See generally* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115, 1132-33 (1999).

381. *See supra* text accompanying note 371.

382. *See, e.g.,* Eric A. Posner, *Dockets of War*, NAT'L INT., Feb. 23, 2011, http://nationalinterest.org/article/dockets-war-4890.

383. Blank, *supra* note 187, at 735-36.

384. *See, e.g.,* Ian O'Doherty, *Why the Israeli People Have Finally Had Enough*, INDEP., Jan. 5, 2009, http://www.independent.ie/opinion/columnists/ian-odoherty/why-the-israeli-people-have-finally-had-enough-1592022.html ("The civilian deaths in Gaza are to be mourned, and anyone who says otherwise is reprehensible. But is a sick and twisted irony, they are mourned more by Israelis than by Hamas, who know that every dead Palestinian kid is worth another piece of propaganda."); Dershowitz, *supra* note 15, at 26 ("Every time a Palestinian terrorist kills an Israeli civilian, Hamas wins. And every time an Israeli soldier

The Goldstone Mission had an opportunity to break this cycle—to put the imprimatur of the Human Rights Council, which historically has been pathologically hostile to Israel,[385] on an inquiry that would have seriously dealt with the question of how modern militaries should respond to belligerents that make civilians and their property part of the battlefield.[386] In every respect, the Mission was singularly unsuccessful, and civilians in future conflicts will ultimately pay the price with their lives and treasure. [387] Justice Goldstone's reconsideration of the Report's conclusion does not by itself correct the trajectory of how the international community addresses asymmetrical conflicts, but perhaps it is a start.

kills a Palestinian civilian, Hamas wins. That is their strategy . . .").

385. *See supra* text accompanying note 80.

386. *See supra* notes 264-69 and accompanying text.

387. Anderson, *supra* note 238 ("Defenders' violations of their obligations under international humanitarian law, while not relieving attackers of their obligations, will in fact tend to make collateral damage from even legally permitted attacks more likely and more extensive."); *see also* Reynolds, *supra* note 268, at 76.

THE EXTRAORDINARY RESTRICTIONS ON THE CONSTITUTIONAL RIGHTS OF CENTRAL INTELLIGENCE AGENCY EMPLOYEES: HOW NATIONAL SECURITY CONCERNS LEGALLY TRUMP INDIVIDUAL RIGHTS

DANIEL PINES*

Employees of the Central Intelligence Agency (CIA or "the Agency") engage in activities designed to protect the nation's security and, at heart, its Constitution. Ironically, however, CIA employees, by dint of their employment with the Agency, are required to forego many of the very constitutional protections they fight so hard to protect. U.S. law and Agency regulations restrict the ability of CIA employees to engage in political activity, take outside employment, or travel internationally. The CIA significantly invades the privacy of its employees by requiring extensive and intrusive background checks of its employees including blood tests and polygraph examinations. The Agency even goes so far as to limit who its employees can befriend, date, and marry. To top it all off, CIA employees are greatly precluded from contesting these limitations as Congress has prohibited them from forming unions or going on strike, and the Judiciary has greatly limited the ability of Agency employees to bring claims in U.S. courts. Failure to comply with any of the above restrictions can result in disciplinary action and even termination of employment. CIA employees recognize, upon voluntarily joining the Agency, that their constitutional freedoms will be restricted to protect national security; yet few Americans realize the breadth and depth of those restrictions. This article examines the legality of the various restrictions imposed on CIA employees. It concludes that virtually all pass constitutional muster but that one–prohibiting employees from maintaining a substantial and personal relationship with any citizen from certain designated nations–could raise legal concerns.

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TABLE OF CONTENTS

INTRODUCTION

The sacrifices that employees of the Central Intelligence Agency make in defense of this country are well known. The 102 stars on the wall of the Agency's entryway represent each of the Agency's employees killed in the line of duty.[1] Seven of these stars were recently added to reflect the CIA officers killed when a suicide bomber detonated his belt of explosives at a CIA base in Afghanistan.[2] Even if not asked to give the ultimate sacrifice to our nation,

1. CENT. INTELLIGENCE AGENCY, *Headquarters Virtual Tour*, https://www.cia.gov/about-cia/headquarters-tour/virtual-tour-flash/index.html (last visited Nov. 13, 2011).
2. Joby Warrick & Pamela Constable, *CIA Base Attacked in Afghanistan Supported*

CIA officers are often asked to live overseas in locations and under circumstances which would often not be described in the most glowing of terms. At best, this requires an Agency officer to uproot himself or herself and his or her family from the familiar to the unfamiliar; at worst, it places the officer and sometimes the officer's family in unpleasant, inhospitable, and sometimes exceedingly dangerous locales. Of course, there are also the long hours and high stress of the job. And let's not forget the pressure to succeed, as failure can lead to catastrophic results.

Less well-known are the sacrifices all Agency employees make with regard to their personal rights and privileges. Basic freedoms and protections so enshrined in the U.S. Constitution that most Americans take them for granted–freedom of speech, right to privacy, freedom of travel, due process, equal protection–are dramatically curtailed for the CIA employee, usually in the name of protecting national security. Indeed, it could be argued that Agency employees are more restricted in their ability to employ their constitutional rights than possibly any other group of citizens of this country, save perhaps prison inmates. It is thus the height of irony that the very CIA officers the nation so relies upon to defend our liberties and freedoms are also the very Americans most deprived of the protections such basic rights afford.

To be fair, CIA employees recognize that they will be sacrificing certain rights upon joining the Agency. Employment with the CIA is voluntary; nobody is drafted against their will. Further, the CIA notifies its employees before hiring them of at least some of the sacrifices and restrictions that come with the job. However, the sheer magnitude of the limitations placed on Agency employees undoubtedly comes as a shock upon commencement of work. Certainly, there is a widespread understanding that classified information may not be disclosed. But restrictions on outside employment? Personal foreign travel? Dating? Newly hired Agency employees likely do not expect such limitations.

The mere fact that CIA employees, and the public at large, may be surprised by these restrictions, however, does not make them illegal by any means. It is well recognized that the United States Government is able to restrict the constitutional rights of its employees in ways that, if imposed on the general public, would be clearly illegal.[3] As the Supreme Court recently stated, in laying out

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Airstrikes Against Al-Qaeda, Taliban, WASH. POST, Jan. 1, 2010, at A01; Press Release, Cent. Intelligence Agency, Statement on CIA Casualties in Afghanistan, (Dec. 31, 2009), *available at* https://www.cia.gov/news-information/press-releases-statements/cia-casualties-in-afghanistan.html.

3. Rutan v. Republican Party of Ill., 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) ("The restrictions that the Constitution places upon the government in its capacity as law-

the general principles with regard to the ability of the government to restrict the rights of its employees:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.[4]

CIA employees have the added burden of limitations imposed by Congress and the courts due to the need to protect national security. The Director of the CIA also possesses extraordinary powers, established by statute, with regard to CIA employees such as firing CIA employees without any specific cause or proof–in order to protect that security.

This article seeks to explore the fascinating interplay between employee rights and government restrictions in the area of national security by evaluating the multitude of restrictions imposed on Agency employees. Part I of this article discusses the incredible statutory power of the CIA's Director to terminate Agency employees to protect national security. Due to this statutory power, the Judiciary typically accords incredible deference to the Director's decisions.

There is, of course, a considerable difference between "deference" and "rubber-stamping," and the Judiciary's radar is particularly attuned when it comes to the protection of constitutional rights. Nonetheless, in the area of restrictions on CIA employees, the courts almost always tilt towards protecting national security over protection of constitutional rights. Thus, the remainder of the article provides a detailed analysis of the limitations on constitutional rights of CIA employees in seven particular contexts. Specifically, Part II explores limitations on the ability of CIA employees to engage in political expression. Part III investigates the Agency's

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maker, *i.e.*, as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees.").

4. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600 (2008). *See also* Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 87-88 (2006) (describing the doctrine of unconstitutional conditions as the limits imposed by the Supreme Court on the government's ability to condition government benefits, including continued employment, in exchange for the employee's forfeiture of constitutional rights).

ability to preclude friendships, love interests, and even marriage of its employees. Part IV assesses the Agency's ability to enjoin outside employment, require its employees to submit résumés they wish to use to seek future employment, and even restrict post-employment opportunities. Part V reviews the Agency's extensive ability to conduct background investigations of prospective and current employees, as well as engage in work place searches of employee work areas and belongings. Part VI describes limitations on the personal, international travel of CIA employees. Finally, Parts VII and VIII discuss the limitations on the ability of Agency employees to seek to change or challenge these restrictions by discussing how Agency employees are prohibited from unionizing or striking and restricted from access to the courts.

For each category I explain the restriction imposed on the Agency employee and then discuss in detail the basis for the legality of that restriction. Not all of these restrictions are exclusive to the CIA. Employees of other U.S. intelligence agencies are subject to certain of these restrictions; military and diplomatic personnel must contend with others. However, when evaluated as a whole, an argument can certainly be made that no employee in the United States Government is more limited in his or her constitutional rights than the CIA officer.

I. EXTRAORDINARY POWER OF THE DIRECTOR OF THE CIA

The National Security Act of 1947 provides the Director of the Central Intelligence Agency (DCIA or Director) with extraordinary powers to terminate the employment of CIA officers. As that Act provides:

> Notwithstanding the provisions of any other law, the Director of the Central Intelligence Agency may, in the discretion of the Director, terminate the employment of any officer or employee of the Central Intelligence Agency whenever the Director deems the termination of employment of such officer or employee necessary or advisable in the interests of the United States.[5]

This authority of the DCIA to terminate an Agency employee cannot be tempered by statements or promises made by other (even senior) Agency employees nor by language in Agency handbooks or Agency regulations. Any such limitations on the DCIA's power to terminate would be at odds with the legislative intent of

5. National Security Act of 1947 § 104A(e)(1), 50 U.S.C. § 403-4a(e)(1) (2006).

the National Security Act.[6] Thus, even if an Agency supervisor made promises regarding continued employment or an Agency regulation or handbook expressed a limitation to the DCIA's termination authority, such statements could not, in fact, limit the DCIA's authority and would not create a legally reasonable basis for an expectation of continued employment.[7] In addition, it is irrelevant whether or not the employee being terminated or the employee making promises of continued employment actually knew of the DCIA's authority or its extent.[8]

Courts have construed this authority of the DCIA as providing the Agency's Director with an extensive ability to terminate the employment of a CIA officer. As the Supreme Court has noted, this language authorizes the DCIA to terminate employment whenever *the DCIA* deems it necessary to protect U.S. interests, "not simply when the dismissal *is* necessary or advisable to those interests."[9] Thus, in the Court's view, "[t]his standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review."[10]

Such deference emanates from several sources. First, it is recognized that protecting national security interests falls primarily to the Executive Branch, not the courts, as the Constitution gives the Executive Branch primacy in foreign affairs, including national security matters.[11] Second, the courts have repeatedly acknowledged that the Judiciary typically lacks the expertise to assess national security matters, as the experts on that subject matter are usually senior members of the Executive Branch and in particular the DCIA.[12] Most critically, it is recognized that "the Agency's effi-

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6. Doe v. Gates, 981 F.2d 1316, 1320-21 (D.C. Cir. 1993) (noting that provisions in Agency handbooks do not limit the DCIA's authority to terminate employment and "any employee's statements to the contrary have no binding force").

7. *Id.* at 1321.

8. *Id.* ("Federal employees are chargeable with knowledge of governing regulations or statutes . . . .").

9. Webster v. Doe, 486 U.S. 592, 600 (1988).

10. *Id.*

11. Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (describing how courts have consistently "been reluctant to intrude upon the authority of the Executive in military and national security affairs"); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936) (noting the inherent authority of the President to conduct foreign affairs, per the Constitution); United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980) (stating that the Executive Branch is "constitutionally designated as the pre-eminent authority in foreign affairs").

12. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (asserting "the exclusive competence of the Executive Branch in the field of foreign affairs"); *Truong Dinh Hung*, 629 F.2d at 913-14 (stating that while the Executive Branch, including the intelligence agencies, has "unparalleled expertise" in national security matters, the courts are "unschooled" and "largely inexperienced" in such matters); Stillman v. CIA, 517 F. Supp. 2d 32, 39 (D.D.C. 2007) (noting that the deference given to the government with regard to classification decisions stems from "the recognition that the government is in the best position to judge the harm that would result from disclosure").

cacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees."[13]

Judicial hyperbole aside, such deference to the DCIA is nonetheless not absolute. Specifically, the Supreme Court has made it clear that the National Security Act does not trump the U.S. Constitution. For example, the Court has repeatedly "made clear that public employees do not surrender all their First Amendment rights by reason of their employment"[14] and therefore a public employee cannot be fired "for exercising her constitutional right to freedom of expression."[15] As the Court has held, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[16] The Court continued, "[w]e require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[17] Thus, "a constitutional claim based on an individual discharge [of a CIA employee] may be reviewed by the District Court."[18] As discussed in the introduction, that review typically involves balancing the constitutional rights of the employee with the needs of the Agency (and the DCIA) to protect national security. The following sections will explore that balancing act in the context of numerous Agency–and U.S. Government–imposed restrictions on the constitutional rights of CIA employees.

II. RESTRICTIONS ON ENGAGING IN POLITICS AND POLITICAL EXPRESSION

Congress has expressly stated that government "employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation."[19] Despite such a lofty declaration, Congress has nonetheless proceeded to vastly limit the ability of government employees to actually participate in the political process, and the courts have typically upheld such laws.

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13. *Webster*, 486 U.S. at 601. *See also* Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

14. Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (citing four Supreme Court precedents).

15. Rankin v. McPherson, 483 U.S. 378, 383-84 (1987). *See also* Connick v. Myers, 461 U.S. 138, 142 (1983) (noting that continued public employment cannot be conditioned "on a basis that infringes the employee's constitutionally protected interest in freedom of expression").

16. *Webster*, 486 U.S. at 603.

17. *Id.*

18. *Id.* at 603-04.

19. 5 U.S.C. § 7321 (2006).

Concern about the politicization of civil servants reaches all the way back to the beginning of our nation's history with Thomas Jefferson issuing an edict that government officers should not seek to influence the votes of others nor engage in politics.[20] However, it was not until 1883 that any actual rules on political activity by government workers were put into effect. In that year, President Chester A. Arthur issued a set of rules which were to govern the U.S. civil service; the first of these rules provided that executive service officers should not use their office to coerce anyone else's vote nor interfere in an election.[21] The rules governing civil servants were amended over the subsequent decades, eventually becoming what is known as the Hatch Act, enacted in 1939 and named after Senator Carl Hatch–who was the Act's chief sponsor.[22] Revised and amended over the years, the current version of the Hatch Act spells out the limitations on the political expression of U.S. government employees today.[23]

The Hatch Act divides federal employees in two categories: "less restricted" and "further restricted."[24] It should come as no surprise that employees of the CIA fall within the latter category.[25] Both categories of employees, with only a few exceptions not relevant here, are prohibited from engaging in political activity while on duty, while in any room or building used for discharging government duties, while wearing any uniform or official insignia indicating the employee's office or position, or while using any government vehicle.[26] These restrictions are pretty strictly interpreted. Thus, for example, the Act prohibits government employees from placing a partisan political bumper sticker on any government-owned vehicle; engaging in any political activities outside

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20. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973). The heads of the executive departments during Jefferson's presidency responded to Jefferson's directive by issuing the following order: " '[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.' " *Id.*

21. *Id.* at 558.

22. *See id.* (discussing the history behind the Hatch Act); Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225 (2005); Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775 (2000).

23. Bloch, *supra* note 22, at 228. The most significant amendment to the Hatch Act came in 1993, when the Act was actually made less restrictive for certain federal employees. *Id.* at 234-35.

24. *Id.* at 238-39.

25. 5 U.S.C. § 7323(b)(2)(B) (2006). CIA employees are not the only "most restricted" employees. Employees of thirteen other agencies, including the Federal Bureau of Investigation, the National Security Agency, and the Defense Intelligence Agency, also fall within this category of employee. *Id.*

26. 5 U.S.C. § 7324(a) (2006).

the office while wearing a patch, pin, or any other insignia of his or her agency; and wearing partisan political buttons or displaying any partisan signage while on duty or in one's office or cubicle at work.[27]

Additional restrictions apply to "further restricted" employees, such as CIA officers. Thus, while "less restricted" employees are permitted to take an active part in political management or in political campaigns with certain exceptions,[28] "further restricted" employees cannot.[29] Thus, CIA employees cannot run for a partisan political office; take an active part in managing a candidate's political campaign for partisan political office; endorse or seek votes for or against a candidate if done in concert with a candidate or a political party; serve as an officer in or delegate to a political party; address a political rally if done in concert with a partisan candidate or party; solicit, accept, or receive political contributions; or actively participate in any form of fundraising for a candidate for a partisan political office or for a political party.[30]

So, what *can* CIA employees do? So long as the political activity does not violate any of the above restrictions, a CIA employee can vote, express his or her political opinions to others, participate in non-partisan activities, be a member of a political party, attend political rallies and events, make a financial contribution to a candidate or political party, and even (oh the excitement) place a sign in his or her yard supporting a candidate for partisan political office.[31] As one commentator described it, federal employees who fall into the further restricted category "are prohibited from engaging in almost all political activities other than voting and expressing their views in private."[32] Any violation of any provision of the Hatch Act, no matter how miniscule, requires a *minimum* penalty of a 30-day suspension from duty without pay and may include termination of federal employment.[33]

The Supreme Court has twice evaluated the most controversial facet of the Hatch Act, that is, the prohibition on the ability of "further restricted" government employees to take an active part in political management or political campaigns. In both cases, the Court found the prohibition to be constitutional.[34] The more rele-

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27. 5 C.F.R. §§ 734.306 (examples 6, 10, and 16) and 734.406 (examples 4 and 6) (2011). *See also* Bloch, *supra* note 22, at 240-46 (listing activities prohibited by the Hatch Act).

28. 5 U.S.C. § 7323 (2006).

29. 5 U.S.C. § 7323(b)(2)(A) (2006).

30. 5 C.F.R. §§ 734.408-734.412 (2011).

31. 5 C.F.R. §§ 734.402-734.405 (2011); 5 U.S.C. § 7323(c) (2006).

32. Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 846 (1996).

33. 5 U.S.C. § 7326 (2006).

34. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973);

vant case, and indeed the most recent Court decision on the Hatch Act–*U.S. Civil Service Commission v. National Ass'n of Letter Carriers* ("*Letter Carriers*")–analyzed the Act under the balancing test articulated by the seminal Supreme Court case of *Pickering v. Board of Education*.[35] In *Pickering*, the Court held that, in determining whether the government can restrict the free speech of its employees, the courts are to seek "a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[36]

Applying this balancing test to the Hatch Act, the Court in *Letter Carriers* focused almost exclusively on the government's interest " 'as an employer, in promoting the efficiency of the public services it performs through its employees.' "[37] The Court found that there was a deepening sense that government administration could be undermined if government personnel are actively partisan; that government service would be damaged if government promotions or favor were based upon political connections, rather than meritorious effort; and that "the political influence of federal employees on others and on the electoral process should be limited."[38]

The Court then held that the Hatch Act directly addressed these concerns. First, the Hatch Act promoted one of the great ends of government, that is, the impartial execution of the law. As the Court noted, it was "fundamental" that government employees "should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party."[39] Prohibiting involvement in political campaigns helped achieve fair and impartial governance. Second, the Hatch Act not only prevented political partiality, but also the appearance to the public of any such impropriety. Third, the Hatch Act helped

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United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). It should be noted that Congress amended the Hatch Act in 1993, well after the Court decided *Letter Carriers*. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993) (codified as amended at 5 U.S.C. §§ 7321-7326 (2006)). However, the major parts of the Act considered by the *Letter Carriers* Court were not affected by the 1993 amendments, and, in fact, the Act continues to preclude "further restricted" government employees from "tak[ing] an active part in political management or political campaigns." 5 U.S.C. § 7323(b)(2)(A) (2006).

35. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 480 ("The time-tested *Pickering* balance . . . provides the governing framework for analysis of all manner of restrictions on speech by the government as employer.") (O'Connor, J., concurring).

36. *Pickering*, 391 U.S. at 568 (1968).

37. *Letter Carriers,* 413 U.S. at 564 (quoting *Pickering,* 391 U.S. at 568).

38. *Id.* at 557.

39. *Id.* at 564-65.

prevent the creation of political machines. Fourth, it served the goal of helping ensure that gaining employment and promotion in the government would be based on merit, not political affiliation. Fifth, the Hatch Act helped ensure that government employees would not feel compelled to vote a certain way, or assist in a certain political campaign, in order to garner favors.[40] Due to these significant bases, as well as a general judicial deference to Congress to decide how to protect against politicization of government agencies, the Court found the balance to weigh significantly in favor of the government and found the Hatch Act did not violate the First Amendment.[41]

It is worth noting that, subsequent to the decision in *Letter Carriers*, the Supreme Court issued *United States v. National Treasury Employees Union* (*NTEU*),[42] which established an alternative balancing test to the one articulated in *Pickering*. The Court in *NTEU* provided that, while the *Pickering* balancing test was to be used to evaluate employment decisions related to individual government employees after they had spoken, a different balancing test applies in situations involving "wholesale deterrent to a broad category of expression by a massive number of potential speakers,"[43] that is, situations in which the government, through rule, regulation or statute, seeks to preclude the speech of employees before such speech has taken place. The Hatch Act clearly falls within the *NTEU* balancing test, rather than the *Pickering* test, as the Act seeks to preclude broad-based speech before it occurs. The Court in *Letter Carriers* obviously did not evaluate the Act under the *NTEU* balancing test, as the *NTEU* decision was not issued until almost twenty years after *Letter Carriers*. Had the Court utilized the *NTEU* test, however, it would have almost certainly come to the same conclusion. Under the *NTEU* test, the government

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40. *Id.* at 564-66. One commentator has described the Hatch Act, in pursuing these goals, as a "good government" statute in that it assumes that public employees, if not restricted in their political activities, would allow partisan pressures to overcome their obligations to the public. Congress thus passed the Hatch Act to save public employees from succumbing to such pressures. As the commentator notes, however, the problem with "good government" legislation such as the Hatch Act, is that its creator–Congress–may have itself enacted or amended the Hatch Act due to partisan political pressures. Gely & Chandler, *supra* note 22, at 804-17.

41. *Letter Carriers*, 413 U.S. at 548. *See also* Bloch, *supra* note 22, at 260 ("[T]he *Letter Carriers* Court viewed the Hatch Act as presenting a conflict between obviously important interests of the government and the First Amendment rights of employees, with the government interests sufficient to vindicate the Act."). The Court also found the prohibition on government employees taking an active part in political management or political campaigns was not unconstitutionally vague or overbroad. *Letter Carriers*, 413 U.S. at 568-81.

42. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995).

43. *Id.* at 467. *See also* Harman v. City of New York, 140 F.3d 111, 118 (2d Cir. 1998) (stating that the *NTEU* test is to be used to consider "a blanket policy designed to restrict expression by a large number of potential speakers," rather than to address "an isolated disciplinary action taken in response to one employee's speech").

must demonstrate "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[44] The five bases enumerated by the *Letter Carriers* Court in support of the Hatch Act[45] would seem to fulfill that requirement, though undoubtedly the government would have to provide additional evidence demonstrating the "necessary impact" that the Hatch Act has had on government operations.

At least one commentator–Anthony Kovalchick–has questioned the Court's conclusion in *Letter Carriers*.[46] Kovalchick asserts that the Court did not seriously analyze, much less question, the bases for the Hatch Act provided by Congress, but merely "acted as a rubber stamp."[47] Further, Kovalchick notes that the concerns expressed in *Letter Carriers* came before the 1993 Amendments to the Hatch Act that liberalized some of the Act's more oppressive provisions; yet many of the potentially harrowing consequences described in *Letter Carriers* did not come true once the Hatch Act's provisions were lessened.[48] Kovalchick's greatest criticism, however, focuses on the Hatch Act's preclusion of government employees running for political office. Kovalchick views this as an attempt by Congressional "incumbents to insulate themselves from electoral challenges from government employees."[49] He believes it to be particularly hypocritical given that under the Hatch Act civil service employees who seek to run for political office must resign from their civil service job, while members of Congress are not required to do so when they run for another elected office.[50] Finally, he notes that interests of Congress in ensuring that public governance is based on merit, not political affiliation, can be achieved by less extreme measures than those established by the Hatch Act.[51]

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44. *Nat'l Treasury Emps. Union,* 513 U.S. at 468 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)). *See also* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (" 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' ") (citations omitted).

45. *See supra* text accompanying notes 39-41.

46. Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419, 431 (2008).

47. *Id.* at 432.

48. *Id.* at 441-42.

49. *Id.* at 421.

50. *Id.* at 454.

51. *Id.* at 471-72. Another commentator has questioned how the Hatch Act has been interpreted with regard to the expression of political opinion by a public employee at work. Carolyn M. Abbate, *It's Time to "Hatch" a New Act: How the OSC's Interpretation of the Hatch Act Chills Protected Speech*, 18 FED. CIR. B.J. 139 (2009).

Kovalchick's criticisms have considerable emotional merit. As he correctly notes, the *Letter Carriers* Court did not spend any time focusing on the other side of the balancing test–namely the negative impact on government employees' freedom of expression and right to engage in political affairs created by the Hatch Act.[52] Further, the Act does appear to have instituted a more extreme framework than necessary to prevent the evils of concern to Congress. Nonetheless, his assertions do not carry substantial legal heft. The courts have acknowledged that legislation restricting expression need not be the best nor least restrictive, it must merely suffice under the *Pickering* (or *NTEU*) balancing test.[53] Further, the Court's failure in *Letter Carriers* to evaluate the detriment to the government employee was a brazen oversight, but not an unjust one. The impediments to government employees were fairly obvious from the restrictions imposed by the Hatch Act. The interest of the government to protect the nation from a politicized civil service were legitimate, there was a valid nexus between the Hatch Act's provisions and the government's interests, and the Court appropriately gave deference to the political branches of the government on a matter involving "politics."[54] It was therefore valid for the Court to uphold the Act's provisions. Thus, while the Hatch Act may not be the clearest, best written, nor most narrowly tailored provision on the books, it certainly seems clear that it passes constitutional muster.

III. LIMITATIONS ON FRIENDSHIPS, DATING, AND MARRIAGE – THE AGENCY'S ANTI-FRATERNIZATION POLICY

While many companies, organizations, and government agencies seek to dissuade employees from dating or marrying each other, especially when such romances involve an employee-supervisor relationship,[55] the CIA's "anti-fraternization" policy goes well beyond the norm. Specifically, the CIA requires its employees to in-

52. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

53. *See, e.g.*, Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1443 (D.C. Cir. 1996) (noting that the government's scheme, though possibly overbroad, "restricts no more speech than is 'reasonably necessary' "); Sanjour v. Envtl. Prot. Agency, 56 F.3d 85, 98 (D.C. Cir. 1995) (acknowledging that the *Pickering* test does not contain a " 'least restrictive means' component").

54. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 99 (1947) ("Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.").

55. *See, e.g.*, 5 C.F.R. § 2635.502(a) (2011) (precluding government employees from engaging in a personal relationship which "would cause a reasonable person with knowledge of the relevant facts to question [the employee's] impartiality in the matter."). This is often the basis for precluding government supervisors from dating their employees.

form the Agency of any "close, personal relationship"–romantic or otherwise–that the employee has with any foreign national. This can range from casual dating, to a long-term friendship, to marriage. The Agency then conducts an "investigation" of the foreign national–which is usually fairly limited and non-invasive–and decides, based upon the need to protect national security, whether the relationship can continue. In some cases, this has required employees to sever long-term friendships, end potential romantic endeavors, and even terminate engagements. Failure to end a "tainted" relationship can lead to termination of employment. Thus, in extreme cases, a CIA employee is forced to choose between her job and her fiancé.

In addition, for citizens of a very small number of countries, the Agency does not even bother conducting a case-by-case analysis of the foreign national in question, but rather places a blanket restriction on close, personal contact by CIA employees with all citizens of those nations. Though the reasons for such blanket prohibitions are not specifically articulated, I suspect the regulation reflects two concerns. First, the nations at issue are antagonistic towards the United States and engage in extensive monitoring of their citizens to ensure that they are not interacting with the enemy. As such, it can be presumed that in situations in which a citizen of those countries does interact in a personal manner with an American, such interaction is likely known to, and possibly even at the behest of, the foreign country. Second, due to the antagonism of these countries towards the United States, it would be extremely difficult for the Agency to acquire enough information about the foreign citizen to be able to conclusively determine whether or not a specific individual poses a national security threat.

The Agency's anti-fraternization policies–certainly the "case-by-case" evaluation and to a much more limited degree the "blanket" preclusions–impact virtually every Agency employee. For example, I have a long-time platonic friendship with a female college classmate who is Swedish. Before each visit, I am required to fill out an expansive form indicating the details of our connection as well as information about our intended meeting. This has been going on for the more than ten years I have been with the Agency and has encompassed almost a dozen visits. At this point, the requirement is more inconvenient than anything else; had I been required to terminate my friendship, however, it would fall well beyond inconvenience. Virtually every Agency employee has similar stories.

Courts have reviewed government restrictions on marriage, dating, friendships and similar associations under two broad constitutional theories: the Due Process Clause and the Equal Protection Clause.[56] Title VII of the Civil Rights Act of 1964 provides additional guidance.[57] I will consider in turn both the Agency's case-by-case evaluations and its blanket regulations under each theory.

A. Case-by-case Evaluations

1. Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[58] Courts have assessed that relationships fall within this Due Process Clause either as a protected "liberty" interest[59] or as an implied right to privacy.[60] In either case, the Supreme Court has held that certain liberty/privacy rights are "fundamental," such as the right to marry, procreate, direct the education and upbringing of one's children, resolve marital issues, use contraception, protect bodily integrity, choose to have an abortion, and decide to refuse unwanted medical treatment.[61] Recently, the Court appears to have added the right to sexual orientation–or at least the right to engage in homosexual acts–to this list,[62]

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56. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (evaluating intimate relationships between homosexuals under both theories).

57. 42 U.S.C. § 2000e-16 (2006) (applying Title VII to federal government employees). As will be discussed later, some courts have asserted that Title VII is the sole remedy for federal government employees alleging national origin discrimination claims, including any claims raised under the Constitution. *See infra* text accompanying notes 114-15. However, as that argument appears questionable, I will address the Constitutional claims as well.

58. U.S. CONST. amend. V. Though the Fifth Amendment applies only to federal government activity, the Fourteenth Amendment guarantees protection against similar action by the states. Cook v. Gates, 528 F.3d 42, 49 (1st Cir. 2008).

59. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). Some courts have described the "liberty" interest as a type of freedom of association. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618-22 (1983) (describing a "freedom of intimate association"). The legal effect appears to the same regardless of how the courts choose to delineate the "liberty" interest. *Id.* (appearing to use the same criteria as the "liberty" interest based upon the Due Process Clause, discussed in the text accompanying this footnote).

60. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 263-64 (2004) (noting that the U.S. Constitution "does not explicitly mention a right to privacy" but that cases such as *Griswold* and *Roe v. Wade* grounded "the right to privacy . . . in the Due Process Clause of the Fourteenth Amendment").

61. *Glucksberg*, 521 U.S. at 720.

62. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overturning a sodomy law, the Court noted the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in [homosexual] conduct without intervention of the government").

though the matter is not entirely settled.[63] However, the Court has made it clear that it is highly reluctant to add any additional fundamental rights to this list.[64]

If governmental action threatens one of these fundamental rights, the courts apply "heightened protection," allowing the government to infringe on such interests only if " 'the infringement is narrowly tailored to serve a compelling state interest.' "[65] If the government action does not threaten a fundamental right, the courts utilize a rational basis standard.[66] Under this latter standard, the law or regulation at issue "is accorded a strong presumption of validity."[67] The government need not provide any evidence to sustain the rationality of the regulation; rather, " '[t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record."[68] The strength of the individual's interest and the extent of the intrusion on that interest are irrelevant in this analysis.[69] Thus, courts merely evaluate whether the regulations at issue seek to achieve a legitimate governmental purpose, and then whether those regulations rationally

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63. *See Cook*, 528 F.3d at 51-52 (listing the numerous diverging viewpoints of courts and commentators with regard to the *Lawrence* case); Witt v. Dep't of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008) ("*Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied . . . .").

64. *Glucksberg*, 521 U.S. at 720 ("But we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' ") (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)). States sometimes add additional protections. *See* Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 646 (2004) (describing certain state laws that limit employers). It is unclear, however, whether these state laws could be employed against a federal employer located in the state. In any case, neither Virginia–where CIA's headquarters are located–nor Washington D.C.–where many of the cases against the Agency are litigated–appears to have any such laws. *Id.* at 646-70; Matthew W. Finkin, *Life Away from Work*, 66 LA. L. REV. 945, 946 (2006).

65. *Glucksberg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

66. Kelley v. Johnson, 425 U.S. 238, 248 (1976) (stating that, in instances where there is no fundamental liberty right, the individual must show that the government action "is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest"); *Cook*, 528 F.3d at 48-49 n.3 ("Where no protected liberty interest is implicated, substantive due process challenges are reviewed under the rational basis standard."); *Witt*, 527 F.3d at 817 ("Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases."); Steffan v. Perry, 41 F.3d 677, 684-85 (D.C. Cir. 1994) (noting that the rational basis test, when applicable, applies to both laws and regulations); Major John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 28 (2005) ("[C]ourts will invalidate the regulation of non-fundamental rights or non-fundamental liberty interests only if the regulation fails to relate rationally to a legitimate government purpose.").

67. Heller v. Doe, 509 U.S. 312, 319 (1993); *Cook*, 528 F.3d at 49 n.3 (under the rational basis test, "a statute passes constitutional muster so long as the law is rationally related to a legitimate governmental interest").

68. *Heller*, 509 U.S. at 320-21 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

69. *Cook*, 528 F.3d at 55.

further that purpose.[70] As courts have noted, "[i]t is hard to imagine a more deferential standard than rational basis."[71]

As noted above, the right to marry is clearly a fundamental liberty interest protected by the Due Process Clause and thus entitled to heightened protection.[72] As such, for the CIA to preclude an employee from marrying (or, more specifically, terminate an employee's employment for failing to comply with an Agency preclusion of marriage), the Agency must show that its action is "narrowly tailored to serve a compelling state interest."[73] The courts have found national security interests to constitute a type of compelling state interest that meets this standard.[74] Thus, if the Agency can demonstrate a legitimate national security concern about the current or potential spouse of an Agency employee, then requiring the Agency employee to preclude or discontinue marrying that individual would likely pass due process muster.[75]

Whether relationships that fall short of marriage also constitute a fundamental liberty interest, however, remains unclear. Most lower courts have refused to find a fundamentally protected right to have such relationships.[76] As one district court stated:

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70. *Heller*, 509 U.S. at 320 (noting that, under the rational basis test, there need merely be "a rational relationship between the disparity of treatment and some legitimate governmental purpose"); *Kelley*, 425 U.S. at 247 (noting that, since the police department has an unquestionable need to promote the safety of persons and property, a county regulation limiting the length of a police officer's hair will violate the constitution only if "respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property"); *Steffan*, 41 F.3d at 685.

71. *Steffan*, 41 F.3d at 685. Courts have been even more deferential in applying the test when the matter involves the military. *Id.* ("[W]hen judging the rationality of a regulation in the military context, we owe even more special deference to the 'considered professional judgment' of 'appropriate military officials.' ").

72. *See supra* text accompanying note 61.

73. Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *see supra* text accompanying note 65.

74. *See* U.S. Info. Agency v. Krc, 989 F.2d 1211, 1214-15 (D.C. Cir. 1993) (noting that protection of national security interests is a basis for termination of employment); Doe v. Gates, 981 F.2d 1316, 1324 (D.C. Cir. 1993) (upholding termination of a CIA employee where his " 'homosexual conduct was a threat to national security' "); Bennett v. Chertoff, 425 F.3d 999, 1000 (D.C. Cir. 2005) (noting that courts cannot consider denial or revocation of a security clearance under Title VII because such determinations are sensitive and inherently discretionary judgment matters involving national security); Witt v. Dep't of Air Force, 527 F.3d 806, 821 (9th Cir. 2008) (stating that military affairs can be sufficient to justify discrimination under a heightened scrutiny test).

75. It should also be noted that the issue rarely gets this far. As employees need to notify the Agency about close and personal relationships with foreign nationals, the employee should have made the Agency aware of the romantic involvement well before the relationship moves to the point of marriage.

76. *See*, *e.g.*, Cameron v. Seitz, 38 F.3d 264, 275 (6th Cir. 1994) ("[T]he constitutional protection of the right of marital association did not clearly extend to a dating relationship or to engagement . . . ."); Shawgo v. Spradlin, 701 F.2d 470, 483 (5th Cir. 1983) (finding "a rational connection between the exigencies of [police] Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit"). *But see* Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984) (holding da-

> The reason is self-evident. It is impossible to draw a principled line demarcating the point on the spectrum of dating relationships at which a romantic attraction is transformed from a dalliance into a prospective union worthy of constitutional protection. As a result, society has defined that line at marriage (or in some states at the declaration of a civil union).[77]

The recent Supreme Court case of *Lawrence v. Texas*, however, may question that conclusion.[78] In *Lawrence*, the Court struck down a Texas statute that made it a crime for two individuals of the same sex to engage in sodomy. As the Court stated, "[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[79]

The *Lawrence* opinion, however, left almost as many questions as answers.[80] It failed to articulate the standard of review it employed for assessing the constitutionality of the Texas statute.[81] Further, it is unclear whether the constitutional protections it asserts apply only to the sexual acts at issue (that is, protection of the bedroom), or to the relationship (that is, homosexual relationships).[82]

The answer to this latter question may indicate the reach of the opinion, and its import, to our current discussion. Prior to *Lawrence*, the Court had upheld anti-sodomy statutes, especially as enforced against homosexuals, finding that there was no constitutional right of homosexuals to engage in sodomy.[83] Based upon

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ting to be protected by the first amendment's freedom of association). *Wilson*, however, has been roundly criticized. *See Cameron*, 38 F.3d at 275 (noting that, contrary to the holding in *Wilson*, "other circuit court cases strongly suggest that such an association is not a clearly established constitutional right"); Plummer v. Town of Somerset, 601 F. Supp. 2d 358, 368 (D. Mass. 2009) ("*Wilson* . . . was no longer good law in 2001, and certainly was not good law in 2005.").

77. *Plummer*, 601 F. Supp. 2d at 366 (upholding the termination of employment of a police officer for having a relationship with a known drug user and alleged prostitute).

78. Lawrence v. Texas, 539 U.S. 558 (2003).

79. *Id.* at 578.

80. *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1060 (2004) (discussing the "opacity" of the *Lawrence* opinion).

81. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916-17 (2004) (noting the criticism and confusion that *Lawrence* may generate by not providing a standard of review).

82. *Id.* at 1904 (noting that the dissent in the opinion focuses on the act, but asserting that the key to the opinion is " '[i]t's not the *sodomy*. It's the *relationship*!' ").

83. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

that ruling, numerous circuit courts held that homosexuality and homosexual conduct were not fundamental interests protected by the Constitution; thus, only a rational basis was needed for the government to preclude homosexual behavior or fire employees for acknowledging that they were homosexual.[84] If, however, *Lawrence* is interpreted to protect relationships (and not acts), then an argument could be made that its protection should reach all romantic relationships–homosexual or heterosexual–to include dating. After all, the gay relationship in *Lawrence* was not a marriage in any sense of the term; rather, all indications are that it was a one-night stand.[85] If such a "relationship" is protected by the Constitution, then so too should all heterosexual or homosexual romantic relationships, whether deeply committed or lasting only a few hours.[86]

These issues are being debated in the courts and in academia,[87] and probably will not be fully resolved in the near term. Regardless, the answer (or perceived answer) probably will not impact the legality of the Agency's policies. *Lawrence* was concerned with either an invasion of privacy in the bedroom or discrimination based on sexual preference. The Agency's policy implicates neither concern. The Agency's decision to preclude an employee from a friendship or a romantic relationship is not based on what sexual acts are or are not committed, nor on the sexual preference of the employee. Rather, it is based solely on the act-neutral, sexual preference-neutral question of whether the close, personal relationship has national security implications. As such, the concerns raised in *Lawrence*–whether interpreted as applying to sexual acts or to sexual preferences–are not at issue with the Agency's requirements, thereby suggesting that however *Lawrence* is eventually interpreted, it will not impact the CIA's policies.

Given that *Lawrence* does not appear relevant to the Agency's restrictions on the dating life and friendships of its employees, there is no basis for believing that such relationships are "fundamental rights." Therefore, Agency policies restricting such rela-

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84. *See*, *e.g.*, Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996) (applying the rational basis test in agreeing with six other circuits that the military can exclude homosexuals from its ranks pursuant to its "Don't Ask, Don't Tell" policy).

85. *See* Tribe, *supra* note 81, at 1904 (describing the relationship in *Lawrence* as "quite fleeting, lasting only one night and lacking any semblance of permanence or exclusivity"); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408 (2004) (suggesting the individuals in *Lawrence* "might have just been tricking with each other" and indeed might not have even known each other's name at the point they were arrested by the police).

86. Indeed, Laurence Tribe asserts that the Court concluded all "nonprocreative intimate relationships between opposite-sex adult couples–whether marital or nonmarital, lifelong or ephemeral–[deserve to be] protected." Tribe, *supra* note 81, at 1904.

87. *See* Tribe, *supra* note 81; Sunstein, *supra* note 80; Franke, *supra* note 85.

tionships should be evaluated under the rational basis test. As noted above, under this highly deferential standard, the Agency need merely show that its actions achieve a legitimate governmental purpose, and then whether those actions rationally further that purpose.[88] Assuming the Agency can show that there is even a remote, legitimate national security threat posed by the friend or significant other of an Agency employee, terminating the employee's employment for refusing to end that relationship should easily pass the rational basis test.

Even if *Lawrence* is found to be applicable to the CIA's policies in this area, and even if the protections offered by *Lawrence* are deemed "fundamental," the Agency's reliance on national security interests as the basis for its determinations should be sufficient to prevail even against that heightened standard. In *Briggs v. North Muskegon Police Department*, a district court case affirmed by the Sixth Circuit before the *Lawrence* opinion, the court determined that a police officer could not be fired from his job for cohabitating with a married woman who was not his wife.[89] Noting that courts appear divided on whether the Constitution protects sexual conduct outside marriage, the court there found the better view to be that sexual privacy–even amongst unmarried couples–was a fundamental right protected by the Constitution.[90] It therefore overturned the termination of employment, holding that the stated reasons for the termination (loss of the officer's credibility with the citizenry) did not impact the ability of the officer to do his job.[91] The opposite, however, is true for the CIA. As an individual with a top secret clearance whose job is to protect this nation's security, an Agency employee's relationship with an individual who is a national security risk clearly impedes the ability of a CIA employee to do his or her job and places our nation at risk. As noted above, courts have found national security to be a compelling interest that fulfills the constitutional requirements.[92] As such, should dating and friendships be considered "fundamental" constitutional rights, courts would likely find the Agency's precluding specific relationships, on a case-by-case basis, due to national security reasons to fulfill the higher standard and pass constitutional muster.

88. *See supra* text accompanying note 70.

89. Briggs v. N. Muskegon Police Dep't, 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

90. *Id.* at 590.

91. *Id.* at 590-91.

92. *See supra* text accompanying note 74.

2. Equal Protection

Equal protection analysis employs a test similar to that for due process. Indeed, as the Supreme Court stated in *Lawrence*, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[93] Yet, as the Supreme Court has noted elsewhere, "[a]lthough both Amendments require the same type of analysis . . . the two protections are not always coextensive."[94]

The Equal Protection Clause, contained in the Fourteenth Amendment to the Constitution, provides that states may not "deny to any person within its jurisdiction the equal protection of the laws."[95] It is well settled that the Equal Protection Clause applies not only to states, but also to the federal government.[96]

The general rule is that government actions are presumed to comply with the Equal Protection Clause, and thus will be upheld, so long as they fulfill the rational basis test, *i.e.*, that they are "rationally related to a legitimate state interest."[97] However, as in the due process analysis discussed above, heightened judicial scrutiny for equal protection is employed with regard to actions against a "suspect class."[98] These protected suspect classes include race, gender, national origin, legitimacy, and ethnicity.[99] Sexual orientation may also be a protected suspect class.[100] The level of heightened scrutiny depends on the equal protection interest at issue.[101] For most of those interests, including national origin, government laws or actions which apply only to a protected class "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."[102]

Spouses, significant others, and friends are not protected classes in and of themselves. However, Agency regulations that impact

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93. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

94. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

95. U.S. CONST. amend. XIV, § 1.

96. Doe v. Gates, 981 F.2d 1316, 1322 n.2 (D.C. Cir. 1993) (" 'The equal protection component of the [F]ourteenth [A]mendment is binding upon the federal government as part of the [F]ifth [A]mendment's [D]ue [P]rocess [C]lause.' ") (citation omitted).

97. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 440 (1985). *See also* Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (quoting *Cleburne*).

98. *Cleburne*, 473 U.S. at 437; *Cook*, 528 F.3d at 61 ("Under equal protection jurisprudence, a governmental classification aimed at a 'suspect class' is subject to heightened judicial scrutiny.").

99. *Cleburne*, 473 U.S. at 440-41; Stein, *supra* note 60, at 267 n.27.

100. Stein, *supra* note 60, at 267-71.

101. *Cleburne*, 473 U.S. at 440-41; Stein, *supra* note 60, at 269.

102. *Cleburne*, 473 U.S. at 440.

such close, personal relationships could trigger equal protection concerns, particularly if such decisions are connected to national origin–as could appear to be the case for the Agency's anti-fraternization policy. However, as noted above, the Agency's case-by-case policy involves investigations of each reported relationship on an individual basis to determine if the specific individual poses a national security concern. Presuming that the Agency then makes determinations regarding the relationship based on the foreign national's particular situation, and not on his or her national origin, such a determination would not impact any protected class and therefore need merely pass the rational basis test.[103]

The Agency should be able to easily clear that hurdle. For example, in *U.S. Information Agency v. Krc*, the D.C. Circuit upheld the U.S. government's termination of employment of a foreign service officer for homosexual escapades with government officials of foreign countries.[104] The court made it clear, however, that its willingness to uphold the termination was based on the fact that the employee was terminated due to his poor conduct, not the fact that he or his conduct was homosexual. As the court noted:

> It is beyond genuine dispute that the USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country. Such behavior reflects appallingly poor judgment and virtually invites an approach from a hostile intelligence service.[105]

Similarly, a few years earlier, the same court upheld the CIA's termination of a homosexual Agency employee, finding that termination also was not due to the employee's sexual orientation, but rather due to the fact that the employee lied to the Agency about being a homosexual.[106] Determining there was no evidence that the Agency had a blanket policy against homosexuality, the court found "that the CIA had a legitimate concern about [the employee's] trustworthiness, in light of the fact that he hid information about his involvement in homosexual activity despite suspecting or knowing that the Agency considered such involvement to be a matter of security significance."[107] Thus, the discharge of the employee was rationally related to the Agency's " 'legitimate government se-

103. *See supra* text accompanying note 97.
104. U.S. Info. Agency v. Krc, 989 F.2d 1211 (D.C. Cir. 1993).
105. *Id.* at 1214.
106. Doe v. Gates, 981 F.2d 1316 (D.C. Cir. 1993).
107. *Id.* at 1324.

curity interest in collecting foreign intelligence and protecting the nation's secrets.' "[108] As such, the Agency's current restrictions, based upon national security interests, would appear to clearly prevail under a rational basis test.

3. Title VII

Title VII of the Civil Rights Act of 1964 protects discrimination of employees by their employers on the basis of race, color, religion, sex, or national origin.[109] However, until the early 1970s, Title VII did not protect federal employees.[110] Indeed, to that point, though it was recognized that discrimination of federal employees clearly violated both the Constitution and statutory law, it was unclear what remedy for such discrimination was available.[111] In 1972, however, Congress amended Title VII to ensure that federal employees would be "made free from any discrimination based on race, color, religion, sex, or national origin."[112] The amended language gave the Equal Employment Opportunity Commission (EEOC) the authority to issue rules and regulations to prohibit discrimination against federal employees and the power to effectuate remedies in instances of such discrimination.[113]

The Supreme Court has stated that Title VII is the exclusive statutory basis for discriminatory claims by federal employees.[114] Some courts have gone so far as to assert that Title VII preempts even constitutional claims.[115] However, such an argument appears incorrect. As noted at the beginning of this article,[116] the Supreme Court has firmly stated that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[117] Yet nothing in Title VII, and in particular the provisions related to federal employees, indicates that the statute preempts constitutional claims. Indeed, the courts, including the Supreme Court, have heard numerous constitutional claims of discrimina-

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108. *Id.* (quoting the lower court's opinion in the case, Doe v. Webster, 769 F. Supp. 1, 3 (D.D.C. 1991)).

109. 42 U.S.C. § 2000e-2(a) (2006).

110. Brown v. Gen. Servs. Admin., 425 U.S. 820, 825 (1976).

111. *Id.*

112. 42 U.S.C. § 2000e-16(a) (2006).

113. 42 U.S.C. § 2000e-16(b) (2006).

114. *Brown*, 425 U.S. at 835 (concluding, after review of the language and legislative history of Title VII, that it "provides the exclusive judicial remedy for claims of discrimination in federal employment").

115. *See, e.g.*, Mlynczak v. Bodman, 442 F.3d 1050, 1056-57 (7th Cir. 2006) (stating, without much discussion, that Title VII precludes even claims of discrimination raised under the Fifth Amendment's Equal Protection Clause).

116. *See supra* text accompanying note 16.

117. Webster v. Doe, 486 U.S. 592, 603 (1988).

tion of federal employees, yet did not dismiss such cases under the argument that Title VII is the exclusive remedy for such assertions.[118] As those courts permitted the constitutional claim to proceed, it must be presumed that Title VII exclusivity does not preclude such constitutional claims.

In any case, Title VII cases are analyzed under a long-standing, burden-shifting framework established by the Supreme Court almost 40 years ago.[119] Under that framework, the plaintiff must first establish a prima facie case of discrimination, for example, that the plaintiff is a minority who was denied a promotion or a job provided to a non-minority. The burden then shifts to the employer to articulate a legitimate and non-discriminatory basis for its action. Finally, the burden shifts back to the plaintiff to show that the employer's stated reason for its action is a pretext for a discriminatory decision.[120] At all times, the plaintiff bears the burden of proof that he or she was subjected to intentional discrimination.[121]

Applying this to the Agency's case-by-case analysis, a Title VII claim would likely commence with the plaintiff CIA employee asserting that whatever action the Agency took against the plaintiff was based on the national origin of the plaintiff's spouse, fiancé, or friend. The Agency would then counter that its basis for action was not pursuant to national origin, but rather related to a valid national security basis. The plaintiff would then seek to demonstrate that the Agency's national security basis was merely a pretext.

In this context, the plaintiff faces an uphill battle as, in most cases, it will be extremely difficult to demonstrate that national origin, and not national security, was the basis for the Agency's action. In any event, the ability of the employee to win his or her claim will depend on a court's evaluation of the particular facts involved.

B. The Agency's Blanket Policy on Employee Relationships with Citizens of Certain Countries

As noted above, Agency regulations also preclude Agency employees from having any significant interaction with individuals from certain countries. From a legal perspective, this differs signif-

118. *See*, *e.g.*, *id.* at 603-05 (remanding constitutional claims of discrimination to the district court); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) (allowing that a Constitutional claim of discrimination could proceed even if a Title VII claim is precluded).

119. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

120. *Id.* at 802-05. *See also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (reiterating the standard set by *McDonnell Douglas*); Prince v. Rice, 453 F. Supp. 2d 14, 21-23 (D.D.C. 2006) (also discussing the *McDonnell Douglas* test).

121. *Burdine*, 450 U.S. at 252-53.

icantly from the above case-by-case evaluation. In the case-by-case scenario, the analysis is based on the specifics of the given foreign national. In the blanket situation, however, the Agency is making a determination based *exclusively* on a person's nationality or national origin. As discussed above, national origin is a protected class under equal protection law.[122]

In some ways, this Agency regulation appears analogous to a line of cases in the immigration arena in which the U.S. Government places restrictions on non-Americans from certain countries due to policy reasons. In such cases, the courts have held that "classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."[123] Based on this, the courts have upheld regulations such as those made in response to the political uprising in Iran in 1979. Such regulations required immigrant alien, postsecondary school students who were natives or citizens of Iran to provide special information to the Immigration and Naturalization Service (INS).[124] More recently, the courts have upheld similar special registration requirements for immigrants from certain specified countries in order to prevent terrorism.[125] The basic philosophy of the courts in these areas is that immigration restrictions are a matter of public policy specifically within the expertise of the President.[126] While the Judiciary "lack[s] the information necessary for the formation of an opinion," the President "has the opportunity of knowing the conditions which prevail in foreign countries" and "has his confidential sources of information and his agents in the form of diplomatic, consular and other officials."[127] Thus, the courts have employed the rational basis test in such circumstances, finding such provisions to have a rational basis so long as the President is not "clearly in excess of his authority."[128]

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122. *See supra* text accompanying note 99.

123. Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979) (citing Mathews v. Diaz, 426 U.S. 67 (1976)).

124. *See*, *e.g.*, Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (dismissing a due process claim to the regulation); *Narenji*, 617 F.2d 745 (dismissing both due process and equal protection claims to the regulation).

125. *See*, *e.g.*, Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006).

126. *See Mathews*, 426 U.S. at 79-80 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

127. *Narenji*, 617 F.2d at 748. *See also Mathews*, 426 U.S. at 81 (noting that the responsibility for regulating the relationship between the United States and foreign nationals "has been committed to the political branches of the Federal Government" and therefore is more appropriately determined by the Legislative and the Executive branches); *Kandamar*, 464 F.3d at 72 (noting that the Supreme Court's judicial review in the immigration arena is "deferential").

128. *Narenji*, 617 F.2d at 748. *See also Kandamar*, 464 F.3d at 73 (upholding the Attorney General's requirement that young males from certain countries be subject to special registration as such registration is rationally related to the "government objectives of moni-

An argument could be made that the Agency's blanket policy should fall within the same category as immigration–given that it is based on national security grounds which, as the courts have repeatedly acknowledged, falls within the expertise of the President[129]–and therefore should also be subject to the rational basis standard. The problem with such an argument is that the courts have found that *all* immigration decisions, by their very nature, implicate foreign policy concerns within the President's expertise and therefore should be considered under the rational basis test.[130] The courts have not, however, come to the same conclusion with regard to all decisions or regulations implemented by the CIA. Rather, as shown throughout this article, the courts view those decisions and regulations on a case-by-case basis. If the regulation or decision implicates a protected class, it should be considered under the strict scrutiny standard or otherwise under the rational basis test.

With regard to the Agency's blanket policy, it would seem more likely that courts would not interpret such a policy as analogous to immigration policies, but rather akin to an Agency policy forbidding its employees from associating with African-Americans or with homosexuals (putting aside, of course, the large numbers of both groups who are already critical members of the Agency). As such, it would appear the courts would apply strict scrutiny analysis which, as noted above, applies to discrimination based upon national origin.[131]

While no court appears to have addressed this issue directly, some guidance can be gleaned from a D.C. district court case, *Huynh v. Carlucci*.[132] That case concerned a challenge to a Department of Defense (DoD) regulation that denied security clearances to naturalized citizens from any of 29 designated countries, unless the individual had been a U.S. citizen for more than five years or had resided in the United States for more than ten years. DoD asserted that it instituted the policy because information about citizens born in those 29 countries was typically difficult to obtain or verify and that accurate background information was critical to determine whether a security clearance could be granted. The court found the regulations constituted discrimination based upon national origin and thus should be examined under a strict scrutiny standard. The court then held that the DoD regulation did not pass strict scrutiny analysis, as DoD could not show

toring nationals from certain countries to prevent terrorism").

129. *See supra* text accompanying note 11.

130. *See supra* text accompanying notes 123-28.

131. *See supra* text accompanying note 99.

132. Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988).

that its "policy is supported by any convincing empirical evidence or is a necessary or precisely-tailored procedure for preserving national security."[133] Indeed, the court noted that it was "hard put to find even a rational basis for the [DoD] Regulation."[134]

The Agency's blanket regulation, however, has a twist that may distinguish it from *Huyhn*. Although the Agency is clearly making decisions based upon national origin–as noted above, a protected category for equal protection claims[135]–it is not the national origin of the restricted individual (the CIA employee) that is at issue, but rather it is the national origin of the employee's contact (a non-U.S. person) that is in question. No court case appears to have evaluated such "association" claims in either the due process or equal employment context.

Title VII cases, however, have addressed this issue, holding that employers violate that Act when they discriminate on the basis of association with a member of those protected classes–although most of the cases have involved questions of race rather than national origin.[136] The earliest cases held that discrimination based on such association was not covered by Title VII, asserting that the individual bringing suit (usually a white male claiming discrimination at work for his marriage to a black female) was not a member of the minority class that Congress intended to protect by Title VII.[137] Subsequent cases, however, have pretty uniformly rejected such analysis and have held that Title VII covers an employee's association with a protected class where the employee's race or national origin is a factor.[138] This most frequently comes into play in the context of a claim that a white employee was fired for being in an inter-racial or inter-ethnic marriage, but it has also been applied to friendships. In such cases, the courts have found

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133. *Id.* at 66-67.

134. *Id.* at 67.

135. *See supra* text accompanying note 99.

136. Interestingly, while Title VII does not indicate whether it covers associational discrimination, the Americans with Disabilities Act (ADA) explicitly prohibits "denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (2006).

137. *See, e.g.*, Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 208-10 (N.D. Ala. 1973) (holding that Title VII does not protect a white employee who alleged he was discharged for his association with fellow black employees as the plaintiff did not claim that he was fired due to his race); Adams v. Governor's Comm. on Postsecondary Educ., No. C80-624A, 1981 WL 27101, at *3-4 (N.D. Ga. Sept. 3, 1981) (holding that a white employee, allegedly discriminated based upon his wife's race, lacked standing under Title VII).

138. *See* Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (rejecting the "restrictive reading" of *Ripp* and *Adams*); Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 299 (S.D.N.Y. 1996) ("Several courts have rejected the highly restrictive holdings of *Ripp* and *Adams* . . . ."); Chacon v. Ochs, 780 F. Supp. 680, 682 (C.D. Cal. 1991) (rejecting "the reasoning in *Ripp* and *Adams* as inconsistent with both the language and intent of Title VII").

that the employee's race or national origin was indeed a factor as it could be argued that the employee would not have been fired had he or she been of the same race as his or her spouse or friend.[139] As one court described it, "Title VII prohibits race-conscious discriminatory practices. Applying Title VII protections to discrimination based on an interracial relationship is consistent with the very purpose of Title VII: by necessity, the race of the plaintiff is a factor affecting the conduct of the defendant."[140]

Several cases, however, have gone a step further, finding that Title VII protects association with individuals of other races and national origins, even if the plaintiff's own race is not a factor in the matter. For example, in *Reiter v. Center Consolidated School District*, the district court upheld a white female employee's Title VII claim that her school district employer discriminated against her based upon her "close association with the Spanish citizens of the district."[141] Similarly, in *Barrett v. Whirlpool Corp.*, the Sixth Circuit upheld a Title VII claim by white females that they had been discriminated against based on their association with and advocacy on behalf of their African-American co-workers.[142] Accepting this type of associational discrimination appears to be the

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139. *See, e.g.*, *Holcomb*, 521 F.3d at 139 (holding that Title VII applies to claims by a white male that he was fired for having a black wife since "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race"); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998), *rev'd on other grounds,* 188 F.3d 278 (5th Cir. 1999) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (holding that not only marriage, but also friendship, can create an associational race discrimination claim so long as the discrimination was based on the employee's race); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."); *Rosenblatt*, 946 F. Supp. at 300 ("Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race. As a result, plaintiff has standing to pursue his civil rights claims under Title VII."); Gresham v. Waffle House, Inc., 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (holding that a white female "has stated a claim under Title VII by alleging that she was discharged by her employer because of her interracial marriage to a black man"); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (holding that a white woman can maintain a Title VII claim based upon an allegation of being discharged for having a friendship with a black male).

140. *Chacon*, 780 F. Supp. at 682 (upholding the ability of a Caucasian woman to bring a claim under Title VII that she was subjected to a hostile work environment due to her marriage to a Hispanic man).

141. Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1459-60 (D. Colo. 1985).

142. Barrett v. Whirlpool Corp., 556 F.3d 502, 512-14 (6th Cir. 2009).

trend as several other courts have come to similar conclusions,[143] and no published case seems to have rejected this concept.

In coming to this conclusion, the courts have relied on guidance provided by the United States Equal Employment Opportunity Commission (EEOC),[144] which is charged with enforcement responsibility for Title VII claims.[145] The Code of Federal Regulations (CFR) for Title VII, promulgated by the EEOC, defines national origin discrimination "as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[146] The CFR further states that the United States "will examine with particular concern" employment decisions based on factors including "*association* with persons of a national origin group."[147] The EEOC webpage states that "[n]ational origin discrimination . . . can involve treating people unfavorably because they are married to (or associated with) a person of a certain national origin or because of their connection with an ethnic organization or group."[148] EEOC's Compliance Manual similarly notes that "Title VII prohibits discrimination against a person because he or she is associated with an individual of a particular national origin."[149] Finally, several EEOC commission cases have recognized that Title VII protects association with individuals of other national origins.[150] Importantly, as the Supreme Court has noted,

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143. *See* Blanks v. Lockheed Martin Corp., 568 F. Supp. 2d 740, 746 (S.D. Miss. 2007) (voicing its approval for racial association discrimination claims based on "mere friendly and/or social relationships," but noting that several unpublished cases have not supported that view); Baker v. Wilmington Trust Co., 320 F. Supp. 2d 196, 202-03 (D. Del. 2004) (recognizing that an associational discrimination claim can exist based on national origin); LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 772-73 (D. Neb. 1999) (recognizing that white male can assert Title VII claim of discrimination based upon his association with a black co-worker, but determining that plaintiff did not prove his case); Chandler v. Fast Lane, Inc., 868 F. Supp. 1138, 1143-44 (E.D. Ark. 1994) (recognizing ability of white females to bring cause of action under Title VII based on right to association with African-Americans).

144. *Tetro*, 173 F.3d at 994 (noting that EEOC opinions in support of race association claims bolsters the court's decision to uphold such claims); *see Parr*, 791 F.2d at 892; *Chacon*, 780 F. Supp. at 682; *Reiter*, 618 F. Supp. at 1460 (same for national origin association).

145. 42 U.S.C. § 2000e-16(b) (2006). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971) (noting that the EEOC has enforcement responsibility for Title VII).

146. 29 C.F.R. § 1606.1 (2011).

147. *Id.* (emphasis added).

148. U.S. Equal Emp't Opportunity Comm'n, *National Origin Discrimination*, http://www1.eeoc.gov/laws/types/nationalorigin.cfm (last visited Nov. 11, 2011). *See also* U.S. Equal Emp't Opportunity Comm'n, *Facts About National Origin Discrimination*, http://www1.eeoc.gov//eeoc/publications/fs-nator.cfm (last visited Nov. 11, 2011) ("Equal employment opportunity cannot be denied because of marriage or association with persons of a national origin group . . . .").

149. U.S. EQUAL EMP'T OPPORTUNITY COMM'N COMPLIANCE MANUAL § 13-II (Dec. 2, 2002), *available at* http://eeoc.gov/policy/docs/national-origin.html.

150. *See* Morgan v. Schafer, EEOC Appeal No. 0120072653 (Aug. 29, 2008) (accepting

these types of EEOC interpretations of Title VII " 'are entitled to great deference.' "[151]

The courts, however, are not uniform as to the degree of association necessary to trigger the protection in Title VII cases. In *Baker v. Wilmington Trust Co.*, a district court in Delaware, with little discussion, held that a relationship between bank tellers and their Indian clients did not establish a sufficiently close relationship to trigger Title VII protection.[152] In contrast, the Sixth Circuit in *Barrett*, discussed above, found that "the degree of the association is irrelevant."[153] The Sixth Circuit noted that Title VII protects discrimination in its entirety; if a person is discriminated against due to his or her association with a member of another race or national origin, the closeness of the relationship is immaterial. Rather, the degree of association should be used solely as a factor in proving the alleged discrimination; for example, it will be easier for an employee to show that there was discrimination based on the national origin of an individual's spouse as opposed to an individual's distant friend.[154] The Sixth Circuit would appear to have the more convincing argument.

On its face then, the Agency's actions in precluding its employees' association with persons of certain national origin groups (namely citizens of certain countries) would appear to constitute a Title VII violation. It is worth noting, however, that Title VII explicitly contains a national security exemption, which allows discrimination "if (1) the occupancy of such position . . . is subject to any requirement imposed in the interest of the national security of the United States . . . and (2) such individual has not fulfilled or has ceased to fulfill that requirement."[155] However, EEOC guidance indicates that to invoke this exception the government employer must "prove that the challenged employment decision was made because of national security requirements imposed by statute or Executive Order."[156] The EEOC cases that have considered

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concept of national origin discrimination based upon association with Native Americans), *available at* http://www.eeoc.gov/decisions/0120072653.txt; Carney v. Reno, EEOC Appeal No. 01971033 (Apr. 7, 1999) (accepting same concept for people of Korean ancestry), *available at* http://www.eeoc.gov/decisions/01971033_r.txt.

151. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (citing Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).

152. Baker v. Wilmington Trust Co., 320 F. Supp. 2d 196, 203 (D. Del. 2004).

153. Barrett v. Whirlpool Corp., 556 F.3d 502, 513 (6th Cir. 2009). *See also* Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (holding that the degree of association is not relevant in a race association claim, but asserting that the discrimination must be due to the employee's race).

154. *Barrett*, 556 F.3d at 513.

155. 42 U.S.C. § 2000e-2(g) (2006). *See also* 29 C.F.R. § 1606.3 (2011) (noting that it is not unlawful to deny employment based upon this national security exception).

156. U.S. Equal Emp't Opportunity Comm'n, *Notice N-915-041: Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the*

the exception do not provide any illumination on the issue before us. Further, no court case has directly addressed this exception, and few have even examined this area at all.[157]

The only relevant case that has considered the exception is the 1984 case of *Molerio v. FBI*, in which an individual claimed that the FBI refused to hire him as a special agent due to his Cuban background and his father's alleged connection to a pro-Castro association.[158] The D.C. Circuit upheld the FBI's decision for a variety of reasons. However, with regard to the plaintiff's claims of national origin discrimination, the court–noting that the FBI attached "special weight" to the fact that the plaintiff had relatives residing in a country hostile to the United States–held that "[n]either the general policy nor its particular application to Cuba is any evidence of discrimination on the basis of race or national origin, since it would apply to any person, of any race or nationality, with relatives in the pertinent country."[159] Based on the national security exemption to Title VII, the court noted that "the mere fact that such requirements impose special disabilities on the basis of connection with particular foreign countries is not alone evidence of discrimination."[160]

Molerio, however, would not seem to comport with policy guidance issued by the EEOC with regard to the National Security exception. That guidance provides an example in which a company that does primarily government contract work refuses to hire an individual because the individual has family residing in Mexico. In such a situation, the policy guidance indicates that the national security exception is not available because the reasons for not hiring the individual were "not made because of national security requirements imposed by statute or Executive Order."[161] With the national security exception unavailable, there would need to be an assessment of whether the basis for denying to hire the individual related to a protected discriminatory reason; "[f]or example, such a policy would discriminate against Hispanics if it were applied only to applicants who had family residing in Mexico."[162]

In the end, then, the law in this area is muddled at best. First, it is unclear whether the courts would accept the concept of "association" discrimination to apply in the constitutional context. Se-

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Civil Rights Act of 1964, as Amended (May 1, 1989), www.eeoc.gov/policy/docs/national_security_exemption.html.

157. 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 59.05 (2d ed. 2007).

158. Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984).

159. *Id.* at 823.

160. *Id.*

161. U.S. Equal Emp't Opportunity Comm'n, *supra* note 156.

162. *Id.* Why the example focuses on race (Hispanic) and not national origin (Mexico) is unclear.

cond, in the Title VII context, it is unclear whether the national security exception would apply and to what extent.

Given the trends in this area, my best guess is that courts would accept the concept of "association" discrimination for constitutional cases. Not only is it a clear form of discrimination based on a protected classification, but there is no reason for the courts to distinguish the reach of the Constitution from Title VII. Put another way, it is difficult to believe a court would assert that the Constitution permits a type of national origin discrimination that a statute such as Title VII does not. If this analysis is correct, then from a constitutional perspective the Agency's policy of prohibiting relationships with citizens of certain countries would constitute national origin discrimination and thus require strict scrutiny analysis. Alternatively, if the courts do not accept "association" discrimination, then the Agency's policies do not discriminate against a protected class and will be evaluated under the rational basis test.

In the Title VII context, courts would employ the burden-shifting process discussed above.[163] Thus, the plaintiff employee would first need to prove a prima facie case of national origin discrimination, which should be fairly easy given that the Agency's policy covers all individuals of certain countries. The Agency would then need to provide evidence that it has a valid non-discriminatory basis for its action, which presumably would be national security concerns. The Agency would point to the national security exemption to Title VII as the basis for arguing that national security trumps alleged discrimination. The plaintiff would then need to argue that national security interests are merely a pretext and that the preclusion in interaction with individuals of the given country is based on other (namely, political) grounds.

In the end, however, whether the case is brought as a constitutional or a Title VII claim, and regardless of the government's burden, the base question will come down to how well the Agency can defend its policy on national security grounds–a question that cannot be addressed here without revealing the classified information of exactly which nation's citizens are off limits to Agency employees, and how and why the Agency made that determination. However, it seems clear that if the Agency's policy is vaguely focused on citizens of countries that could only theoretically pose a threat to the United States–and is based primarily on the inability of the Agency to acquire information about individuals in those countries–then, like the *Huynh* case, the Agency will have difficulty defending its regulation as constitutional. If, on the other hand, the

163. *See supra* text accompanying notes 119-21.

Agency can provide substantial evidence that national security interests require the restriction–for example, showing that citizens of the prohibited countries are so limited in their interaction with Americans that any such attempted association should be presumed to be an attempt to recruit or provoke–then the Agency's blanket policy might well be able to pass Title VII evaluation, as well as both strict scrutiny and rational basis analysis.

IV. RESTRICTIONS ON OUTSIDE EMPLOYMENT

The Agency, like other U.S. government agencies, exerts extraordinary control on the outside employment opportunities of its employees, in regard to both seeking a second job while still employed with the Agency and attempting to secure post-Agency employment. If CIA employees wish to engage in any outside employment while still employed at the Agency, they are required to fill out an Outside Activity Approval Request (known as an "879 form," which corresponds to the Request's form number).[164] The Agency may then preclude the employee from engaging in the outside employment if such employment would have a negative impact on the Agency or the ability of the employee to perform his or her Agency job.[165] Further, the Agency will bar outside employment if such employment would be with another foreign government (known as an emolument). In addition, any résumé an employee wishes to send out to prospective employers must be vetted by the Agency to ensure that classified information is not disgorged nor national security risked. Finally, Agency employees, like all government employees, must conform to government-wide ethics rules that restrict future employment. Overall then, the Agency can dictate its employees' outside employment; curtail future employment; and not only review an employee's résumé before it is sent, but actually edit it. While all of this may appear to be highly intrusive, not to mention an apparent conflict of interest for the Agency to restrict the employment alternatives of its employees, it is nonetheless perfectly legal.

The Supreme Court has long held that "the right of the individual to contract [and] to engage in any of the common occupations of life" is a liberty interest protected by the Fourth (and

164. Other government employees have similar requirements. *See* 5 C.F.R. § 2635.803 (2011) (requiring government employees to "obtain prior approval before engaging in outside employment or activities").

165. This too is based upon a government-wide restriction. *See* 5 C.F.R. § 2635.802 (2011) (stating that a government "employee shall not engage in outside employment or any other outside activity that conflicts with his official duties").

Fourteenth) Amendments.[166] This right includes "the right of the individual to contract [and] to engage in any of the common occupations of life."[167] However, the right is not absolute. Thus, the government may restrict employment so long as such action is not "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[168]

In determining whether a government action that deprives employment is arbitrary or unreasonable, courts tend to evaluate "(1) the nature and seriousness of the alleged governmental interference; and (2) the strength of the justification given."[169] For example, in *Wilkerson v. Johnson*, the defendant used his position as a member of the Tennessee Board of Barber Examiners to pass regulations that effectively precluded the plaintiffs from opening a barber shop next door to the board member's own barber shop.[170] The Sixth Circuit held that the board member's infringement in allowing plaintiffs to pursue their occupation "is sufficiently serious, and the reasons given in justification for the delay so lacking in substance as to constitute a due process violation of plaintiffs' 'liberty' interests."[171]

While any Agency decision regarding the outside employment of its employees would need to be considered on a case-by-case basis (as discussed below) the CIA's restrictions on employment are vastly less drastic than those in *Wilkerson* and have a much more legitimate justification (usually related to protection of national security).

A. Secondary Employment

Restricting an employee from taking a second job does not infringe on an employee's right to pursue his or her main occupation or earn a living. And, if that second job would jeopardize national security–for example, seeking employment with an entity affiliated with terrorism or drug trafficking–there would be more than substantial justification for the Agency to preclude such employment.

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166. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Parate v. Isibor, 868 F.2d 821, 831 (6th Cir. 1989) (noting that *Meyer* represents a "long held" assertion that the freedom to pursue a career is a liberty interest); Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) (quoting *Meyer*).

167. *Meyer*, 262 U.S. at 399.

168. *Id.* at 400. *See also Parate*, 868 F.2d at 831 (noting that unreasonable or arbitrary interference with the freedom to pursue an occupation would be a substantive due process violation).

169. *Parate*, 868 F.2d at 831. *See also Wilkerson*, 699 F.2d at 328 (noting these two bases for evaluation).

170. *Wilkerson*, 699 F.2d at 325.

171. *Id.* at 328.

However, there does not appear to be any federal case law that has considered the due process interests in seeking secondary employment. Some guidance nonetheless can be gleaned from state law governing an employee's duty of loyalty to his or her employer. Under Virginia law–which would likely govern CIA cases in this area given the location of CIA's headquarters in Langley, Virginia– it is "long recognized that under the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment."[172] As part of this duty, the employee may not take any action that is adverse to the interests of his or her employer.[173] Thus, the Virginia courts have held that it is a breach of this duty if the employee takes a second job that is adverse to the benefit of his or her first employer.[174] By analogy, I would expect courts to support the Agency in precluding an Agency employee from taking a second job that endangers national security, as such secondary employment clearly would be adverse to the interests of a national security agency such as the CIA.

B. Emoluments

One of the reasons CIA employees must inform the Agency of outside employment is to ensure that they do not violate the Emoluments Clause of the Constitution. The Emoluments Clause provides that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[175] The purpose of the clause was to prevent federal employees from undue influence or corruption from foreign governments.[176] "Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government . . . ."[177]

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172. Williams v. Dominion Tech. Partners, 576 S.E.2d 752, 757 (Va. 2003).

173. E.L. Hamm & Assocs. v. Sparrow (*In re* Sparrow), 306 B.R. 812, 839-41 (Bankr. E.D. Va. 2003).

174. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 516 (4th Cir. 1999) (holding undercover reporters to have breached a duty of loyalty to a food chain when the reporters took jobs with the food chain solely to document alleged abuses).

175. U.S. CONST. art. I, § 9, cl. 8.

176. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand, ed., rev. ed. 1937, reprint 1966); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand, ed., rev. ed. 1937, reprint 1966); Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114 (1993).

177. Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 18 (1994).

Though few court cases have evaluated the Emoluments Clause,[178] the Department of Justice's Office of Legal Counsel (OLC) has provided extensive guidance to federal agencies regarding the Clause's restrictions.[179] Per OLC, "[t]he language of the Emoluments Clause is both sweeping and unqualified."[180] OLC therefore has interpreted the clause as applying to all federal government employees, not just senior officials.[181] It applies broadly to all types of employment and compensation, including partnership earnings where some part of the earnings derive from the partnership representing a foreign government.[182] Indeed, a U.S. employee is not only prohibited from employment by a foreign government itself, but also from receiving compensation from corporations and other entities controlled by foreign governments (such as public universities).[183] Thus, the clause effectively precludes CIA employees from engaging in outside employment with any entity controlled by a foreign government, even if the foreign government is an ally of the United States.[184] Given the overseas presence of Agency employees, as well as their experience and expertise in foreign affairs, this can considerably impact CIA workers. And while it certainly makes sense to preclude CIA employees from working for an enemy intelligence agency, the Emoluments Clause also has the perhaps unintended effect of forbidding an Agency employee,

178. The only published case I could find was United States *ex rel.* New v. Rumsfeld, 448 F.3d 403, 410 (D.C. Cir. 2006) (rejecting, with little analysis, the "weak" claim that the government violated the Emoluments Clause by requiring members of the U.S. army to wear a United Nations patch when serving as part of a U.N. peacekeeping force). The district court in *New* noted that there did not appear to be a Supreme Court precedent related to the Emoluments Clause. United States *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 102 (D.D.C. 2004), *aff'd*, 448 F.3d 403 (D.C. Cir. 2006).

179. For detailed discussion of the role and relevance of OLC opinions, see Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93 (2008).

180. Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 177, at 17. *See also* 49 Comp. Gen. 819, 821 (1970) (noting that the drafters of the Clause "intended the prohibition to have the broadest possible scope and applicability").

181. *Emoluments Clause and World Bank*, *Memorandum Opinion for the General Counsel Smithsonian Institution*, 2001 WL 34610590 (O.L.C.) (May 24, 2001), *available at* http://www.justice.gov/olc/smithsonianwb.htm; Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 158 (1982).

182. Applicability of the Emoluments Clause to Non-Government Members of ACUS, *supra* note 176.

183. *Emoluments Clause and World Bank*, *supra* note 181; Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 177.

184. It is worth noting that the reach of the Emoluments Clause is not unlimited. Per the express terms of the clause itself, Congress has the ability to limit the expanse of the Emoluments Clause and has invoked this authority on several instances. For example, Congress exempts from the clause gifts of minimal value, as well as gifts of educational scholarship or medical treatment, that a federal employee may receive from a foreign government. 5 U.S.C. § 7342(c)(1) (2006).

in his or her free time, from supplementing his or her government income by teaching an English literature course at a foreign public university or working with preschoolers at a foreign government-owned child day care center. As the Emoluments Clause is part of the U.S. Constitution, its provisions are clearly constitutional.

C. Pre-Review of Résumés

The courts have continuously made it clear that the CIA has the right to engage in pre-publication review of its employees' writings related to intelligence activities[185] and to preclude those writings from including classified information.[186] The courts have come to this conclusion based on the extraordinary need of the government to protect national security, as the release of classified information could:

> reveal intelligence sources, methods and activities, foreign government information, or information impacting the foreign relations of the United States, and that disclosure could cause serious damage to national security, endanger the safety and lives of individual [sic] who work for and with the CIA, and undermine the ability of the CIA to collect intelligence information.[187]

No court appears to have considered whether the CIA can subject the résumés of its employees to the same "pre-publication" scrutiny. However, résumés are a form of publication provided to outside and "uncleared" sources that include intelligence information (such as the mere fact that the employee works at the Agency, as well as details of the employee's position). Such documents could easily disclose classified material if not monitored. As

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185. Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (upholding the CIA's right to require its former employees to submit their writings on intelligence activities to the CIA prior to publication, so that the Agency can assess whether the writings contain classified information).

186. McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983) (upholding CIA's decision to refuse to allow a former employee to publish classified information); Berntsen v. CIA, 618 F. Supp. 2d 27 (D.D.C. 2009) (finding the CIA properly classified eighteen items in the manuscript of a former CIA employee); Boening v. CIA, 579 F. Supp. 2d 166, 170-72 (D.D.C. 2008) (acknowledging that the CIA may preclude a former employee's publication of classified information which has not been disclosed to the public, though assessing that the court does not have enough information to determine if that is the situation here); Stillman v. CIA, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) ("Courts have uniformly held that current and former government employees have no First Amendment right to publish properly classified information to which they gain access by virtue of their employment."); Wilson v. McConnell, 501 F. Supp. 2d 545, 552 (S.D.N.Y. 2007) (upholding CIA determination that certain information that a former CIA employee sought to publish in her book was classified).

187. *Berntsen*, 618 F. Supp. 2d at 30-31.

such, it is difficult to envision a court precluding this type of Agency requirement, given that the same law and logic for prepublication review of proposed books and articles would also apply to résumés. Thus, as long as the Agency's résumé review is confined solely to searching for classified information and is conducted to protect national security (and not to preclude employees from leaving the Agency), the Agency's requirement to review its employees' résumés would appear to pass constitutional muster–even if it could be seen as raising a potential conflict of interest.

D. Ethics Rules

Finally, government-wide ethics rules restrict all government employees, including CIA officers, from working on certain matters after they leave the Agency. Thus, a former government employee is forever banned from acting on behalf of another entity (such as an industrial contractor) in connection with and with the intent to influence any USG agency if the issue pertains to a particular matter–such as a contract–in which the employee "participated personally and substantially" as a government employee.[188] There is also a two-year restriction on acting on behalf of another entity before a USG agency with regard to any matter that fell under the employee's responsibilities when he or she worked for the government.[189] Certain senior personnel also cannot professionally interact with *any* employee of their former agency on behalf of another entity for one year after leaving government employment.[190] For example, applying these rules, a DCIA can go to work for an industrial contractor after retiring or resigning from the Agency. However, the former DCIA cannot meet or have a telephone call with any CIA employee on behalf of that contractor on any issue for one year after leaving the Agency, for two years with regard to any Agency contract that existed while he was DCIA, and forever on any contract in which he was personally and substantially involved while at the Agency if he is seeking to influence that CIA employee. Courts have consistently found that such restrictions pass constitutional muster.[191]

188. 18 U.S.C. § 207(a)(1) (2006).
189. 18 U.S.C. § 207(a)(2) (2006).
190. 18 U.S.C. § 207(c) (2006).
191. *See* United States v. Nevers, 7 F.3d 59 (5th Cir. 1993) (finding 18 U.S.C. § 208 (1988) is not unconstitutionally vague); United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) (holding the same for 18 U.S.C. § 207 (1964)).

V. RESTRICTIONS ON EMPLOYEE PRIVACY: BACKGROUND INVESTIGATIONS AND MONITORING AGENCY EMPLOYEES AT WORK

Employment at the CIA comes with an understandable and expected reduction in personal privacy. The Agency engages in extensive background investigations of prospective employees. Current employees also undergo such background checks every few years as part of standard Agency practice. These investigations require prospective and current employees to disclose significant amounts of personal information to the Agency, undergo drug tests, and take the infamous polygraph examination. In addition, the Agency also conducts routine searches of current employees' work computer files and, when appropriate, searches of their work areas.

A. Providing Personal Information

When the Agency offers a job to an applicant, it provides that individual with a Conditional Offer of Employment (COE). The "condition" is that the employee must pass the Agency's detailed background investigation. As part of that investigation, the individual is required to provide extensive amounts of personal information covering the last fifteen years or more of the individual's life.[192] The purpose of requesting this information is to allow the Agency to determine whether the individual poses a national security risk, such that he or she should not be permitted access to the Agency's classified information (and thus would not be suitable for employment at the CIA).

Even after an individual passes the background investigation and starts work at the Agency, the CIA continues to require personal data throughout the individual's career.[193] Every few years, employees are required to provide additional personal information as part of the Agency's routine reinvestigation of its employees to determine if any national security concerns have arisen since the employee commenced work. In addition, every two years, Agency employees must fill out a Financial Disclosure Form, which as the name implies, seeks substantial information about an employee's finances. Such financial information is sought by the Agency to uncover unexplained income that could suggest the employee is involved in espionage. On the flip side, revelation of a serious finan-

192. *See Application Process*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/careers/application-process/index.html (last visited Nov. 12, 2011) (describing the application requirements for applying to the Agency, including background checks).

193. *Id.*

cial problem could suggest that the employee might be vulnerable to recruitment by a foreign service–or at least susceptible to sell classified information–in order to acquire money.

Requiring prospective and current employees to provide such information triggers two possible constitutional concerns: the Fifth Amendment privilege against self-incrimination and the right to privacy. With regard to the former concern, most Agency documents requesting information from current and prospective Agency employees provide that, though the Agency will inform the Department of Justice (DoJ) of any violations of U.S. criminal law, the information provided by the employee will not be used against him or her in any criminal proceeding. Further, when CIA transmits any such information to DoJ, it is caveated with the statement that such information is for lead purposes only and cannot be used in a criminal prosecution. Thus, there would not appear to be any self-incrimination concerns. As the D.C. Circuit has stated, in evaluating a case requiring the revelation by government employees of illegal drug use, "the protection of the [Fifth Amendment] privilege extends only to criminal prosecutions. A government employee would not be incriminating himself within the meaning of the Fifth Amendment if his answers could not be used against him in a criminal case."[194]

As for the right to privacy, courts have expressed doubt as to whether there even exists a constitutional right to privacy in personal information.[195] Nonetheless, even if such a right exists, the courts have upheld the government's right to seek the information from prospective and current employees in certain employment contexts. The D.C. Circuit, for example, evaluated a DoD form–seemingly similar to the Agency's form–requiring individuals in positions with access to classified information or in a "critical sensitive" position to provide a significant amount of personal information.[196] The forms requested detailed information relating to the employee's financial history, arrest record, use of illegal narcotics, and mental health. Balancing the invasion of privacy with the government need, the court found DoD had "sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into [its] employees' privacy."[197] It first noted that the individual interest in privacy was "significantly less important" when the government collected the information for its

194. Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 292 (D.C. Cir. 1993).

195. *See generally* Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 791-93 (D.C. Cir. 1997) (discussing numerous court decisions that conclude such a right does not exist, as well as many court opinions that provide for such a right).

196. *Id.* at 789.

197. *Id.* at 793.

own purposes as an employer, rather than for public dissemination.[198] The Court then held that the government's need to protect "the interests of national security" outweighed these limited privacy interests.[199] Thus, it permitted the government to ask the detailed personal questions of individuals involved in protecting classified information noting the courts' "traditional reluctance to intrude on Executive decisionmaking in the area of national defense."[200] The same should hold true with regard to the CIA questionnaires.

B. Drug Testing

Prospective Agency employees are all required to undergo drug testing.[201] Such drug testing involves examination of blood and urine specimens. The Supreme Court has consistently found such testing to intrude upon the expectations of privacy that society has long recognized as reasonable and therefore constitutes a search under the Fourth Amendment.[202] As the Fourth Amendment precludes only "unreasonable" searches, the Supreme Court has then gone on to evaluate whether blood and urine testing for alcohol or drug abuse is "reasonable." The Court has noted that, normally, a government search is reasonable only if the government possesses a reasonable suspicion that a specific individual has engaged in wrongdoing and a warrant from a court. The Agency's requirement that all prospective employees engage in blood and urine testing, without a warrant, clearly does not meet this criteria.

However, the Court has found that there are times when "special needs" exist to preclude the individualized suspicion and warrant requirements. In such instances, the courts weigh the private and public interests of the given situation. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered

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198. *Id.* Other courts evaluating similar disclosures of personal information by government employees have noted that government employees may have a diminished expectation of privacy based on their position. Thus, "any employee who occupies a position of public trust is aware of his employer's elevated expectations in his integrity and performance" and thus has "diminished rights to withhold personal information that compromises the right of the public to repose trust and confidence in them." Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury, 25 F.3d 237, 244 (5th Cir. 1994) (upholding right of IRS to require its "public trust" employees to submit answers to a questionnaire concerning personal use of drugs and alcohol).

199. *Am. Fed'n of Gov't Emps.*, 118 F.3d at 793-94.

200. *Id.* at 794.

201. *See Application Process*, *supra* note 192.

202. Skinner v. Ry. Labor Execs'. Ass'n, 489 U.S. 602, 616-17 (1989). *See also* Chandler v. Miller, 520 U.S. 305, 313 (1997) (citing *Skinner* for the "uncontested point" that "Georgia's drug-testing requirement, imposed by law and enforced by state officials, effects a search within the meaning of the Fourth and Fourteenth Amendments").

by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[203] Based upon this analysis, the Supreme Court has upheld drug tests via blood or urine examinations in situations where "the proffered special need for drug testing [is] substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[204] Thus, the Court has allowed drug tests for railway employees involved in train accidents,[205] U.S. Customs Service employees seeking to be promoted to certain sensitive positions,[206] and high school students who wished to participate in school sports.[207] It has, however, refused to allow such testing for candidates to certain state offices,[208] as well as for unwitting maternity patients where the tests would be used to prosecute mothers whose children tested positive for drugs at birth.[209]

Though the Supreme Court has not specifically addressed the issue of such testing for CIA employees, the Court has noted that

> employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test [for drug testing], especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test.[210]

Based upon this, lower courts have upheld drug testing of individuals with or seeking security clearances.[211] As these courts have

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203. *Skinner*, 489 U.S. at 624. *See also Chandler*, 520 U.S. at 313-14 (describing the process for court evaluation laid out by *Skinner* and its progeny); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665-66 (1989).

204. *Chandler*, 520 U.S. at 318.

205. *Skinner*, 489 U.S. 602.

206. *Von Raab*, 489 U.S. 656.

207. Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

208. *Chandler*, 520 U.S. 305.

209. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

210. *Von Raab*, 489 U.S. at 677. The Court in this case remanded the matter to decide whether a Customs Service requirement met this criteria due to the insufficient record before the Court. *Id*. at 658.

211. *See* AFGE Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) (allowing random drug testing of Navy employees holding top secret security clearances); Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) (upholding drug testing by a number of executive agencies of employees holding secret clearances); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (allowing the Department of Justice to drug test employees with top secret clearances); Nat'l Treasury Emps. Union v. Hallett, 756 F. Supp. 947 (E.D. La. 1991) (allowing the U.S. Customs Service to conduct drug testing of employees holding top secret, secret or confidential security clearances).

noted, "[i]ndividuals who accept jobs that subject them to such close review of their personal lives cannot legitimately claim to have a high expectation of job-related privacy."[212] Further, the government need for such testing is high in such situations as "[t]he ways in which users of illegal drugs might put into jeopardy classified information in their possession are too obvious to require much elaboration."[213] A drug-abusing employee could be blackmailed, might sell classified information to pay for drugs, or could mishandle classified information due to a drug-induced, diminished capacity.[214] As all CIA employees are required to have and maintain a security clearance, it seems quite clear that the courts would uphold the Agency's blood and urine testing of its current and prospective employees for drug use.

C. Polygraph Examination

One of the most feared facets of the Agency's background investigation involves the polygraph exam,[215] more commonly known as a lie detector test. Such exams consist of strapping the prospective or current employee to a special chair, placing electrodes on the arm and chest, asking a series of questions related to national security concerns, and evaluating the body's responses to those questions for deception. The Agency is the only U.S. government entity that routinely requires its employees to undergo a polygraph exam as part of the process of obtaining and retaining employment. And though the efficacy of and need for the polygraph has been questioned, the exam appears likely to remain a critical part of the Agency's background investigation. It is also clear that requiring such an exam is perfectly legal.

The Employee Polygraph Protection Act (EPPA)[216] makes it unlawful for any employer "directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test."[217] Employers who violate this provision are susceptible to civil penalties and lawsuits.[218]

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212. *AFGE Local 1533*, 944 F.2d at 507.

213. *Id.* at 506 n.6.

214. *Id. See also Hartness*, 919 F.2d at 172-73 (noting the potential for blackmailing drug-using government employees); *Hallett*, 756 F. Supp. at 953 (noting that drug-induced government employees "with access to sensitive information may disclose such information through off duty intoxication, blackmail, or bribery").

215. *See Application Process*, *supra* note 192.

216. 29 U.S.C. §§ 2001-2009 (2006).

217. 29 U.S.C. § 2002(1) (2006).

218. 29 U.S.C. § 2005 (2006).

However, the federal government is expressly exempt from the prohibition on the use of polygraph exams.[219] Indeed, the EEPA explicitly provides that "[n]othing in this chapter shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to any individual employed by, assigned to, or detailed to . . . the Central Intelligence Agency."[220] The courts have made it clear that any state law that seeks to limit the application of polygraph exams to CIA employees–or any federal government worker, for that matter–would be considered preempted by the EEPA and thus null and void.[221] Thus, as fearsome as the polygraph process may be, it is clearly a legal activity and by all accounts likely to remain in use by the Agency.

D. Workplace Searches

The CIA has long conducted searches of employees' work areas and computers whenever there is a reasonable belief that the employee has engaged in activity detrimental to the Agency. Agency regulations indeed make it clear that the Agency can and will search work spaces and monitor any and all of its information systems. For example, the CIA regularly engages in standardized searches of all employees' e-mails and other electronic correspondence through use of certain search terms. This is undertaken to detect whether any Agency employee is engaging in inappropriate behavior, such as using government computers for reviewing or advancing child pornography or downloading information for purposes of espionage. Agency regulations provide that an employee has no reasonable expectation of privacy in any Agency information system and that any misuse can lead to administrative sanction and/or referral to the Department of Justice for criminal prosecution. CIA employees are presumed knowledgeable about such regulations on searches as a matter of law.[222]

The Supreme Court has held that the Fourth Amendment does apply to government officials in their work environment: "[i]ndividuals do not lose Fourth Amendment rights merely because

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219. 29 U.S.C. § 2006(a) (2006).

220. 29 U.S.C. § 2006(b)(2)(A)(i) (2006). The EEPA also authorizes the National Security Agency, the Defense Intelligence Agency, and the National Geospatial-Intelligence Agency to conduct polygraph exams of its employees. *Id.*

221. *See* Stehney v. Perry, 101 F.3d 925, 938 (3d Cir. 1996) ("[T]he New Jersey anti-polygraph statute was preempted by a federal statute, the Employee Polygraph Protection Act (EPPA).").

222. Doe v. Gates, 981 F.2d 1316, 1321 (D.C. Cir. 1993) (in discussing CIA regulations, the court noted that "[f]ederal employees are chargeable with knowledge of governing regulations or statutes").

they work for the government instead of a private employer."[223] Based upon this, "[s]earches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment."[224]

The issue then turns on the reasonable expectation of privacy a government employee has in a given item searched. An employee who brings a piece of luggage or a handbag into work has a significant expectation of privacy with regard to the contents of that item.[225] On the other hand, an employee has a vastly reduced expectation of privacy with regard to items that are regularly accessed by other government employees such that "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable."[226]

Due to the wide variety of differing work environments, "the question whether an employee has a reasonable expectation of privacy [in a given search] must be addressed on a case-by-case basis."[227] If an employee has no expectation of privacy in a particular item in the workplace, then the government may search it without triggering the Fourth Amendment. If, however, the public employee has an expectation of privacy in the workplace item, then the courts must "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."[228] Normally, the government needs a search warrant in order to tip this balance into its favor. However, the warrant requirement may be unsuitable in situations in which obtaining the warrant would

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223. O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (O'Connor, J., plurality); *id.* at 731 (Scalia, J., concurring) (noting that constitutional protection against unreasonable searches by the government continue when the government acts as an employer). Together, the plurality opinion and the portions of Justice Scalia's concurring opinion which agree with the plurality opinion constitute a majority of the Court.

224. *Id.* at 715 (O'Connor, J., plurality). *See also id.* at 731 (Scalia, J., concurring) ("The offices of government employees . . . are covered by Fourth Amendment protections as a general matter.").

225. *Id.* at 716 (O'Connor, J., plurality).

226. *Id.* at 718. *See also id.* at 731 (Scalia, J., concurring) (noting that an office which is "subject to unrestricted public access" would not be protected by the Fourth Amendment).

227. *Id.* at 718 (O'Connor, J., plurality). Justice Scalia disagreed with the "case by case" requirement, and with the "reasonableness" standard. He sought a bright line rule that, due to the special needs of the government as employer, "government searches to retrieve work-related materials or to investigate violations of workplace rules . . . do not violate the Fourth Amendment." *Id.* at 732 (Scalia, J., concurring). However, lower courts consider the plurality opinion as governing the law in this area. United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000); Shields v. Burge, 874 F.2d 1201, 1203-04 (7th Cir. 1989); Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1335 (9th Cir. 1987). As the Seventh Circuit stated, even if Justice Scalia appears to have adopted a less stringent standard than "reasonableness," that standard "is the Court's least-common-denominator holding"–if a work-related workplace search was deemed "reasonable" both he and the plurality would agree it would not violate the Fourth Amendment. *Shields*, 874 F.2d at 1204.

228. *Ortega*, 480 U.S. at 719-20 (O'Connor, J., plurality).

frustrate the government's reason for the search, or if "special needs" exist that make acquiring a warrant impractical.[229]

The Supreme Court has found that such "special needs" exist when the government conducts searches of its employees' items "for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct."[230] In such situations, the courts will evaluate whether the search was "reasonable[ ] under all the circumstances."[231]

The Fourth Circuit has specifically applied this analysis with regard to the CIA workplace in the case of *United States v. Simons*.[232] In *Simons*, a division of the CIA had an announced policy that employees were to use the Internet at work for government-related purposes only, that access of unlawful material was prohibited, and that the government would engage in routine electronic auditing of its networks. Pursuant to a random search based on this policy, it was discovered that Simons, an Agency employee, had viewed sites containing sexual content. Simons' computer was then examined from a remote computer system and found to contain a large amount of pornographic material, including pictures of minors. Based upon this discovery, the Agency entered Simons' private work office when he was away, removed the hard drive on his computer, and replaced it with a copy. Search warrants were then obtained, and used to effectuate a more thorough search of Simons' work area.[233]

When Simons was eventually indicted on child pornography charges, he moved to suppress the evidence seized from his office. Applying the above-mentioned guidance provided by the Supreme Court, the Fourth Circuit held that Simons did not have a legitimate expectation of privacy in the files he had downloaded from the Internet, due to the Internet policy in place.[234] Thus, the court found, as a preliminary matter, that viewing and copying his computer files from a remote workstation did not violate the Fourth Amendment.[235]

As for the warrantless entry into his office to retrieve the hard drive, the court found that because Simons did not share the office he had a legitimate expectation of privacy in its contents. However, the court found the searches to be in line with an investigation of work-related misconduct, despite the fact that the dominant

229. *Id.* at 720.
230. *Id.* at 725.
231. *Id.* at 725-26.
232. Simons, 206 F.3d 392.
233. *Id.* at 395-97.
234. *Id.* at 398.
235. *Id.* at 399.

purpose of the search appears to have been to acquire evidence that Simons had engaged in criminal activity. As the Fourth Circuit stated, the Agency's special need to ensure the workplace operates efficiently and properly does not evaporate merely because the evidence being acquired was of a crime. Simons' violation of the Internet policy "happened also to be a violation of criminal law; this does not mean that [the CIA division] lost the capacity and interests of an employer."[236] As there were reasonable grounds for the search, the scope of the search was reasonably related to the objective, and the search was not overly intrusive, the court upheld the search as not violating Simons' Fourth Amendment rights.[237]

Thus, the Agency would appear to have considerable leeway in searching an employee's work-related area and/or computer. This is particularly true given the Agency notifications to the workforce that it routinely conducts such searches.[238] While any such analysis would be based on the specifics of a given case, as required by the Supreme Court,[239] as a general matter such searches could extend not only to Agency files, offices, and computer downloads, but also to e-mail and instant messaging exchanges.[240]

VI. LIMITATIONS ON PERSONAL INTERNATIONAL TRAVEL

The CIA imposes significant restrictions on the ability of its employees to travel overseas for non-work related reasons. Employees seeking to engage in personal foreign travel must provide details of that travel to the Agency beforehand. The Agency then conducts a review of the proposed trip, on a case-by-case basis, and can deny the travel for national security reasons. Despite the obvious impact that prohibiting personal travel can have on an employee, such restrictions appear quite legal.

The courts draw a major distinction between restricting the right to travel within the United States and restricting the right to travel internationally. As the Supreme Court has consistently stated:

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236. *Id.* at 400.

237. *Id.* at 401. The court did note that it might have reached a different conclusion had the employee's alleged criminal acts not also been a violation of the Agency's policy. *Id.*

238. *See* discussion *supra* p. 148-51.

239. *See supra* text accompanying note 227.

240. *See Legality of Intrusion-Detection System to Protect Unclassified Computer Networks in the Executive Branch*, 2009 WL 3029764 O.L.C. (Aug. 14, 2009), *available at* http://www.justice.gov/olc/2009/legality-of-e2.pdf (asserting the government does not violate the Fourth Amendment rights of its employees when it uses an intrusion-detection system to search Internet communications of its employees made on government computers when the employees are informed that such searches may occur via log-on banners and/or computer-user agreements).

> The constitutional right of interstate travel is virtually unqualified. By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' the Court has held, can be regulated within the bounds of due process.[241]

Courts employ the rational basis test to evaluate government regulation of international travel.[242] Using this test, the Supreme Court has upheld various government restrictions on international travel, mostly on grounds of national security. In 1964, for example, the Court found the Secretary of State's refusal to validate passports for travel by U.S. citizens to Cuba to be constitutional.[243] The Court noted the State Department had expressed concerns– about Cuba's stated intention to export its Communist revolution, as well as the fear of imprisonment of Americans in Cuba without charges. The Court held that these concerns were legitimate bases for the Secretary of State to have "justifiably concluded" that travel to Cuba could lead to "dangerous international incidents."[244]

The Supreme Court reaffirmed travel bans to Cuba 20 years later, stating "we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by re-

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241. Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (citations omitted) (quoting Califano v. Torres, 435 U.S. 1, 4 n.6) (finding a statutory provision precluding certain social security benefits for any month an individual spends abroad to have a rational basis and thus constitutional). *See also* Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting *Califano*); Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (noting that international travel "is an important aspect of the citizen's 'liberty' guaranteed in the Due Process Clause of the Fifth Amendment") (quoting Kent v. Dulles, 357 U.S. 116, 127 (1958)).

242. *Califano*, 439 U.S. at 177 (stating that a government-imposed limitation on international travel is constitutional unless it is deemed "wholly irrational"). *See also id*. at 178 (noting that the constitutionality of measures restricting international travel "does not depend on compelling justifications. It is enough if the provision is rationally based"); Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 604 (7th Cir. 2009) ("The Supreme Court affords great deference to restrictions on international travel so long as they are justified by a rational foreign policy consideration."); Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 662 (N.D. Cal. 1994) ("Because international travel is not a fundamental right, limitations on it are evaluated under a rational basis test."); Moses v. Allard, 779 F. Supp. 857, 867 (E.D. Mich. 1991) ("The [*Califano*]Court held that a mere rational justification would suffice for Congress to limit international travel.").

243. Zemel v. Rusk, 381 U.S. 1 (1965).

244. *Id.* at 14-15. The Court dismissed the claim that the restriction deprived travelers of First Amendment rights to view the basis and impact of the nation's policies first hand, finding that the restriction was really "an inhibition of action," not speech. *Id.* at 16-17. *See also Clancy*, 559 F.3d at 605 (disposing of a First Amendment claim based upon regulations precluding travel to Iraq by noting that "[t]he Supreme Court has held that governmental restrictions on international travel inhibit action rather than speech").

stricting travel."[245] In so concluding, the Court made clear its "classical deference to the political branches in matters of foreign policy."[246] As it noted, issues involving foreign affairs are to be left almost entirely to Congress and the Executive Branch to manage.[247]

The most relevant case in this area is *Haig v. Agee*.[248] In that case, Philip Agee, a former CIA employee, undertook a deliberate campaign to undermine the Agency by traveling to foreign countries and exposing covert CIA officers. Beyond divulging classified information, violating his non-disclosure agreement with the Agency, and harming the ability of the United States to gain foreign intelligence, Agee's actions also led to numerous acts of violence against purported CIA employees he identified. Based on this perceived harm and Agee's announced intention to continue to travel abroad to expose CIA employees, the Secretary of State revoked Agee's passport. Agee promptly sued on a variety of grounds, including deprivation of his right to travel overseas.[249]

The Court upheld the Secretary's actions. With regard to Agee's constitutional claims, the Court stated that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation" and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests."[250] The Court quickly, and easily, found that Agee had jeopardized those interests, as well as endangered the nation's foreign relationship with other countries; thus, the Court upheld the revocation of Agee's passport.[251]

However, the Court has not blindly permitted all restrictions on international travel. Twice, in decisions pre-dating the Cuba cases above, the Court found prohibitions based on political affiliation to be illegal. In the first of these cases, the Secretary of State denied passports to certain individuals based upon their alleged affiliation with the Communist Party and their refusal to sign an affidavit denying such affiliation.[252] The Court found the Secretary's actions to be illegal because Congress had not delegated that authority to the Secretary. In so holding, the Court explicitly stated that it was not deciding whether such an act would

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245. Regan v. Wald, 468 U.S. 222, 243 (1984).

246. *Id.* at 242.

247. *Id.* ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' ") (citation omitted).

248. Haig v. Agee, 453 U.S. 280 (1981).

249. *Id.* at 283-87.

250. *Id.* at 307.

251. *Id.* at 308-09.

252. Kent v. Dulles, 357 U.S. 116 (1958).

have been constitutional had Congress passed a law authorizing such actions.[253]

The Court, however, did address that situation in the second case–*Aptheker v. Secretary of State*.[254] In *Aptheker*, the Court evaluated a statute that barred members of any communist organization from applying for, renewing, or using a U.S. passport. It ultimately held the statute to be an unconstitutional violation of the Due Process Clause of the Fifth Amendment because it "too broadly and indiscriminately restrict[ed] the right to travel.[255] The Court noted that the statute applied both to members who knew and to members who did not know that their organization sought to further the aims of the world communist movement. The statute also did not take into account the level of activity the individual had in the organization, the commitment of the individual to the organization's purpose, the reasons for the individual's travel, or the place where the individual was traveling. Finally, the Court noted that Congress could have taken less drastic measures to fulfill its objective of safeguarding national security.[256] Given that the statute restricted a constitutionally-protected activity, but was not " 'narrowly drawn to prevent the supposed evil,' " the Court refused to uphold the statute.[257]

The CIA's restrictions on international travel do not have the same problems. The Agency does not ban all personal international travel of its employees. Rather, it merely requires that all employees inform the Agency of such travel. The Agency then reviews the specific travel on a case-by-case basis and can deny the travel for national security reasons.[258] Thus, unlike *Aptheker*, the Agency's restriction is narrowly drawn to prevent the proposed evil of risking national security. Further, as the Supreme Court noted in *Haig v. Agee*, protection of national security easily passes the rational basis test.[259] Finally, as noted at the beginning of this article, the federal government has more leeway to restrict the rights of its employees than it does public citizens.[260] As the Supreme Court has upheld the government's right to preclude international

253. *Id.* at 129.

254. Aptheker v. Sec'y of State, 378 U.S. 500 (1964).

255. *Id.* at 505.

256. *Id.* at 509-513.

257. *Id.* at 514 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)). *See also* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 604-05 (7th Cir. 2009) (noting that the Court has distinguished between general policy bans on international travel established for foreign policy reasons and those created to "discriminate among people based on their political affiliation").

258. Personal trips to North Korea or Iran, for example, would probably not be approved.

259. *See supra* text accompanying note 248.

260. *See supra* text accompanying notes 3-4.

travel by public citizens on the basis of national security concerns,[261] clearly the government (in the form of the CIA) can preclude its employees from such travel for the same reason. Thus, the Agency's restrictions on international travel, assuming a valid nexus in a given case to protection of national security, should pass constitutional muster.

VII. PROHIBITION ON UNIONS AND STRIKES

One mechanism by which Agency employees could theoretically challenge the above restrictions on their constitutional rights would be through unionization, collective bargaining, and the threat or actuality of a strike. However, these options are entirely foreclosed to CIA employees.

Congress has noted that "in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection."[262] The Supreme Court has gone so far as to proclaim that the right to unionize "is a fundamental right."[263] However, it is well accepted that the U.S. Constitution itself does not recognize a right to unionize; rather, any right for such unionization stems from legislative fiat.[264]

The Federal Service Labor-Management Relations Act is the congressional statute governing unionization by federal employees.[265] It mandates that every federal government "employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of

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261. *See supra* text accompanying notes 250-51.

262. 29 U.S.C. § 401(a) (2006).

263. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

264. *See* David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 138 (1988) ("The Constitution of the United States does not expressly recognize a right to unionize . . . ."); WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 174 (3d ed. 1993) ("[T]he right of public employees to bargain collectively . . . is not protected by the Constitution."); Am. Fed'n of Gov't Emps. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (upholding ability of President to exclude certain subdivisions of the Marshals Service from unionizing, in compliance with the Federal Service Labor-Management Relations Act).

265. Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 303 (2004); *Reagan*, 870 F.2d at 724.

such right."[266] However, this statute explicitly excludes employees of certain agencies, including the CIA, from forming unions.[267]

Whether the inability of the CIA to unionize is a curse or a blessing is certainly up to debate. However, it is undoubtedly true that one key advantage of unions is their ability to help protect and assist government employees.[268] This is done in a number of ways. One mechanism is seeking to influence Congress to pass legislation that benefits workers. This can be done by administering pressure on Congress or by seeking to acquire legislative influence. For example, federal unions engage in significant efforts each year to induce Congress to increase federal pay.[269] It is no coincidence that, over the past 20 years, half of the top ten donors to members of Congress were unions.[270] Another way federal unions can assist federal employees is by bringing lawsuits on their behalf. A perusal of the footnotes of this article can attest to this fact, given the plethora of significant constitutional cases cited in which the plaintiff is a federal government union.[271] Regardless of the benefits that could accrue with unionization, the courts have upheld the statutory ability of the government to preclude certain of its employees–such as CIA officers–from forming unions.[272]

Associated with the right to unionize is another useful tool for employees: the right to strike. In essence, the power of collective bargaining stems from the ability of employees to utilize certain economic weapons. Without those economic weapons, the employee loses considerable leverage. As one commentator has stated, "[c]ollective bargaining evidently functions as a method of fixing terms and conditions of employment only because the risk of loss

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266. 5 U.S.C. § 7102 (2006). While § 7102 refers only to an "employee," the definition of "employee" in the subsequent section of the statute makes clear that its terms apply solely to federal government employees. *See infra* note 267.

267. 5 U.S.C. § 7103 (2006) (defining an "employee" covered by the statute as an individual "employed in an agency" with the term "agency" defined as an "Executive agency" but explicitly providing that the definition does not include "the Central Intelligence Agency" as well as the FBI, NSA, and others).

268. *See generally NLRB*, 301 U.S. at 33 (noting that unions are "essential to give laborers opportunity to deal on an equality with their employer").

269. *See* Mike Causey, *2009 The Year of the Fed*, FEDERALNEWSRADIO.COM (Oct. 9, 2009), http://www.federalnewsradio.com/?nid=&sid=1781276 (noting the crucial role that federal unions play in the determination of the annual pay raise for federal employees).

270. David von Drehle, *Spotlight: Campaign Finance and the Court*, TIME, Feb. 8, 2010, at 14 (evaluating the top ten donor organizations to Congress between 1989 and 2010, and noting that five of them were unions).

271. *See, e.g.,* cases cited *supra* notes 35, 194, and 195 (comprising plaintiffs such as the American Federation of Government Employees, National Federation of Federal Employees, and National Treasury Employees Union (NTEU)).

272. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (holding that, per the provisions of the Federal Service Labor-Management Relations Act, the President can exclude certain subdivisions of the Marshals Service from unionizing).

to both parties from a strike can become 'so great that compromise is cheaper than economic battle.' "[273]

However, as with the right to unionize, the right to strike has never been considered a right protected by the Constitution.[274] Indeed, until fairly recently, such collective action on the part of employees was often prosecuted as a conspiracy.[275] Thus, like the right to unionize, the right to strike stems from statute,[276] in particular Section 7 of the National Labor Relations Act.[277]

That Act, however, explicitly states that it does not apply to federal employees, and no other statute provides government employees with the right to strike.[278] To the contrary, federal statutory law expressly precludes all federal government employees, including CIA employees, from "participat[ing] in a strike, or assert[ing] the right to strike, against the Government of the United States."[279] This also includes "work stoppages or any similar activity interfering with a federal agency's operations."[280]

Courts have upheld this preclusion, deciding that–because the right to strike is not a constitutional right–government restrictions or prohibitions on strikes need merely fulfill the rational basis test. As discussed previously,[281] under this relaxed test, the government action is permissible so long as its basis "is not 'arbitrary' or 'irrational,' i.e., 'if any state of facts reasonably may be conceived to justify it.' "[282] Courts have accepted numerous bases for the government to preclude strikes by its employees: the public servant's higher duty to the public good, the need to ensure the continued functioning of the government, as well as the desire to protect the public's health and safety.[283] Based on these, courts have had no

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273. 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1572-73 (John E. Higgins, Jr. et al. eds. 5th ed. 2006) (quoting COX, BOK, GORMAN & FINKIN, LABOR LAW CASES AND MATERIALS 469 (12th ed. 1996)).

274. *See* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971) ("At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers."); THE DEVELOPING LABOR LAW, *supra* note 273, at 1573 ("The right to strike has never been accorded unqualified constitutional protection."); GOULD, *supra* note 264, at 174 (noting that the right of public employees to strike is not protected by the Constitution).

275. *Blount*, 325 F. Supp. at 882.

276. *Id.*; THE DEVELOPING LABOR LAW, *supra* note 273, at 1585.

277. THE DEVELOPING LABOR LAW, *supra* note 273, at 1585.

278. *Blount*, 325 F. Supp. at 882. (noting that the NLRB does not include "any governmental or political subdivisions" and that no other federal statute provides government employees the right to strike).

279. 5 U.S.C. § 7311(3) (2006). *See also* THE DEVELOPING LABOR LAW, *supra* note 273, at 1589 n.86 (citing § 7311 for the proposition that "[e]mployees of the federal government are absolutely prohibited from participating in strikes").

280. *In re* Prof'l Air Traffic Controllers Org., 724 F.2d 205, 206 n.6 (D.C. Cir. 1984).

281. *See supra* text accompanying notes 66-71.

282. *Blount*, 325 F. Supp. at 883 (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

283. *Id.*

problem finding that the government's preclusion of the ability of its employees to strike fulfills the rational basis test and passes constitutional muster.[284]

It is worth noting that the consequences of violating the prohibition to strike are fairly severe. Government employees who participate in a strike–or even merely assert the right to strike–against the federal government face a fine and imprisonment of up to one year.[285] More imposing, however, such individuals may not only be legally terminated from their federal government position, but also become statutorily precluded from employment by the federal government in any capacity, with no temporal limitation.[286]

VIII. RESTRICTIONS ON ACCESS TO COURTS

Not only are CIA employees deprived of many of their constitutional rights, but they are also greatly restricted in their ability to challenge such deprivations in court. As a general matter, the right to "petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights" and is "intimately connected both in origin and purpose, with the other First Amendment rights of free speech and free press."[287] Nonetheless, it is beyond doubt that access to the courts is not unfettered. Congress and the courts can and do impose numerous limitations on court access, such as statute of limitations provisions and protected privileges. Included in these limitations are several statutes and judicial doctrines that specifically place significant limitations on an Agency employee's ability to bring suit against the CIA.

Thus, by statute, a CIA employee may only bring a tort claim against the Agency pursuant to the Federal Tort Claims Act (FTCA).[288] The only exceptions are for alleged violations of the Constitution or a federal statute.[289] Yet the FTCA still creates several roadblocks for a CIA employee seeking to sue the Agency in tort. In addition to requiring the filing of an administrative claim with the

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284. *Id.*

285. 18 U.S.C. § 1918 (2006).

286. Clarry v. United States, 85 F.3d 1041, 1046 (2d Cir. 1996) (finding that federal air traffic controllers who participated in a strike against the United States lose any right to future federal employment as "[5 U.S.C.] § 7311 provides that any person who participates in a strike against the federal government may be barred indefinitely from employment with the federal government").

287. United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

288. 28 U.S.C. §§ 1346(b)(1), 2679 (2006) (stating the FTCA is the exclusive mechanism for all claims against the United States and its agencies for injury to person or property from the negligent or wrongful act or omission by a federal government employee acting within the scope of his or her duty).

289. 28 U.S.C. § 2679(b)(2) (2006).

Agency before bringing suit,[290] the FTCA also prevents certain claims from ever being filed against the federal government. Thus, a CIA employee is precluded from filing a tort claim against the Agency for negligent execution of a statute or regulation, engagement in a discretionary government function, assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, interference with contract rights, and for "[a]ny claim arising in a foreign country."[291] The last exemption is particularly critical given the focus of the Agency on overseas operations.[292] Thus, the FTCA imposes significant restraints on possible lawsuits by Agency employees.

The Political Question Doctrine, created by the courts, imposes further limitations. This doctrine finds its roots in the landmark decision of *Marbury v. Madison*, wherein Chief Justice Marshall stated that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[293] Though the contours of the doctrine are notoriously " 'murky and unsettled,' "[294] the Supreme Court has outlined a series of factors that would constitute political questions and thus require dismissal of a case. These factors include that the matter is constitutionally committed to another political branch of government, that the court would need to make a policy determination not meant for judicial consideration, or that the court's opinion would show a lack of respect for another branch of government.[295] Courts have found that national security matters can fall under this doctrine,[296] which may prove an impediment to CIA employee lawsuits.

A more critical judicially-created doctrine is the State Secrets Privilege. The State Secrets Privilege permits the United States to prohibit the disclosure of information in a court of law which would harm the national security.[297] Its basis stems from the supremacy

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290. 28 U.S.C. § 2675(a) (2006).

291. 28 U.S.C. § 2680 (2006).

292. It is worth noting that this last exemption also applies to decisions made in the United States related to overseas activities. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

293. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803). *See also* Alperin v. Vatican Bank, 410 F.3d 532, 544 (9th Cir. 2005) (recognizing *Marbury* as the launching point of the Political Question Doctrine).

294. Bancoult v. McNamara, 445 F.3d 427, 435 (D.C. Cir. 2006) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring)).

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

296. *See, e.g.*, Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005) (dismissing a claim, pursuant to the Political Question Doctrine, that the United States and the former National Security Advisor were involved in the failed kidnapping attempt of Chile's President, as such a claim implicated matters best left to the political branches of government).

297. United States v. Reynolds, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1, 7 (D.C.

of the Executive Branch in matters concerning military and foreign affairs, and the courts' reluctance to interfere in those areas.[298] The privilege is quite absolute, as it concerns areas in which "the courts have traditionally shown the utmost deference to Presidential responsibilities."[299] Indeed, the government can intervene and assert the privilege even if it is not a party to the litigation.[300] Judicial scrutiny of a properly asserted state secrets claim is extremely limited.[301] When properly invoked, no party may use the protected information at trial.[302] The court must then dismiss any claims based upon the protected information and, further, if the protected information goes to the very subject matter of the case, dismiss the entire lawsuit.[303] Based upon the CIA's invocation of the State Secrets Privilege, courts have dismissed numerous claims filed by Agency employees against the CIA alleging various wrong-doings,[304]–even though the courts have recognized the inherent unfairness such dismissal can place on the Agency litigant.[305] In upholding such cases, the courts not only restrict access to the courts by the particular federal litigants, but undoubtedly dissuade other Agency employees from even considering filing suit against their employer.

Finally, as noted in Part I, an employee may be entirely precluded from bringing suit against the CIA depending on the type of action undertaken by the Agency. Specifically, the courts have consistently held that statutory claims involving revocations of a security clearance cannot be reviewed by the courts.[306] Thus, the Supreme Court has dismissed as non-judiciable a claim by a CIA employee under the Administrative Procedures Act (APA) that his

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Cir. 1978).

298. *Reynolds*, 345 U.S. at 6-7.

299. United States v. Nixon, 418 U.S. 683, 710 (1974).

300. Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991); Fitzgerald v. Penthouse Int'l Ltd., 776 F.2d 1236, 1241-42 (4th Cir. 1985).

301. Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) ("When properly invoked, the [S]tate [S]ecrets [P]rivilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege.").

302. *Reynolds*, 345 U.S. at 11.

303. CIA v. Sims, 471 U.S. 159, 179-81 (1985) (dismissing claim that would have required disclosure of individual names and their institutional affiliations after the Director of Central Intelligence invoked the State Secrets Privilege); *Reynolds*, 345 U.S. at 10-11 (protecting a military report from disclosure after Secretary of the Air Force invoked State Secrets Privilege); *Zuckerbraun*, 935 F.2d 544 (dismissing entire case when key purported evidence is impermissible under the State Secrets Privilege).

304. *See, e.g.*, Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005) (dismissing a race discrimination claim filed by a CIA employee pursuant to the State Secrets Privilege invoked by the Agency).

305. *See id.* at 348 ("We recognize that our decision [to dismiss the claim pursuant to the State Secrets Privilege] places, on behalf of the entire country, a burden on Sterling that he alone must bear.").

306. Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) (holding that the courts will not consider a statutory claim based on revocation of a security clearance).

national security clearance was illegally revoked.[307] Other courts have similarly dismissed Title VII claims brought by government employees asserting that revocation of their security clearances was due to discrimination.[308] As the Supreme Court has noted, the reason for such dismissals is that "it is not reasonably possible" for an outside, non-expert body–such as a court–to review the decision of whether to grant or revoke a security clearance, to evaluate whether the Agency correctly decided who can and cannot be trusted with classified information, and to "determine what constitutes an acceptable margin of error in assessing the potential risk."[309] Still, it is important to note that courts have only precluded claims related to revocation of security clearances that are based on statute. Where such a claim is based on the Constitution, the courts have permitted the suit to continue.[310]

CONCLUSION

Central Intelligence Agency employees face a wave of limitations on their constitutional rights. They are greatly restricted in their ability to engage in political expression, date, marry, befriend, acquire an outside job, protect their privacy, conduct personal foreign travel, and even challenge these restrictions through unions, strikes, or the courts. These limitations appear perfectly legal, though the limitation on association with nationals of certain foreign nations is certainly susceptible to constitutional challenge.

Regardless of legality, however, the overall extent of restrictions on basic human rights and liberties placed on CIA employees is fairly staggering. Yet, the ability of the government to restrict these constitutional and personal rights stems from four perfectly logical and acceptable sources. First and foremost is what can be best described as a knowing and voluntary waiver. Certain

307. Webster v. Doe, 486 U.S. 592, 601 (1988).

308. *See, e.g.*, Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("[E]mployment actions based on denial of security clearance are not subject to judicial review, including under Title VII."); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[A]n adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

309. *Egan*, 484 U.S. at 529.

310. *Webster*, 486 U.S. at 603-04 (allowing constitutional claims by a CIA employee that he was improperly terminated for being a homosexual, as "we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court"); *Ryan*, 168 F.3d at 524 (dismissing a Title VII claim based upon revocation of a security clearance, but stating that "our holding is limited to Title VII discrimination actions and does not apply to actions alleging deprivation of constitutional rights" as there is no indication that Congress clearly stated an intent to preclude such constitutional claims); Stillman v. Dep't of Defense, 209 F. Supp. 2d 185, 208-13 (D.D.C. 2002), *rev'd on other grounds*, 319 F.3d 546 (D.C. Cir. 2003) (emphatically holding that constitutional claims can be brought with regard to revocation of a security clearance).

commentators have suggested that individuals cannot waive their constitutional rights.[311] Such an assertion is pure hogwash. As one commentator has noted:

> Constitutional rights are waived every day. People incriminate themselves, surrender their rights to counsel, waive a bundle of rights as part of plea bargains, and sign contracts surrendering a right to trial through arbitration or confession of judgment clauses. A criminal defendant even has a constitutional right to waive certain constitutional rights.[312]

This is certainly true of CIA employees. Such individuals, by dint of understanding the purpose of the CIA and their employment within it, concede to waiving a host of rights. The most obvious is the freedom of speech to disclose classified information, though that is hardly the only right freely waived to protect national security. By becoming a CIA employee, and receiving the benefits of such employment–monetary, patriotic, prestigious, or otherwise–CIA employees knowingly, willing, and lawfully give up numerous, substantial rights.

Such a waiver is connected to a second basis for limiting the rights of CIA employees; namely, contractual. Every CIA employee signs a Secrecy Agreement, in which the employee agrees not to disclose classified information. Throughout his or her career, an Agency employee may sign additional Secrecy Agreements, pledging not to reveal information related to more specific national security matters. Such Secrecy Agreements not only put CIA employees on notice about the broad-based restrictions imposed upon them, but also create a valid contractual obligation which has been upheld by the courts.[313]

Third, as indicated several times previously, the government plays a much different role as an employer than it does in its interaction with and obligation to the general public. As Justice Scalia has stated:

> The restrictions that the Constitution places upon the government in its capacity as lawmaker, *i.e.*, as the regulator of private conduct, are not the same as the restrictions that it

311. *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 346 (1981) (discussing the position of Ronald Dworkin).

312. *Id.* at 346 (citations omitted).

313. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (finding in favor of the CIA, when a former CIA employee breached his Secrecy Agreement with the Agency by failing to submit a publication to the Agency for pre-publication review).

> places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their jobs. With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason.[314]

Fourth, and most critical, is the power of the DCIA and deference of courts to national security. As noted in Part I, by statute, the DCIA maintains awesome powers, not to mention incredible deference by the courts. Such power and deference is not limitless, but it is nonetheless part of the reason that courts have generally permitted DCIAs to place restrictions on CIA employees in the name of national security.[315]

So, what are we to make of this quandary? On the one hand, there are these four compelling bases for restricting the rights of CIA employees. On the other hand, the actual list of limited rights is mind-boggling and cuts across virtually every major right provided to Americans–speech, travel, employment, friendships, etc. And, as stated in the introduction, such limitations are particularly ironic given that Agency employees defend our national security precisely to protect rights that are specifically restricted to them.

The answer lies in attempting to make sure that there is a proper balance between protection of national security and protection of the individual rights of CIA employees. The courts have assessed that, for the most part, the Agency has legally implemented the correct balance. Most Agency decisions are made on a case-by-case basis and weigh the national security concerns of a given interest with the individual rights of a particular Agency employee. Where the Agency places itself most at risk in upsetting the bal-

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314. Rutan v. Republican Party of Ill., 497 U.S. 62, 94-95 (1990) (Scalia, J., dissenting) (citations omitted).

315. *See supra* text accompanying notes 9-10.

ance is where assessments are not made on a case-by-case basis, but rather are dependent on over-arching general concepts. The blanket restriction on CIA employees having significant personal relationships with citizens of certain countries is a perfect example of this imbalance. While no court has specifically analyzed such scenarios, judicial decisions in analogous circumstances suggest that the Agency will have difficulty justifying its position.

Whether all of the Agency restrictions will continue to be upheld, however, comes down to how well the Agency can prove the national security risk at issue. As noted above, sometimes the courts employ a rational basis test to assess government action; sometimes they utilize a more exacting strict scrutiny mechanism. In the area of national security law, however, the test used is almost irrelevant. The real question considered by the court is whether the government's assertion of national security is or is not legitimate. If legitimate, the courts seem willing to restrict even the most hallowed of constitutional rights of an Agency officer. If the national security claim, however, is more theoretical or ethereal, the courts seem more likely to rule in favor of the CIA employee.

The result of these decisions by the Agency and the courts is not theoretical, but rather has a significant impact on the lives of the thousands of CIA employees. Admittedly, the restrictions do not seem to be impacting the Agency's ability to recruit and retain quality employees. More and more Americans continue to apply for employment with the CIA. And more and more CIA employees continue to spend years upon years, decades upon decades, engaging in actions to protect this country from harm. However, such interest in the Agency, and the dedication of its employees, does not authorize the Agency to overlook its obligation to ensure that the rights of its workers are not swept under the overarching rug of national security. As indicated in this article, the Agency traditionally does a pretty good job of fulfilling that obligation. Yet continued vigilance is required to ensure that the ever-mounting threats to our nation do not improperly supersede the individual rights of the government employees whose job it is to protect our national security.

TOWARDS A SYNTHESIS BETWEEN ISLAMIC AND WESTERN *JUS IN BELLO*

JACOB TURNER

International Humanitarian Law (IHL) has lagged behind modern warfare. This article deals with the difficulties in distinguishing civilians from combatants in an age where most conflicts are fought between irregular combatants and full-time armies. The recent killing of Osama Bin Laden, as well as the increasing use of armed aerial 'drones' has provided publicity to these debates. It has also become apparent that many Islamist participants in warfare do not consider themselves primarily bound by traditional Western IHL sources, such as the Geneva Conventions, instead preferring religious sources.

It is imperative that new provisions of IHL be developed to accommodate the dynamics of modern warfare. In order that these provisions attain the requisite level of moral force to bind both state and non-state actors, a new element of legitimacy must also be secured. This article takes the novel approach of suggesting that Islamic as well as Western sources of law should be taken into account in re-designing the law. The article concludes by demonstrating how such a synthesis may be achieved in practice, particularly in relation to the distinction between civilians and combatants.

TABLE OF CONTENTS

INTRODUCTION

In the body of international humanitarian law (IHL), there is a lacuna regarding the status of combatants engaged in asymmetric warfare. This has arisen, at least in part, out of a failure to establish a satisfactory distinction between civilians and combatants reflecting the nature of such conflicts and commanding the respect of parties to them.

The recent killing of Osama Bin Laden by United States Special Forces Operatives has publicized the debates regarding the legal status of irregular combatants. Some have claimed that Bin Laden ought to have been captured alive and tried in a court. The U.S. administration has argued that Bin Laden's killing was justified as part of an ongoing war.[1] At least some of the legal and moral uncertainty surrounding Bin Laden's death, as well as the status of many other such belligerents, stems from a lack of clarity in IHL.

It is imperative that new provisions of IHL be developed to accommodate the dynamics of modern warfare. In order for these provisions to attain the requisite level of peremptory force to bind both state and non-state actors, a new element of legitimacy must be secured.

This article suggests that this gap in IHL be solved by recourse to a combination or synthesis of Islamic norms with traditional sources of Western law. Perhaps contrary to popular belief, many of the tactics commonly employed by modern terrorists are contrary to Islamic law. Given that many participants in modern warfare operate on a religious, rather than a nationally motivated, ideological agenda,[2] it seems fitting that this apparent "Clash of Civilizations"[3] be moderated by a solution which draws on the legal doctrines of both groups, rather than just traditional Western just war theory.[4] Indeed, a solution will only command the support required for it to be effectual if a holistic approach is taken.[5]

Although a long-standing tenet of Western just war theory, the appropriateness of applying a single moral and legal standard to all combatants has recently been doubted.[6] Accordingly, this article seeks to meet two challenges: first, to show that a single standard of IHL is both necessary and appropriate for combatants on either side of asymmetric conflicts, and second, to demonstrate

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1. A statement by Attorney General Eric Holder described the action as "an act of national self-defense.," Aidan Lewis, *Osama Bin Laden: Legality of Killing Questioned*, BBC NEWS, May 12, 2011, http://www.bbc.co.uk/news/world-south-asia-13318372.

2. JOHN KELSAY, ARGUING THE JUST WAR IN ISLAM 2 (2007).

3. *See* Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

4. Much of just war theory is ostensibly derived from Christian sources. *See* Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 667 (1939).

5. This point is also recognised by Bekir Karliğa, who writes, "It is imperative that the approach of 'global ethics' that has been developed by Protestant intellectuals . . . should be enriched, especially with the intellectual tradition of Islamic thinking." Bekir Karliğa, *Terror, War, and the Need for Global Ethics*, *in* TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE 44, 61 (Ergün Çapan ed., 2005).

6. *See* JEFF MCMAHAN, KILLING IN WAR 38 (2009).

that it is possible to draw such a standard from common themes in both Western and Islamic jurisprudence.

The article will begin by outlining the current system of IHL covering asymmetric warfare. Next, it will identify the problems to which the system gives rise and the manner in which they have been exploited. The moral rationale for a new system will then be assessed from a Western and then an Islamic perspective. In so doing, the article will analyse both moderate and extremist sources and interpretations of Islamic jurisprudence. Finally, the article will attempt to find common ground between these various sources and tentatively suggest a new set of norms concerning the conduct of asymmetric warfare as well as possible approaches to drafting a new code.

I. THE TRADITIONAL APPROACH

It is a truism that generals will try to fight the previous war. The same is true of the scholars who draft the laws of war. The Regulations With Respect to the Laws and Customs of War on Land of 1899 and 1907 (The Hague Regulations) reflect a debate between larger states with powerful organised armies, such as Prussia, and smaller states, such as Belgium and the Netherlands which anticipated being invaded. In the early 20th century the powerful military states prevailed, meaning The Hague Regulations struck the balance in favour of the organised military forces.[7] Every subsequent instrument has been based on the structure of The Hague Regulations. Accordingly, much IHL came to be based on the assumption that wars are clashes between the armies of states, who regulate conflicts by asserting a fundamental dichotomy between combatants and civilians. Although there is a great deal of scholarly debate on the matter, I will assume *arguendo* during this article that the same rules and principles of IHL apply to non-international as to international armed conflicts.

The theoretical divide between combatants and civilians is enshrined in Article 1 of The Hague Regulations.[8] The laws, rights,

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7. For a summary of the debates surrounding the adoption of The Hague Regulations, *see* JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 100-08 (1993); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 217-18 (1971).

8. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 1, Oct. 18, 1907, T.S. No. 539, *available at* http://www.unhcr.org/refworld/docid/4374cae64.html [hereinafter *Hague Convention (IV) Annex*]. Chapter I, titled "On the Qualification of Belligerents" states:

> The laws, rights, and duties of war apply not only to armies, but also to militia

and duties of war are applied to all parties who fulfill a relatively strict set of formal conditions, such as wearing a uniform and carrying arms openly. The Hague Regulations do anticipate the fact that civilians might "spontaneously take up arms," and provide that, even if they do not have time to "organise themselves" in accordance with the stipulations of Article 1, such parties shall still be regarded as "a belligerent, *if they respect the laws and customs of war*."[9] It is apparent that those civilians who spontaneously take up arms are not subject to all the rigours laid down in Article 1, but it is not clear from which they are exempt. It is at least in part the uncertain ambit of this italicised phrase which has given rise to the legal difficulties so prevalent in today's warfare.[10]

In the immediate aftermath of the Second World War, the laws of war were once again reformulated, but the split between combatants and civilians was preserved.[11] Combatants remain entitled to certain protections under the Geneva Conventions of 12 August 1949 (Geneva Conventions).

Under Common Article 3 of the Geneva Conventions, civilians are entitled to unconditional protection from being the object of attack. Further regulations are set out in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (the First Additional Protocol). Article 48 of the First Additional Protocol states the "Basic Rule," otherwise known as the "principle of distinction." "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population

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and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Id. at Annex Chapter I.

9. *Id.* at art. 2 (emphasis added).

10. John Kelsay dates the expansion of just war theory to cover irregular forces to the United States Civil War, when Francis Lieber, the legal advisor to the Union General Henry Waller Halleck, recognized that the "guerillamen" of the Confederacy could not simply be treated as criminals and brigands. JOHN KELSAY, ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS 78-81 (1993). However, as Kelsay notes, whilst the General Orders No. 100 (otherwise known as the "Lieber Code") did advance just war theory in this direction, it still struck the balance in favour of established armies. *Id.*

11. Indeed, lest it be thought that partisan civilian forces rising up against totalitarian and iniquitous regimes are a thing of the past, at the time of writing (March 2012), insurrections are occurring across the Arab world against undemocratic governments.

and combatants and between civilian objects and military object tives and accordingly shall direct their operations only against military objectives."[12]

Article 43(1) of the First Additional Protocol defines the armed forces of a Party as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."[13] To this extent, Article 43(1) adopts most of the fairly restrictive criteria of Article 1 of The Hague Regulations.[14] However, the First Additional Protocol then goes beyond The Hague Regulations in explicitly recognising several other forms of combatants.[15]

Another category of combatants was created in Article 44(3) of the First Additional Protocol. Perhaps having in mind the partisan fighters who resisted the Nazi occupation of mainland Europe, Article 44(3) observes that "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself."[16] Article 44(3) concludes that such a party

> [s]hall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[17]

Furthermore, Article 51(3) of the First Additional Protocol provides, "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[18]

It would seem from the foregoing analysis that parties in the field of warfare are required to distinguish themselves definitively from the civilian population (at the very least when they are

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12. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

13. *Id.* at art. 43(1).

14. *See id.* at art. 1 (in particular, the requirements that such troops are "commanded by a person responsible for his subordinates" and "conduct their operations in accordance with the laws and customs of war"). Article 43(1) similarly provides that "[s]uch armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." *Id.* at art. 43(1).

15. *See id.* at art. 43(2)-43(3).

16. *Id.* at art. 44(3).

17. *Id.*

18. *Protocol I*, *supra* note 12, at art. 51(3).

mounting an attack). I will term this obligation the "principle of differentiation." A corollary to the principle of differentiation is the prohibition from deliberately blurring the lines between civilians and combatants. Under the First Additional Protocol, such actions are deemed "perfidy."[19] Article 37 proscribes inter alia "the feigning of civilian, non-combatant status."[20] It is unclear whether the principle of differentiation is part of customary international law. There is very little discussion of the crime of perfidy in the current legal literature.[21] This is surprising given its obvious application to situations of asymmetric warfare.

Such reticence regarding perfidy has been reflected in more recent development in IHL. Deliberately disguising oneself as a civilian is not amongst those crimes punishable under the Rome Statute of the International Criminal Court (Rome Statute).[22] However, Article 8(2)(b)(xxiii) does provide that "[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is to be considered a "serious violation[ ] of the laws and customs applicable in international armed conflict."[23]

In fact, the Rome Statute seems to have dropped the notion of perfidy from its crimes–at least in terms of feigning civilian status. This is evident from the language of Article 8(2)(b)(vii), which proscribes "[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury."[24]

This mirrors the language of Article 37(1) of the First Additional Protocol, yet notably does not include part (c) of the latter: the prohibition on the feigning of civilian status. So far as the *travaux préparatoires* are concerned, only the submissions of the United States and New Zealand make any mention of perfidy as a crime that should be included.[25] However, such formulations evi

19. *Id.* at art. 37.

20. *Id.*

21. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 200-03 (2004); *see also* John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction*, 6 J. INT'L CRIM. JUST. 627 (2008).

22. Rome Statute of the International Criminal Court art. 8(2)(b)(xxiii), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

23. *Id.* at art. 8(2)(b).

24. *Id.* at art. 8(2)(b)(vii).

25. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, U.N. Doc. A/CONF.183/13 (Vol. Ill) (1998), at 225-26, 236-37.

dently did not find favour in the eventual Rome Statute. No record of the specific reasoning is preserved.

Under traditional IHL, there is no provision for a *tertium quid* between being a combatant, with the rights and obligations that category entails, and being a civilian. Extensive legal literature has been devoted to this issue, and the discussions therein need not be repeated here.[26]

II. PROBLEMS WITH THE TRADITIONAL APPROACH

The text of instruments such as The Hague Regulations and the First Additional Protocol indicate that there was once at least some nexus between the principle of distinction and the principle of differentiation. Today the principle of differentiation is not only ignored, but its absence is actively used as a tool of war by many groups. Yoram Dinstein notes the apparent inconsistency between the prohibition from feigning civilian status in Article 37 of the First Additional Protocol and the relaxation of the civilian/combatant distinction elsewhere in that document. Dinstein considers that situations where "perfidious removal of uniform" may constitute a breach of the Law of International Armed Conflict are "surprising inasmuch as the Protocol in general–far from imposing more stringent constraints on combatants taking off their uniforms–actually relaxes in a controversial way the standards of customary international law in this context."[27]

Dinstein's criticism is pressing, but it does not follow that the principles of distinction and differentiation are utterly irreconcilable. The main difficulty is not with the shift away from combatants perceived solely as uniformed members of established armies per se, as Dinstein suggests, but rather the fluidity of the civilian/combatant definition under the First Additional Protocol.

The issue with the apparently tiered system that operates between Articles 43, 44, and 51 of the First Additional Protocol is that there is an inevitable race to the bottom. Why would a belligerent party desire to be bound by the seemingly higher legal standard applied in Article 43 if they could take advantage of Article 44? Moreover, the impact of Article 51(3) is also a source of con-

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26. Although United States case law recognizes such a category (*see* United States *ex rel.* Quirin v. Cox, 317 U.S. 1 (1942)), Aharon Barak, after having extensively surveyed the relevant literature, said, "In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category." HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., 53(4) PD 817, para. 28 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf [hereinafter *Targeted Killings Case*]; *see also* ANTONIO CASSESE, INTERNATIONAL LAW 408-10 (2005).

27. DINSTEIN, *supra* note 21, at 203.

fusion. What constitutes taking part in hostilities? How are such protections to be lost and gained? Traditional IHL provides no clear answers.

The reluctance of armies to attack civilians, or to cause excessive civilian casualties even when they are not being targeted directly, is exploited by belligerent groups. Hizbollah, Hamas, and operatives of the Tamil Tigers–to name but a few–frequently situate their fighters within densely populated areas. This leads to two related problems for a regular army attacking: first, the chances of civilian casualties are necessarily increased; second, there is much greater scope for a belligerent to hide his or her weapon and instantly melt back into the civilian population.

In short, the current state of IHL permits belligerents to claim the full rights of civilians and avoid the liabilities of combatants.[28] In particular, the gaps between Article 43 and Article 44 of the First Additional Protocol allow this to happen–notwithstanding the fact that few modern irregular belligerents consider themselves bound by these legal structures. Armies fighting against belligerents using such tactics are thus prone to accusations of having deliberately and indiscriminately targeted civilians. In an age where media support for or consternation with military tactics can have an enormous bearing on military strategy, such behaviour on the part of belligerents may act as a powerful weapon in furthering their policy aims via the discrediting of the opposition in the eyes of world opinion.[29]

Non-binding interpretative guidance published by the International Committee of the Red Cross in 2008 (ICRC Interpretative Guidance) acknowledged these difficulties,[30] but fell short of recommending root and branch alterations to the law.[31] Although issues such as the scope of "direct participation in hostilities" were clarified in the ICRC Interpretative Guidance, the key ability for insurgents and terrorists to readily switch between civilian and combatant status was preserved.[32] This preservation occurred

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28. *See* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legality Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010).

29. *See* Edward Kaufman, A Broadcasting Strategy to Win Media Wars, 25 WASH. Q. 15 (2002).

30. Nils Melzer, International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. OF THE RED CROSS 991 (Feb. 26, 2009) [hereinafter *ICRC Interpretative Guidance*].

31. *Id*. at 995-96.

32. *Id*. at 996. The ICRC Interpretative Guidance provides:

> Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized

via the restriction of "direct participation" for civilians merely to the period during and immediately prior to undertaking an armed attack.[33]

Ten states, including the United Kingdom, France, and Germany,[34] recognised the potential for the special rule in 44(3) of the First Additional Protocol to reduce the protection of civilians in that members of the opposing armed forces might come to regard every civilian as "likely to be a combatant in disguise and, for their own protection, would see them as proper targets for attack."[35] Those states made a reservation that Article 44(3) would only apply where Article 1(4) of the First Additional Protocol is engaged.[36] This denotes situations where "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[37] However, although superficially attractive, this reservation does not actually restrict the use of Article 44(3) in practice. The determination as to when Article 1(4) is engaged is a completely subjective enterprise. As exemplified below in the rhetoric used by al-Zawihiri and Bin Laden, amongst others, almost every modern irregular belligerent would describe his or her fight as one against colonial domination, alien occupation, etc.[38]

The difficulties of enforcing IHL against such belligerents can be seen from the present difficulties facing the United States, regarding its policy of interning what it termed to be "unlawful com-

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> armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function.
>
> Continuous combat function is later defined as requiring "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.

Id. at 1007. It is difficult to see why the designation of "continuous combat function" was reserved only to the organised armed forces of a state, rather than all combatants.

33. *Id.* at 996; *see also* Parks, *supra* note 28, at 784. ("The ICRC gave little deference to the advice of its military experts, declining to correct, much less delete, Section IX.").

34. These states were Australia, Belgium, Canada, France, Germany, Ireland, the Netherlands, New Zealand, the Republic of Korea, and the United Kingdom. Further, Spain and Italy limit the "situations" to cases of occupation alone. *See* Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 849 INT'L REV. RED CROSS 143 (2003).

35. U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT § 4.5.1 (2004), *available at* http://www.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule 106.

36. *Id.*

37. Gaudreau, *supra* note 34, at 147.

38. *See generally Profile: Ayman al-Zawahiri*, BBC NEWS (June 16, 2011), *available at* http://www.bbc.co.uk/news/world-middle-east-13789286; *Osama bin Laden: Famous Quotes*, THE TELEGRAPH (May 2, 2011), *available at* http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8487347/Osama-bin-Laden-famous-quotes.html.

batants" in Camp X-Ray, Guantanamo Bay. Recent U.S. Supreme Court cases have grappled with these issues. In *Boumediene*, a 5-4 majority ruled that a writ of habeas corpus could apply to Guantanamo detainees.[39] In *Hamdi*, the Supreme Court ruled that prisoners could be termed illegal "enemy combatant[s]," but that this did not deprive them of the right to challenge this before an impartial tribunal.[40] Although President Obama announced through an executive order issued on only his second day of office his intention to close the Guantanamo detention facility within a year, the base remains open at the time of this writing, more than two years later.[41] The current dilemma facing the Obama administration regarding how to deal with prisoners is illustrative of the dearth of IHL.[42]

One particular source of difficulty is that many of the belligerents themselves do not feel constrained by IHL and see its very existence as a tool of Western imperialism. Part of the issue here is that customary international law is generally formed by state behaviour, and, as noted above, most warfare is no longer between two states. One way of circumventing the problem of attributing responsibility might be to widen the rules regarding state responsibility. A recent attempt at clarifying this area was made with the International Law Commission's publication of the Draft Articles on State Responsibility.[43] However, the fundamental debate regarding the level of control over an armed unit--the subject of this article--has not been resolved. Indeed, the International Criminal Tribunal for the former Yugoslavia seems to have created a different standard than that of the International Court of Justice.[44] In any case, it is submitted that adjusting the rules regarding state responsibility is not the optimum solution for three reasons.

First, although certain groups may be seen more directly as proxies for other countries (such as Hezbollah for Iran), it is not true that all such belligerent groups have comparable ties to a particular country. To catch every belligerent group within this new net would risk expanding the notion of state responsibility so wide as to render it meaningless. Second, the prevalent trend in

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

40. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

41. Jonathan Masters, Council of Foreign Relations, *Closing Guantanamo?* (July 11, 2011), http://www.cfr.org/terrorism-and-the-law/closing-guantanamo/p18525 (last visited October 6, 2011).

42. *See id*. (summarizing and discussing the problems specific to Guantanamo).

43. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, Supplement No. 10 (A/56/10), chp.IV.E.1, (Nov. 2001), *available at* http://www.unhcr.org/refworld/docid/3ddb8f804.html.

44. *See* Antonio Cassesse, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649 (2007).

international law, at least over the last fifty years, has been away from a state-based system. Instead of being the sole repositories for a person's rights and responsibilities, there has been an increasing tendency to accord these to the individual. Numerous documents and treatises reflect this–most notably the Universal Declaration of Human Rights. In terms of IHL, the development of the International Criminal Court has been a major step in this direction: individuals can now be tried for various crimes against humanity.[45] Third, to expand the notion of state responsibility does not get to the root of the problem with IHL here.[46] The key lacuna is in the substantive law; altering the procedural aspects of it will not solve this.[47]

It can be seen from the foregoing analysis that the problem is not necessarily that IHL completely lacks the tools to control the actions of terrorists.[48] The problems are essentially twofold: first, the current provisions regarding how to distinguish combatants from civilians are not clear, and second, those provisions relating to the obligation of combatants to differentiate themselves are not enforced.

III. THE MORAL POSITION

There are sound moral justifications for a single value-neutral code which applies to combatants on both sides of an asymmetric

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45. The empowering document is the Rome Statute of the International Criminal Court, which came into force in 2002. It is widely seen as embodying customary international law, and possible *jus cogens*. Rome Statute, *supra* note 22, at arts. 5-8.

46. *See generally* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 121-28, 139-54 (1996) (discussing "The Failure of State-Centric Codifications to Comprehensively Address the Extradite or Prosecute Obligation of States").

47. One example of a possible constraint was recognized in a recent article by Richard Goldstone:

> Some have suggested that it was absurd to expect Hamas, an organization that has a policy to destroy the state of Israel, to investigate what we said were serious war crimes . . . the laws of armed conflict apply no less to non-state actors such as Hamas than they do to national armies. Ensuring that non-state actors respect these principles, and are investigated when they fail to do so, is one of the most significant challenges facing the law of armed conflict.

Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, April 1, 2011, *available at* http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story_1.html.

48. The inadequacies of IHL in this area have frequently been discussed. *See*, *e.g.*, Emanuel Gross, *Self-Defense Against Terrorism–What Does It Mean? The Israeli Perspective*, 1 J. MIL. ETHICS 91 (2002); Christopher C. Burris, *Re-examining the Prisoner of War Status of PLO* Fedayeen, 22 N.C. J. INT'L L. & COM. REG. 943, 976 (1997); James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 AM. SOC'Y INT'L L. PROC. 307 (1987); Draper, *supra* note 7.

conflict. Doubt has recently been cast on an area long-regarded as fundamental to just war theory: the independence between *jus in bello* and *jus ad bellum* (the "separation thesis"). As will be shown below, the collapse of this distinction would be fatal to the stability of the civilian and combatant distinction, as well as potentially have a bearing on the types of tactics which are permissible. Neither consequence is desirable. Before making the positive case for the necessity of a new set of norms which is applicable to all parties in a conflict, both of these challenges will be addressed.

Even Michael Walzer, who elsewhere is a stringent defender of the independence thesis, suggests that in certain asymmetric guerrilla wars, "considerations of *jus ad bellum* and *jus in bello* . . . come together."[49] The reasoning for this, Walzer contends, is that "the degree of civilian support that rules out alternative strategies also makes the guerrillas the legitimate rulers of the country."[50] In making this argument, Walzer does not retract the principle of separation altogether. Rather, he is merely making the empirical appraisal that in certain situations of a true levée en masse, the otherwise independent factual criteria for a just war of defence would be satisfied.

In fact, those countries which reserved the application of Article 44(3) of the First Additional Protocol to situations of true revolt against colonial domination and alien occupation seem to be making roughly the same point which Walzer does: when such causes have such overwhelming *jus ad bellum* justification, the laws of *jus in bello* become supererogatory. As suggested above, this view is unhelpful on the grounds that such labels are highly subjective, and almost all modern irregular combatants consider their cause to be covered by them.

Jeff McMahan has cast doubt on the moral foundations of the independence thesis in all circumstances, particularly on the notion that all combatants share a "moral equality"[51] notwithstanding the justness (or lack of justness) of their cause.[52] One of the main points made by those who doubt the independence thesis is that the model of simultaneous claims of self-defence cannot be justified. McMahan employs the "policeman and murderer" example in his attempt to demonstrate the truth of this proposition:

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49. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATION 195 (4th ed., Basic Books 2006).

50. *Id.* at 196.

51. *See* MCMAHAN, *supra* note 6.

52. *Id.*

> [T]he murderer has, by wrongfully threatening the lives of further innocent people, made himself liable to be killed in their defense. He therefore has no right of defense against the police, if their only effective defensive option is to kill him. It is therefore false that by posing a threat to another, one necessarily makes oneself liable to defensive action.[53]

Walzer has claimed that such analogies are inappropriate: "War as an activity (the conduct rather than the initiation of the fighting) has no equivalent in a settled civil society. It is not like an armed robbery, for example, even when its ends are similar in kind."[54] The lack of analogy argument is true in part, but its mere recitation does not show why this is the case. The crucial point is that in a war, we simply do not know which party is the "murderer" and which party is the "policeman." The phenomenon of limited human knowledge is a highly relevant material factor in wars which cannot be eliminated or argued out of existence.[55]

As McMahan's book shows, removing the independence thesis can have troubling effects. The final chapter of *Killing in War* addresses possible bases for civilian liability.[56] After having collapsed the separation between *jus in bello* and *jus ad bellum*, McMahan avers that "the account of liability to attack in war that I have defended cannot rule out the possibility that civilians may be liable to intentional attack."[57] Following from his interim conclusion that those combatants who fight in an unjust war do not have the same moral status as those who fight in a just war, McMahan asserts that a civilian who is culpable of being a willing supporter or participant in a system of oppression renders a civilian "not innocent."[58]

The implications of removing the separation thesis might also render the crime of perfidy obsolete. John C. Dehn has posed a powerful example as to why this might be a favourable development.[59] He cites the July 2008 rescue of hostages held in a jungle camp by Revolutionary Armed Forces of Columbia (FARC) rebels, conducted by Colombian security forces who posed as "aid workers and journalists" as well as members of the International Red Cross

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53. *Id.* at 14.
54. WALZER, *supra* note 49, at 127.
55. Christopher Kutz, *Fearful Symmetry*, *in* JUST AND UNJUST WARRIORS 69 (David Rodin & Henry Shue eds., 2008) (arguing for the maintenance of symmetry).
56. MCMAHAN, *supra* note 6, at 213.
57. *Id.* at 221.
58. *Id.* at 232.
59. Dehn, *supra* note 21.

in order to carry out the operation.[60] Dehn notes that the international community's reaction to this act was almost universally positive.[61] On its face, this example provides a compelling reason to collapse the *jus ad bellum* and *jus in bello* distinction as far as acts of perfidy are concerned.

This should be resisted. As will be explained below, such signposts of clear epistemic certainty in the justness of one's cause are few and far between in the fog of war. Dehn effectively makes this point: "an unsympathetic victim presents a threat to the rule of law."[62] Dehn concludes that the prohibition on perfidy either does not apply to non-international armed conflict, or it is a "non-criminal violation of IHL."[63] It is submitted that neither explanation is particularly satisfactory.

Rather than doing away with the separation thesis or creating limited examples of *lex specialis* as Dehn suggests, perhaps a better way of looking at why this action seemed morally acceptable is to appeal to the underlying justifications for the prohibition on perfidy. As argued elsewhere in this paper, the principle of differentiation is a corollary to the obligation to distinguish between the targeting of civilians and combatants. Both principles are designed to minimise the accidental or deliberate killing of civilians. In the Colombian hostage rescue example mentioned above, there was no possibility of endangering any civilians collaterally, given that it took place in an isolated, jungle environment. Simply put, owing to the particular factual circumstances, there was no possibility in that situation of the animating principle behind the rule being violated. This point can be illustrated by changing the fact pattern slightly: had the rescue taken place within a dense urban setting, thickly populated by other civilians, then it might well have been seen as objectionable by many in the international community given the tendency for innocents to be caught in the crossfire.

Does this mean that the prohibition on perfidy might be relaxed in such limited circumstances as were arguably engaged in the Columbian hostages example? Such a conclusion should also be rejected. The long-term consequences of the Colombian forces' act of perfidy should not be ignored. It is probable the FARC rebels would be less willing in the future to grant non-combatant immunity to any party in the aftermath of these actions, on the justifiable

60. *Id.* at 629; *see also*, *Colombian Soldier Wore Red Cross Logo in Hostage Rescue*, N.Y. TIMES, July 17, 2008, *available at* http://www.nytimes.com/2008/07/17/world/americas/17colombia.html.

61. Dehn, *supra* note 21 at 638.

62. *Id.* at 653.

63. *Id.*

basis that they would have to suspect everyone of being a combatant. Red Cross members, journalists, and other non-combatants in the vicinity could become targets on the basis that they might be disguised enemies. The link between distinction and differentiation is impossible to break.

The role of uncertainty also plays an important instrumental role in restraining the conduct of soldiers. The idea that combatants fighting for a just cause may operate on a higher moral stratum than their enemies (who presumably fight for an unjust cause) could arguably lead to feelings of increased psychological fervour amongst combatants–thus making them more prone to commit atrocities. Anthony Coates writes, "The more war is justified, the less restrained it seems likely to become so that, in extreme but by no means rare cases, 'just' war generates 'total' war."[64] According to this view, the combatant who fights with doubt in his mind as to the justness of his overall cause is more likely to act with circumspection in the theatre of war. Dan Zupan has described this phenomenon as a "catastrophic success."[65]

This element of epistemic uncertainty is inherent in war. It is almost impossible for a combatant in any given conflict to say which side is in the right–particularly at the time of war. Indeed, today many see the 2003 Iraq conflict as being an unjust war.[66] Despite this, at the time of engagement in the war the case was more finely balanced. Soldiers could not have known that Saddam Hussein did not have the weapons of mass destruction which might have furnished a legitimate claim of self-defence on the part of the coalition at the time of engaging in the war.

To counter the point that the merits of either side are sometimes unclear at the outset of war, the suggestion has been made that punishments for participation in an unjust war could be meted out postbellum,[67] once the fog of war has lifted and it has become clear what the precise merits were. This suggestion is problematic for several reasons. Firstly, there is the truism that history is written by the winners. It may well be the case that the unjust side prevails–does that mean that every soldier for the just side should then be subject to potential punishment? Secondly, knowledge of the possibility that every combatant might be subject

64. Anthony Coates, *Is the Independent Application of* Jus in Bello *the Way to Limit War?*, *in* JUST AND UNJUST WARS, *supra* note 49, at 178.

65. Dan Zupan, *A Presumption of the Moral Equality of Combatants: A Citizen-Soldier's Perspective*, *in* JUST AND UNJUST WARS, *supra* note 49, at 223.

66. RICHARD N. HAAS, WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS 6 (2009).

67. David Rodin, *The Moral Inequality of Soldiers: Why* Jus in Bello *Asymmetry is Half Right*, *in* JUST AND UNJUST WARS, *supra* note 49, at 45.

to postbellum sanctions for mere participation may encourage combatants who would not otherwise commit atrocities to do so. If they suspect that they might be punished anyway, then there are fewer disincentives on them to commit a wrong.

What then justifies soldiers taking commands from their government in situations of war? The best explanation of this is Joseph Raz's Normal Justification Thesis (NJT); it is similar to the social contract-type arguments sometimes put forward to justify the abdication of decisionmaking power in favour of some form of higher sovereign authority.[68] In the absence of law, people would act on those first order reasons which matter only to them: we would write our own morality. There are good *prima facie* reasons–such as the value of individual autonomy–not to let our own morality be replaced by the law. How can individual autonomy be consistent with a system of laws, which purport to tell citizens what they can and cannot do?

The NJT breaks down into three related arguments.[69] The first argument is that the law claims authority. By this, Raz means that the relevant sovereign authority that propagates law claims that there are legitimate reasons to conform to its directives.[70] In order for this claim to be true, all authoritative directives should be based on those reasons that apply to the subjects (the dependence thesis). The preemption thesis holds that law functions to reflect and replace first-order dependent reasons through provision of second-order preemptive reasons in the form of legal norms. Finally, the NJT states that the law claims that subjects are normally justified in following the law's directives, since to follow these will more likely lead subjects to act on the right balance of first-order dependent reasons than if subjects tried to act on appeal to first-order dependent reasons themselves.[71] Effectively, when the NJT is satisfied, the law will be replacing individual citizens' decision-making processes, but doing so in a manner which does not destroy individual autonomy. In order to satisfy the NJT, it may well be the case that an authority requires a democratic mandate and various institutional guarantees of fundamental rights–such as the freedom of speech and the avoidance of marginalising minorities. Contrary to the claim of Robert Nozick, the argument from epistemic doubt is not necessarily a "morally elitist view that

68. Judith Lichetenberg, *How to Judge Soldiers Whose Cause is Unjust*, *in* JUST AND UNJUST WARS, *supra* note 49, at 112.

69. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

70. *Id*. at 30.

71. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1988).

some soldiers cannot be expected to think for themselves."[72] Instead, the NJT is a principled account of precisely how, in the process thinking for themselves, soldiers are morally permitted to and even justified in putting their trust in another institution.

The argument premised on the NJT applies as much to the reasons for going to war as any other pronouncements by the relevant authority. Indeed, it is *a fortiori* the case that the NJT should apply in times of war, when citizens almost always have less intelligence information available to them regarding the status of the potential enemy, its intentions, its armaments, etc. than does the government.[73] As Raz writes, the NJT does not mean that this is the only justification for obeying a government's directive; other considerations, of community loyalty and the importance of maintaining the efficient functioning of institutions may well apply.[74] However, the NJT does seem to best fit the situation of relative uncertainty which all parties face in times of war.[75]

The NJT further accounts for the transfer of liability from those who participate in the war itself to those who made the political decision to engage in war (the *jus ad bellum* liability). F. M. Kamm has constructed several examples to demonstrate situations whereby a person is not liable for undertaking an impermissible act, so long as that person who does it acts as the agent of a principal and all responsibility for the act lies with the principal rather than with the agent.[76] McMahan criticises these examples on the basis that the agent has at least a right to undertake the action itself.[77] However, it is submitted that it is possible to construct an example where an actor, relying on the NJT, acts as an agent for a party which does not have a claim or right to do something, yet nonetheless should not be held liable.

The example is as follows: Suppose A is B's father. To the best of B's knowledge, A is a reasonable and honest man. Simply put, B trusts A and is justified in doing so. They are in a public park. A asks B to pick up from the ground a gold ring, which he says he dropped earlier. B does this. It transpires later that A did not own the ring. Is B morally culpable for having obeyed his father

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72. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 100 (1974).

73. Although the recent "Wikileaks" affair may have altered this somewhat, the general point remains true.

74. *See* RAZ, *supra* note 71, at 53.

75. The mixed response from the media and populations in the United Kingdom, United States, and France regarding their military action in Libya during the early months of 2011 is indicative of this.

76. F. M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 312 (2007).

77. MCMAHAN, *supra* note 6, at 91.

in picking up the ring? I would argue not. Indeed, not only was B excused from liability, but he was also justified in undertaking the action that he did, on the assumption that the NJT is true for their relationship.

It does not matter whether A knew the ring was not his or whether he thought subjectively that it was. The key point is that B would be justified in his action on the basis that the first-order reasons acting on him (such as not stealing) are better served in this instance by adhering to the directives of another source, rather than by B engaging in a de novo investigation of the provenance of the ring. The familial element of this example is important as it factors in, by analogy, the community loyalty and institutional respect elements which also act on participants in a war. This example can be expanded.

Now let us suppose C is D's mother and to the best of D's knowledge, C is a reasonable and honest woman. C makes exactly the same request of D that A made of B, regarding the same ring. D encounters B as he goes to retrieve the ring. A scuffle breaks out. Is D culpable? Is B culpable? No: any moral responsibility for this act lies with the parents who directed their children to undertake the actions. This would be equally true if A actually owned the ring, B actually owned the ring, or neither of A nor B owned it.

This example demonstrates the workings of the NJT in a practical setting and also how situations of war are not quite as removed from domestic analogies as is sometimes supposed by writers like Shue, Rubin and Walzer. It is incorrect to aver that "[a]nalogies with ordinary life only mislead."[78]

After having attempted to rebut negative arguments, it is necessary to make a positive case as to why there should be a single, value-neutral set of norms which apply equally to all parties in an asymmetric conflict. The growing gulf between the philosophical outlooks of combatants who fight on opposing sides of modern asymmetric warfare reflects not just differences in their status within a moral system, but rather different moral systems altogether. As H.L.A. Hart showed, it is the "internal aspect"[79] to a law which explains its binding nature. Scott Shapiro has explained that the internal point of view plays four roles:

> (1) It specifies a particular type of motivation that someone may take towards the law; (2) it constitutes one of the main

78. Henry Shue, *Do We Need a 'Morality of War'?, in* JUST AND UNJUST WARS, *supra* note 49, at 111.

79. H.L.A. HART, THE CONCEPT OF LAW 57 (2d ed. 1994).

> existence conditions for social and legal rules; (3) it accounts for the intelligibility of legal practice and discourse; (4) it provides the basis for a naturalistically acceptable semantics for legal statements.[80]

Shapiro's passage applies particularly to the rules of IHL which, though widely promulgated, clearly do not give rise to any such internal motivation on the part of many irregular combatants. IHL is not a set of commands backed by threats. One of the main reasons for this is that such threats are often idle, owing to the present inability of international criminal law to provide an individualised sanction against combatants who have not engaged in large-scale atrocities. Instead, adherence to any new code of IHL is much more likely to be enforced internally, by the combatants themselves, if it is to be enforced at all. As Hart identifies, it is the critical reflective attitude on a rule which explains adherence. The realist critics who suggest that rules are merely external regularities of behaviour fail to account for this. As such, the second and third portions of Shapiro's categorisation are the most important for the purposes of reforming IHL.

Thomas Franck has more recently reached a similar conclusion regarding compliance with international law. Following Rawls,[81] Franck advocates a "fairness" approach, contending that if nations perceive a rule to "have a high degree of legitimacy" then they are more likely to obey it.[82] Franck defines "legitimacy" as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[83] It is no great logical jump to apply this reasoning to supranational groups, as this article seeks to do.

Harold Koh, in a review of Franck's work, develops his own gloss on the question as to what makes international law binding, which is pertinent to the methodology of this article.[84] Koh argues that reasons for compliance are found at a "transnational" level.[85] For Koh, this is a tripartite process of "interaction, interpretation,

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80. Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1158 (2006).

81. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1999).

82. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 25 (1995).

83. *Id.* at 24.

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

85. *Id.* at 2649-59.

and internalization" [86] whereby first parties (i) "interact," which forces (ii) an "interpretation" of the global norm applicable to the situation.[87] In so doing, the parties (iii) "internalise" the new interpretation of the global norm into their internal normative system.[88] The input legitimacy requirements for a new code of IHL outlined towards the end of this article–particularly those regarding the drafting stage–are in accordance with this model.

It is the desire to engender such an internal attitude of adherence to IHL that provides the motivation for drawing on Islamic sources in order to ameliorate the current norms. The trends identified by Hart, Franck, and Koh, amongst others, indicate that only a solution which can draw on sources and themes common to both theological and legal traditions can have any likelihood of gaining moral traction and hence adherence.

Moreover, the Middle East–the seat of many of today's conflicts–is characterised by a different legal structure than that upon which much IHL is premised. As opposed to the "Westphalian" model whereby systems of law apply on a territorial basis, in much of the Middle East the jurisdiction of law is viewed on a "personal" basis. The norms that apply to any given person do so on basis of their religion, rather than their nationality or the territory in which they reside.[89] Chibli Mallat writes that the historical foundations for this difference originate in the classical Islamic lawyers' divide between *dar al-harb*, the territory of war, as opposed to *dar al-silm*, the territory of peace.[90]

James Cockayne has recast the recent history of IHL as a "conversation" between civilisations, rather than a Huntingtonian "clash."[91] According to Cockayne, IHL has already drawn upon Islamic traditions and norms, which he says have been instrumental in the drafting of modern codes of IHL.[92] In support of this, he cites the Arab participation in the drafting of the First Additional Protocol, which was precipitated in part by the Arab-Israeli conflicts.[93] Indeed, Cockayne contends that "Article 1 (and even the presence of non-State entities) represented a fundamental shift in humanitarian law, beyond the statist model upon which it had long been

86. *Id*. at 2656.
87. *Id.*
88. *Id.*
89. *See*, *e.g.*, CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW 141 (2007).
90. *Id*. at 173.
91. James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations*, 84 INT'L REV. RED CROSS 597 (2002).
92. *Id.*
93. *Id*. at 614.

predicated. This radical shift was, in many ways, the direct product of pressure from Islamic players."[94]

Cockayne correctly identifies that "it is crucial to realize that the identities of the latter were based primarily not on Islam, but on nationalism."[95] Cocayne's historical analysis is certainly helpful in demonstrating the extent to which IHL has begun to stop treating Islam as "the other."[96] Examples of this include the adoption by the Red Cross organisation of the Red Crescent symbols and semiotics.[97] However, as well as securing acceptance of Islam's role by Western powers, universal norms of IHL must be accepted by Islamist fighting forces.

The dominance of personal jurisdiction in the legal traditions of the Middle East is not fatal to the development of a general code of IHL. Hitherto however, at least from the perspective of international treaties on IHL, this phenomenon has been ignored. From a heuristic perspective, the failure to recognise the personal characteristics of Middle Eastern law is likely to be another reason why the Geneva Convention, as well as other instruments of IHL, have achieved such little recognition amongst many belligerent groups in that area.

It might be asked whether it is feasible to reconcile the basic tenet of modern IHL, that certain rights are held by all persons simply by virtue of being human, with the starting premise of Islamic law, that authority is ultimately drawn from Allah.[98] N.W. Barber has demonstrated how it is possible for multiple rules of recognition to exist within a "pluralist" legal system, as is the case in the "new legal order"[99] of the European Union, where both the Court of Justice and certain nations' highest national courts claim to be supreme.[100] Indeed, just as in the European Union the existence of competing rules of recognition may encourage productive dialogue between the respective sources of authority; as Barber puts it, "The risks of actual conflict provide incentives on each party to strive towards harmonious interpretation of the law."[101] As will be further shown below, in the case of Islam such a practice could well be aided by the presence of *ijtihad* (interpretation) as

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94. *Id.*

95. *Id.*

96. *See infra* note 116.

97. Cockayne, *supra* note 91; *see also* Richard D. Parker, *Homeland: an Essay on Patriotism*, 25 HARV. J.L. & PUB. POL'Y 407, 613 (2002) (highlighting the importance of symbols).

98. Cockayne, *supra* note 91 at 622-23.

99. Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 13 (1963) (introducing the term "new legal order").

100. N.W. Barber, *Legal Pluralism and the European Union*, 12 EUR. L. J. 306 (2006).

101. *Id.* at 328.

one of its sources.[102] The vital question is therefore whether it is possible to locate a common denominator between Islamic law and the traditional Western sources, as far as IHL is concerned.

IV. THE NATURE OF ISLAMIC LAW

Before engaging in an analysis of the relevant norms of Islamic law relating to asymmetric warfare and the status of civilians, it is important to briefly explain the nature of Islamic law. It is far from a single, monolithic text but instead is drawn from numerous sources which are regarded with varying degrees of acceptance and authenticity.

Although *sharia* is colloquially referred to as Islamic law, this is just a subset of *fiqh*, which may be roughly translated as jurisprudence. The principal source of *fiqh* will be familiar to readers: the Holy Koran.[103] This provides certain rulings; although the opacity of its language has left many of these open to varying interpretations.[104] Youssef Aboul-Enein and Sherifa Zuhur observe "Islamists . . . selectively draw on Quranic verses and purposefully omit injunctions that do not suit their political agenda."[105] Aside from the broad scope for interpretation of language, especially in translation, the Koran contains structural elements which further complicate matters. There is ongoing debate as to whether certain contradictory verses of the Koran abrogate others.[106] This method of abrogation is known as *nasekh*.

As Maḥmūd Shaltūt shows, the extent to which *nasekh* has occurred within Koranic verses has a significant bearing on its applicability to IHL. He writes that "about 70 verses are considered to have been abrogated, since they are incompatible with the legitimacy of fighting."[107] The reason for the apparent inconsistencies is

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102. Anisseh Van Engeland, *The Differences and Similarities Between International Humanitarian Law and Islamic Humanitarian Law: Is There Ground for Reconciliation?*, 10 J. OF ISLAMIC L. & CULTURE 81, 81–99 (2008) (advocating this solution).

103. Unless otherwise specified, I use the translation by Muhammad Asad on Islamicity: Quran Search, http://www.islamicity.com/quransearch/ (last visited March 13, 2011). Where I have quoted directly from other sources which cite the Koran, I retain the translations used by those authors.

104. A feature which J. Wansbrough has attributed, at least in part, to "a concomitant failure to assimilate Arabian elements to the Judaeo-Christian legacy." J. WANSBROUGH, QUR'ANIC STUDIES: SOURCES AND METHODS OF SCRIPTUAL INTERPRETATION 29 (2004).

105. YOUSSEF H. ABOUL-ENEIN & SHERIFA ZUHUR, U.S. ARMY WAR COLLEGE, STRATEGIC STUDIES INST., ISLAMIC RULINGS ON WARFARE 7 (2004).

106. Hisham M. Ramadan, *Toward Honest and Principled Islamic Law Scholarship*, 2006 MICH. ST. L. REV. 1573, 1582-83 (2006); *Sahih Al-Bukhari* 6:60:8 at 971 (Mika'il al-Almany ed., M. Muhsin Khan trans., 2009), *available at* http://www.biharanjuman.org/hadith/Sahih_Al-Bukhari.pdf [hereinafter *Sahih Al-Bukhari*].

107. Maḥmūd Shaltūt, *The Koran and Fighting*, *in* JIHAD IN MEDIAEVAL AND MODERN ISLAM 26 (Rudolph Peters trans. 1977).

intricately linked to the historical context of the Koran. The migration of Mohammed's followers from Mecca, where they had been a subjugated minority, to Medina marked a turning point in Islamic history.[108] Their increasing strength allowed Mohammed's followers to defend (and indeed advance)[109] their religion by means of warfare.[110]

A second source of *fiqh* is the *hadith*. This consists of short accounts of the Prophet Mohammed's sayings and actions (*sunna*). However, there are various collections of *hadith*, corresponding to different authors. There is some crossover between their content, although they contain often crucial differences. Moreover, varying sources of *hadith* tend to be followed by the different internal denominations of Muslims.

The third source is the *quiyas* (analogies). These are constituted largely by *fatwahs*. Although popularised in Western parlance as "death sentences" by virtue of the famous directive pronounced by Ayatollah Ruhollah Khomeini against the author Salman Rushdie,[111] a *fatwah* is actually a response to a specific question posed to a qualified cleric (*mufti*, or *al-ulama*). The question as to who is a qualified *mufti* is in itself a source of disagreement. Once again, different internal denominations of Muslims prefer the writings of different *muftis*. Many of the debated sources described below–particularly those of contemporary clerics–are *fatwahs*. The advent of the internet has allowed for the instantaneous universal dissemination of such rulings, providing a clear opportunity for their application worldwide, rather than to a small location-centric population.

Some scholars also consider *ijtihad* (interpretation) as a fourth source of Islamic law. This is connected to *ijma* (consensus),[112] which is achieved when one particular *ijtihad* has been agreed upon by all qualified scholars. Numerous textbooks on Islamic law,

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108. KELSAY, *supra* note 2, at 21.

109. This notion is disputed by some scholars, who maintain that Islam's early wars were of a purely defensive nature. Regardless of the truth of this in Mohammed's time, it is apparent that the expansive wars fought by his successors certainly had their aim as expansion, rather than mere consolidation. Islamic texts support the ideological struggle for this. As Kelsay writes, "Islam is the religion of jihad, in the sense of struggle. That is the premise of Islamic mission." *Id*. at 41.

110. NAUNIHAL SINGH, UNHOLY WAR (EXTREMISM IN THE NAME OF ISLAM) 36-37 (2005).

111. *On This Day*, BBC NEWS, Dec. 26, 1990, http://news.bbc.co/uk/onthisday/hi/dates/stories/December/26/newsid_2542000/2542873.stm (last visited March 6, 2011).

112. *See* JIHAD IN MODERN AND MEDIAEVAL ISLAM, *supra* note 107, at 2 ("Tradition has it that the Prophet said: 'My congregation will never be agreed about an error.' ")

and more particularly the Islamic laws of *jus in bello*,[113] supplement these sources.

It is evident that what constitutes *fiqh* is a body of overlapping and sometimes conflicting sources. Borrowing a phrase from the philosophers Gilles Deleuze and Félix Guattari, Chibli Mallat has consequently described Islamic law as "*Mille Plateaux*, a thousand planes, where various levels and intensities of authority and legitimacy operate."[114] It is this plurality of divergent opinions that has led to the wildly differing accounts of Islam's attitude to war and particularly IHL. With this structural element in mind, it is possible to begin a substantive survey of the relevant norms of Islamic law.

Various articles, papers, and monographs have been published–particularly since September 11, 2001–suggesting that *fiqh* actually prohibits many of the tactics used by Islamist terrorists.[115] The reassertion of Islamic laws of IHL was triggered in part as a response to the work of the "Orientalists."[116] However, unlike previous works on this topic,[117] the discussion below does not attempt to assess the compatibility of *fiqh* with *lex lata* but rather whether it can provide lessons for *lex ferenda*.

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113. I have used *jus in bello* here, as it would be an anachronism to describe works written between the 8th and 20th century as "international humanitarian law." For our purposes, however, the terms are synonymous.

114. CHIBLI MALLAT, *Comparative Law and the Islamic (Middle Eastern) Legal Culture*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 609, 612 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

115. *See*, *e.g.*, Khaled Abou El Fadl & Ahkam al-Bughat, *Irregular Warfare and the Law of Rebellion in Islam*, *in* CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION ON WAR IN WESTERN AND ISLAMIC TRADITION 149 (James Turner Johnson & John Kelsay eds., 1990); Muhammad Munir, *Suicide Attacks and Islamic Law*, 90 INT'L REV. OF THE RED CROSS 71 (2008); ABOUL-ENEIN & ZUHUR, *supra* note 105; Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 FORDHAM INT'L L.J. 299 (2003); Ergün Çapan, *Suicide Attacks and Islam*, *in* TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE, *supra* note 5, at 101, 114; Said El-Dakkak, *International Humanitarian Law Lies Between the Islamic Concept and Positive International Law*, 275 INT'L REV. OF THE RED CROSS 101 (1990); Van Engeland, *supra* note 102.

116. Although it had long been in use to describe the study of the Orient, Edward Said imbued the phrase with a new, pejorative, meaning. EDWARD W. SAID, ORIENTALISM (2003). In that work, Said launched a scathing attack on the tradition of "apologists of an exultant Western tradition" who fetishised the East as "supine" and "feminine" but also characterized it as "enraged, congenitally undemocratic and violent." *Id.* at 220, 343, 349.

117. Such studies may be crudely categorized in three groups: the critics, who condemn the norms of Islam as bellicose and barbaric; the apologists, who emphasize the compatibility between Islam and current IHL principles; and those who take a more balanced approach, emphasizing the synergies as well as the inconsistencies between Islamic norms and contemporary IHL. *See generally supra* note 115 and accompanying text.

A. Classical Islam

Classical Islam lacks a precise term for civilians or non-combatants. The dominant terminology involves the concept of *isma*, (immunity).[118] Although it lacked the terminology adopted by current IHL, this does not mean that Classical Islam did not grapple with the same issues.

A *hadith* describing the aftermath of the battle of Hunayn is often recounted in support of the notion that there is a distinction between civilians and combatants in the *fiqh*. Mohamed came across the body of a woman who had been killed by the forces of Khalid ibn Walid. On hearing this, Mohamed said to one of his companions: "Run to Khalid! Tell him that the Messenger of God forbids him to kill children, women, and servants."[119] One of those present then challenged Mohamed, asking "Are they not the children of the pagans?" Mohamed answered: "Were not the best of you, also, once the children of pagans? All children are born with their true nature and are innocent."[120] Numerous other *hadith* repeat such injunctions against the killing of women and children.[121]

It seems from the foregoing passage that there is a reasonable degree of consensus, at least in the *hadith*, that women and children should not normally be killed. In seeking guidance for the drafting of a new definition of non-combatants, the important issue is whether women and children are excluded simply because they are women and children, or rather because they do not pose a threat. John Kelsay has argued that Classical Sunni theorists favoured the former view: "If one is a leader (an adult, ablebodied [sic] male), one's guilt is obvious. If one is a follower (child, woman), one's guilt may be diminished."[122] James Turner Johnson adopts a slightly different, functional, view arguing that the "reason given in the text is not that these [non-combatants] have rights of their own to be spared harm, rights derived either from nature or from considerations of fairness or justice, but rather that they are potentially of value to the Muslims."[123]

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118. ELLA LANDAU-TASSERON, HUDSON INST., CTR. ON ISLAM, DEMOCRACY, & THE FUTURE OF THE MUSLIM WORLD, "NON-COMBATANTS" in MUSLIM LEGAL THOUGHT 2 (2006) ("The category of those who have full immunity ('*isma*'), meaning that they must not be harmed, includes only Muslims and their allies, the infidels who have a specific legal treaty with Muslims.").

119. Abu Dawud, *Jihad* 111, Verses 2663, 2664, http://www.guidedways.com/book_display-book-14-translator-3-start-100-number-2649.htm.

120. Hamza Aktan, *Acts of Terror and Suicide Attacks in the Light of the Qur'an and the Sunna*, *in* TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE, *supra* note 5.

121. Sahih Al-Bukhari, *supra* note 106.

122. KELSAY, *supra* note 2, at 66.

123. JAMES TURNER JOHNSON, THE HOLY WAR IDEA IN WESTERN AND ISLAMIC

The better view is that even in Classical Islam, the question as to who was a legitimate target was based on their posing of a threat. At the time when these texts were composed, the notion of formal armies as separate from the civilian population did not exist to the extent that it did in the early 20th century. Much like the situation of irregular warfare today, any able-bodied male might be considered a potential soldier. The great Islamic polymath, Ibn Rushd (known better as Averroes), wrote that there "is no disagreement about the rule that it is forbidden to slay women and children*, provided that they are not fighting*, for then women, in any case, may be slain."[124] The italicised proviso is key to understanding the meaning of this dictum. Averroes bases it on Mohamed's reaction to seeing a slain woman. Mohamed commented, "She was not one who would have fought."[125]

A further example of the rule that only combatants might be targeted can be found in the Koran itself, at 2:190. The verse says: "And fight in God's cause *against those who wage war against you*, but do not commit aggression–for, verily, God does not love aggressors."[126] Ergun Çapan writes that the "reservation of 'those who fight you' in the original text of the verse is of extreme importance."[127] He continues by saying "the mood in Arabic denotes 'participation' which, in this sense means: 'those who fall under the status of combatant.' Thus, non-combatants are not to be fought against."[128] Munir writes similarly: "The reservation 'those who fight you' in the original text of the verse is of extreme importance, because the Arabic word *muqatil* (pl. *muqatileen*) means combatant."[129] Munir does, however, note that "[M. Marmaduke] Pickthall's translation of '*wa la ta atadu*' differs from that of the majority of commentators . . . according to Mufti M. Taqi it means 'and do not transgress. Verily Allah does not like the transgressors.' "[130] However, it is submitted that the translation as "aggressors" or "transgressors" here makes little difference to the substantive meaning: the transgression in question is that of being aggressive towards those who are non-combatants.

It might be argued that this apparent distinction is contradicted later in the Koran. At 9:36, the Koran states "and fight against those who ascribe divinity to aught beside God, *all together*–just as

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TRADITIONS 122 (1997).

124. JIHAD IN MEDIAEVAL AND MODERN ISLAM, *supra* note 107, at 15 (emphasis added).

125. *Id.* at 17.

126. Asad, *supra* note 103, at 2:190 (emphasis added).

127. Çapan, *supra* note 115, at 106.

128. *Id.*

129. Munir, *supra* note 115, at 84-85.

130. *Id.* at 85 n.69.

they fight against you."[131] On its face, this could be read as allowing for the distinction between civilians and combatants to be collapsed, at least where polytheists or pagans are concerned. Ignoring the polytheist categorisation for the moment, closer inspection still reveals that a partial distinction is to be maintained. The second part of the sentence reveals that the duty is reciprocal. Presumably, if the polytheists (i.e. enemies) did not fight the Muslims all together, then Muslims would have no obligation to fight their enemies all together either. Thus, whilst the imperative is conditional, rather than categorical, verse 9:36 does not entirely abrogate verse 2:190.

The idea that immunity is lost once a party engages in hostilities may be found elsewhere in the *fiqh*. The 8th century scholar al-Shaybani, a disciple of Abu Hanifah (the founder of the Hanafi school), states: "I asked Abu Hanifah about the killing of women, children, such old men who do not have the ability to fight, those suffering from chronic illness and are unable to fight. He forbade their killing and detested it."[132] As Ella Landau-Tasseron concludes, it "is widely agreed [in Islam] that the lives of 'non-combatants' who take part in combat–which need not mean taking up weapons–are forfeit, like those of the warriors themselves."[133] The next logical question is what constitutes taking part in hostilities for the purposes of the *fiqh*. It would appear from the example of the elderly Duraid ibn Simma, who was killed by Mohamed's forces for counseling his son on warfare against the early Muslims, that merely advising could constitute the necessary participation in hostilities in certain circumstances.[134]

A major difficulty with comparing Classical Islamic *fiqh* to IHL is that the *fiqh* appears at various junctures to distinguish between Muslims, followers of other monotheistic religions (people of the Book), and polytheists.[135] The former are offered the greatest degree of immunity (*isma*), and the other two categories progressively less. Indeed, some accounts suggest that all polytheists ought to be killed in any circumstances.[136]

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131. Asad, *supra* note 103, at 9:36 (emphasis added).

132. MUHAMMAD AL-HASAN AL-SHAYBANI, THE SHORTER BOOK ON MUSLIM INTERNATIONAL LAW 82 (Mahmood A. Gazi trans., 1998).

133. LANDAU-TASSERON, *supra* note 118, at 12.

134. *Sahih Al-Bukhari*, *supra* note 106.

135. This term may also be translated variously as "infidels," "pagans," "idolaters," and "those who ascribe divinity to aught beside God." Here I use "polytheists" as it carries the least pejorative connotations. *See* Asad, *supra* note 103.

136. ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTACY AND ISLAM 76 (2004).

Landau-Tasseron contends that there are two potentially inconsistent principles operating within *fiqh*: that which permits (or even mandates) the killing of polytheists, and that which protects non-combatants.[137] There are varying approaches as to how to resolve this apparent inconsistency. The *Hanafi* School has tended to argue that so long as the polytheists do not themselves fight, then their lives are not forfeit. The *Shafií* school, however, has placed greater emphasis on the directive contained within the Koran at 9:5.

Whilst this clash is usually taken to be one of irreconcilable principles, the actual text of the Koran strongly suggests that there is a clear "right answer" to this issue.[138] In order to illustrate this, it is necessary to quote 9:5 in its entirety:

> And so, when the sacred months are over, slay those who ascribe divinity to aught beside God wherever you may come upon them, and take them captive, and besiege them, and lie in wait for them at every conceivable place! Yet if they repent, and take to prayer, and render the purifying dues, let them go their way: for, behold, God is much forgiving, a dispenser of grace.[139]

The inclusion of a conciliatory caveat in the second sentence utterly changes the nature of the verse. Whilst 9:5 still may be seen as requiring the payment of the *jizyah* tax by polytheists,[140] in no way does this verse support the *Shafií* view that polytheists are to be killed in all circumstances. At the very most, 9:5 advocates a forced conversion of polytheists, although this would depend on the meaning ascribed to the words "repent, and take to prayer."[141] Moreover, it seems unlikely that that instruction would cover the other "religions of the Book," Judaism and Christianity. As such, it can be seen that the putative clash of principles within Islam regarding polytheist non-combatants is illusory. Though subsequent scholars have argued otherwise, it is submitted that reading 9:5 in its full context evinces a fairly clear victory for the Hanafist interpretation.

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137. LANDAU-TASSERON, *supra* note 118, at 16-17.

138. *See generally* RONALD DWORKIN, LAW'S EMPIRE 80 (1986).

139. Asad, *supra* note 103, at 9:5.

140. *Id.* M. Marmaduke Pickthall prefers the term "idolaters" to "pagans"–the former apparently excludes Jews and Christians. Muhammad Asad uses "those who ascribe divinity to aught beside God."

141. For example, it might be suggested that repenting and taking to prayer may potentially be consistent with maintaining some polytheist beliefs.

It is apparent from the foregoing that Classical Islamic *fiqh* does support a distinction between combatants and civilians and that this should be done on the basis of individual agents engaging in hostilities. Although the starting point is that women, children, the elderly, and the incapacitated are not considered threats, once they do participate in an attack, any immunity is lost.

Classical Islam also dealt with the issue of perfidy and the use of deception as a tactic.[142] There appear to be strong indications in the Koran that Islam disapproves of the use of deception in any context. Verse 3:161 provides that he who deceives shall be faced with his deceit on the Day of Resurrection, when every human being shall be repaid in full for whatever he has done, and none shall be wronged."[143]

The prohibition on deception applies also in war time, as verse 8:62 shows: "And should they seek but to deceive thee [by their show of peace]–behold, God is enough for thee!"[144] Perfidy and deception in situations of battle are again mentioned at 22:60: "And as for him who responds to aggression only to the extent of the attack levelled against him, and is thereupon [again] treacherously attacked–God will most certainly succour him: for, behold, God is indeed an absolver of sins, much-forgiving."[145]

Mohamed's companion, and the first Caliph, Abu Bakr, contributed significantly to the development of *jus in bello* norms. On instructing the Muslim armies setting out to conquer what is now Syria, Abu Bakr gave the following pronouncement, which has been described as "a mini-manual on Islamic *jus in bello*."[146]

> Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.[147]

142. *See* El-Dakkak, *supra* note 115, at 106-08 (1990).
143. Asad, *supra* note 103, at 3:161.
144. *Id*. at 8:62.
145. *Id*. at 22:60.
146. Munir, *supra* note 115, at 86.
147. ABOUL-ENEIN & ZUHUR, *supra* note 105, at 22.

This dictum contains the seeds of various rules found in modern IHL. It includes the prohibition on killing non-combatants as well as an interdiction on unnecessary harm of the environment. Most importantly, however, there is a proscription of "treachery." Accordingly, it seems that deception as a tactic of war–at least in terms of feigning an absence of belligerency–is prohibited in Islamic law.

Classical Islam dealt specifically with the use of human shields, which were known as *al-tatarrus*.[148] Specifically, this referred to situations where enemies took Muslim prisoners and used them as human shields. The Classical *fiqh* appears to deal with this issue on a basis not dissimilar to a modern proportionality calculation. It is by no means desirable for Muslims to be killed.[149] The 13th century scholar Ibn Taymiyyah, known as Sheikh ul-Islam, rationalises the killing of such shields as follows: "[Permission] is limited and restricted to the situation in which Muslims are in jeopardy if the unbelievers are not raided, even if that leads, as a consequence, to the shield being killed."[150]

Although the more nuanced elements of contemporary a proportionality calculation are not used by Ibn Taymiyyah, it is apparent that a high degree of danger must be engaged before the unintentional killing of civilians is to be allowed. Although the Classical sources do not deal explicitly with the idea of Muslims using human shields themselves, it is highly likely from the unwillingness to risk civilians endangered by the enemy that this would apply *a fortiori* in terms of an obligation for Muslim armies not to use human shields.

B. Contemporary Extremist Islamic Sources

The section below will look into some of the most prominent modern justifications published for the deliberate targeting of non-combatants. These are The Covenant of the Islamic Resistance Movement of August 18, 1988 (Hamas Charter)[151] and the World Islamic Front's 1998 Declaration of Armed Struggle Against Jews and Crusaders (1998 Declaration).[152] As well as these sources, to-

148. *See* Jarret Brachman & Abdullah Warius, *Abu Yaha al-Libi's "Human Shields in Modern Jihad,"* CTC SENTINEL, May 2008, at 1.

149. Asad, *supra* note 103, at 9:4, 6:151.

150. *Website Posts Abu-Yahya al-Libi's Research on Human Shields in Jihad*, May 1, 2008, *available at* http://triceratops.brynmawr.edu/dspace/bitstream/handle/10066/4607/AYL20080410.pdf [hereinafter *Al-Libi*].

151. *The Covenant of the Islamic Resistance Movement of August 18, 1988, available at* http://i-cias.com/e.o/texts/political/hamas_charter.htm [hereinafter *Hamas Charter*].

152. World Islamic Front, *Statement Urging Jihad Against Jews and Crusaders*,

day numerous online discussion forums and militant websites provide the basis for contemporary radicalisation. Although these sources are often decried and dismissed for their stances, an attempt will be made to engage with them as they are seen by their adherents–as serious texts in Islamic law–and if possible to derive principled reasoning from them.

The 1998 Declaration was published in the names of five different Islamic leaders, which included Bin Laden, and is characterised as a *fatwah*. It is interesting to note at this juncture that the *fatwah* here is not a responsum in the traditional sense, but rather a general declaration independent of any particular question or religious controversy. To this extent, it resembles the type of *fatwah* made famous by Ayatollah Ruhollah Khomeini against Salman Rushdie, mentioned above. It may be characterised as a mission statement of Al Quaeda.[153]

The ideological grounding of the 1998 Declaration is set out in the opening sentences, which purport to find support for their aggressive stance in the *fiqh*. It begins by quoting the familiar Verse of the Sword found at 9:5 of the Koran.[154] Second, a hadith of Mohamed is quoted: "I have been sent with the sword between my hands to ensure that no one but Allah is worshipped."[155] After reciting various claims against the US for its occupation of the Arabian peninsula and its support of Israel, the fatwah makes the crucial point that "the ruling to kill the Americans and their allies–*civilians and military*–is an individual duty for every Muslim who can do it in any country in which it is possible to do it"[156]. However, no further reasoning is provided to support the ruling that civilian targets anywhere are justified.

It is no surprise that the 1998 Declaration omits the second part of verse 9:5, which, as discussed above, completely alters its

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AL-QUDS AL-ARABI, Feb. 13, 1998, at 3, *available at* http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_28.html [hereinafter *The 1998 Declaration*]. The original Arabic can be viewed at http:www.library.cornell.edu/colldev/Mideast/fatw2.htm (last visited March 13, 2011).

153. The propriety of making a general announcement of this type–which is not in response to a particular question, issue or target–has been questioned. *See* Çapan, *supra* note 115, at 114:

> One of the primary practices of the methodology of Islamic law is that the determination of the boundaries of the subject matter precedes the final establishment of the judgment . . . Attacks where the goal and target group are not determined [against civilians in general], are in sheer opposition to one of the general principles of Islamic law.

154. *See* JIHAD IN MEDIAEVAL AND MODERN ISLAM, *supra* note 107.
155. *The 1998 Declaration*, *supra* note 152.
156. *Id.*

meaning. Since the 1998 Declaration is not limited to polytheists, but covers Christians and Jews, the citation of verse 9:5 is insufficient to cover the latter categories. More importantly, given that the link between verse 9:5 and the instruction to kill civilians was tenuous at best before, reading its second part strips the 1998 Declaration of any legitimacy as regards fidelity to Classical *fiqh*.

Article 15 of the Hamas Charter cautions against attempts to constrain Muslim ideology by Western values: "The Crusaders realised that it was impossible to defeat the Muslims without first having ideological invasion pave the way by upsetting their thoughts, disfiguring their heritage and violating their ideals. Only then could they invade with soldiers."[157] The nexus between the first sentence and the second is crucial in understanding the aversion of many radical Islamic groups to Western norms of IHL. Such norms are seen as a tactic used by the West (who are deemed to be synonymous with the Crusaders) to emasculate, and hence dominate, Islam.

Nonetheless, the Hamas Charter does seem to make some form of combatant and civilian distinction. Article 20 explicitly distinguishes a "Muslim society" from "a vicious enemy which acts in a way similar to Nazism, making no differentiation between man and woman, between children and old people."[158] Article 30 ostensibly deals with the obligation of non-military personnel in the Arab and Muslim world to support the struggle against the Zionist offensive. However, in so doing, the Charter quotes an interesting (and unsourced) *hadith*: "Whosoever mobilises a fighter for the sake of Allah is himself a fighter. Whosoever supports the relatives of a fighter, he himself is a fighter."[159] It is unclear the extent to which the first sentence (particularly the qualification that mobilising a fighter must be for the sake of Allah) qualifies the second sentence. If the second sentence were read alone, it could be argued that this *hadith* greatly widens the ambit for those who may be legitimately targeted as enemies, probably to whole societies through the iterative operation of its deeming provision.[160] However, it is submitted that this reading is probably not the best one. Rather than concerning *jus in bello* norms, this *hadith* is better seen as explaining the general obligation on Muslims to engage in a jihad (which translates more directly as "struggle," rather than

157. *Hamas Charter*, *supra* note 151, at art. 15.

158. *Id.* at art. 20.

159. *Id.* at art. 30.

160. The process is as follows: fighters may be legitimately targeted. The *hadith* indicates that anyone who provides material or emotional support to a fighter is "himself a fighter." Hence, the class of those who may be legitimately targeted may be expanded almost indefinitely.

"holy war") and does not mean that every member of society must actually take up arms.

Despite the attempt above to engage on a rational basis with the arguments in the Hamas Charter, it is difficult to place too much emphasis on the intellectual rigour behind a document which suggests that the Zionist enemy of Islam was "behind the French Revolution, the Communist revolution and most of the revolutions we heard and hear about."[161] As evidence, the Hamas Charter goes on in Article 32 to cite the Protocols of the Elders of Zion, a notorious anti-Semitic forgery.[162]

Aside from these documents, other arguments have been raised as to why Islamic fighters may target those who are ostensibly civilians. These are generally premised on the basis that whilst the Koran might advocate a prima facie distinction between civilians and combatants, this is abrogated in certain circumstances. Emblematic of this view is Yusuf al-Qaradawi, a prominent Sunni cleric, who claimed that "Israeli women are not like women in our society because Israeli women are militarised."[163] There is some perverse truth in at least the first part of this statement: the emancipated nature of Israeli society allows (and generally requires non-Muslim) women to serve in the army, and fulfill many other roles from which they are precluded in other Middle Eastern states. However, this does not justify, as al-Qaradawi contends, treating all Israeli women as fighters and hence as potential targets.

Such reasoning has been used to justify the destruction of the principle of distinction for not just those who reside in the West Bank, but the entirety of Israeli society. Muhammad Hussayn Fadlallah has argued in a similar vein that "we don't consider the settlers who occupy the Zionist settlements civilians, but they are an extension of occupation and they are not less aggressive and barbaric than the Zionist soldier."[164]

This type of reasoning is not just limited to Islamic scholars. McMahan seems to support at least some of the views of Fadlallah and al-Qaradawi when he writes that all settlers in the West Bank are "active participants in the theft of the Palestinian lands . . . not just conscious and willing participants but enthusiastic and indeed fanatical instigators and perpetrators of the strategy by which the

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161. *Hamas Charter*, *supra* note 151, at art. 22.

162. *Id.* at art. 32.

163. *Yusuf Al-Qaradawi Tells BBC Newsnight That Islam Justifies Suicide Bombings*, BBC NEWS, July 7, 2004, http://www.bbc.co.uk/pressoffice/pressreleases/stories/2004/07_july/07/newsnight.shtml (last visited March 31, 2011).

164. Munir, *supra* note 115, at 74 (quoting Muhammad Hussayn Fadlallah, *An Interview with Secretary General of Islamic Jihad*, AL-HAYAT, Jan. 2003, at 10).

theft is being accomplished"[165] and hence may be the subject of legitimate military targeting. However, he later restricts this principle to only the "adult settlers," writing that instances where children sleeping in their beds are murdered are "instances of murder for terrorist purposes and nothing more."[166] Though McMahan admits that civilian immunity remains a legal necessity, he nonetheless casts doubt on it as a moral proposition. However, as explained in the previous section, if the separation thesis remains intact despite McMahan's attacks, then his assault on civilian immunity here must fail.

Abu Yahya Al-Libi, the prominent Al Quaeda theorist believed by some to be a successor to Bin Laden,[167] published in 2006 a monograph dealing with the aforementioned issue of *al-tatarrus*– the use of human shields.[168] Al-Libi acknowledges that Shafi'ites are of the view that "attacking a shield is not allowed even in cases of coercion,"[169] although he considers this to have been "overwhelmed" and not accepted as *ijma*. The condition of "necessity," however, is recognised numerous times by Al-Libi as a "constraint" upon the doctrine of *al-tatarrus*. Al-Libi considers the extent to which the Classical Islamic fiqh is relevant to modern situations. Noting the changing realities of modern warfare, with "developed weapons which burn targets into ashes"[170] where civilians and combatants are regularly interspersed, he concludes that "modern shielding becomes more effective in achieving its objectives than did ancient shielding."[171]

Although critics of Al-Libi have decried the monograph as an attempt to justify targeting civilians,[172] a close reading reveals quite the opposite. Indeed, Al-Libi goes on to lay down rules for *mujahedeen* fighters which appear as strenuous, if not more so, then the principle of distinction in modern IHL. *Mujahedeen* are directed to:

> [S]tudy [every military operation] taking into consideration many points, such as:
> - Weighing up the military, political, moral or economic im-

165. MCMAHAN, *supra* note 6, at 223.

166. *Id.* at 224.

167. Craig Whitlock & Munir Ladaa, *Al Qaeda's New Leadership: Abu Yahya al-Libi*, WASH. POST, 2006, *available at* http://www.washingtonpost.com/wp-srv/world/specials/terror/yahya.html.

168. *Al-Libi*, *supra* note 150.

169. *Id.*

170. *Id.*

171. *Id.*

172. Jack Barclay, *Al-Tatarrus: al-Qaeda's Justification for Killing Muslim Civilians*, 8 TERRORISM MONITOR 1, 6-7 (2010); Brachman & Warius, *supra* note 148, at 2.

> portance of the target they intend to hit.
> - Choosing, as far as possible, the right place and the right time for the operation and making every endeavor to choose a place far from the homes and thoroughfares used by the public; and trying to avoid rush hour.
> - Using a quantity of weapons or ammunition that will do the job without causing - or at least causing the least possible - damage to Muslims . . .
> - Making a very precise and very realistic evaluation of the damage intended to result from striking a given target, and of the damage that might be caused to the Muslims who are affected by the operation, be it in the number of people killed or in their understanding and support of the operation once it is perpetrated.[173]

It is remarkable the extent to which these rules resemble modern IHL's proportionality and double-effect doctrines, which similarly forbid not the killing, but the deliberate targeting, of civilians. It should, of course, be noted that Al-Libi shows little regard for non-Muslim civilians. Nonetheless, his monograph is highly important inasmuch as modern *mujahedeen* most often conceal themselves within Muslim civilian areas (owing to the fact that a significant amount modern warfare is conducted in territories with a predominantly Muslim population). It must surely follow from Al-Libi's reasoning that there is a reciprocal obligation on Muslim fighters not to endanger fellow Muslims by deliberately situating themselves amongst civilians.

It is apparent from the discussion above that the modern fundamentalist tracts and clerics do not actually disapprove in limine of the distinction between civilians and combatants. Indeed, these sources go out of the way to show that the distinction does not apply to the particular situations where they advocate violence. The issue is not the existence, but rather the factual application of the distinction.

V. BUILDING A NEW CODE

As identified above, two main deficiencies exist in the current law. First, the rules denoting who is a combatant and who is a civilian are made up of a patchwork of conflicting directives. Second, the prohibition on perfidy, and its conceptual relationship with the principle of distinction, is underdeveloped and often ignored.

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173. *Al-Libi*, *supra* note 150, at 22.

As regards the first deficiency, it has been shown that the best view of the Classical Islamic sources is that parties lose non-combatant immunity once they present a direct threat. This new formulation is supported also by verses 2:190 and 9:36 of the Koran, as well as the various *hadith* cited above. The Islamic sources indicate that this is the chief criterion on which parties are to be targeted, a factor which supports the stripping away of the complex and formalistic criteria in existing IHL.

Accordingly, it is proposed that the various definitions of combatants in Articles 1 and 2 of the Annex to The Hague Regulations and Articles 43, 44, and 51(3) of the First Additional Protocol to the Geneva Conventions be deleted and replaced with the following: "A combatant is someone whose deliberate action plays a direct causal role in the existence of a threat of violence towards another or another's property. Once civilian status has been lost in this manner, it cannot be regained until such a time as the party abandons a continuous combat function, or ceases to have the capability engage in such actions (becomes *hors de combat*)."[174]

As with all of the provisions in IHL, this relates only to situations of armed conflicts.[175] There is a fairly strict standard for becoming a combatant, denoted by the inclusions of the direct causal role criterion. This can be expressed as a but-for (sine qua non) causation of a threat.[176] Merely providing general moral support or acting as a human shield would not render a party a combatant. This removes any necessity for near-impossible distinction which some ground commanders might otherwise be forced to draw between those who willingly support belligerent actions by placing themselves close to combatants and unwilling or coerced human shields.

A party who deliberately and directly counsels another to undertake a specific belligerent act, and but for whose counseling the act would not have occurred, may well be classed a combatant. The example of ibn Duraid's killing after he provided close logistical support and counseling to Mohamed's enemies supports this

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174. *Protocol I*, *supra* note 12, at art. 41(1).

175. As stipulated in the Preamble, as well as Article 2(b) of the First Additional Protocol: a party who partakes in actions constituting a threat to persons or property which are not pursuant to the armed conflict (such as a burglar who loots a house during a war), would not be rendered a combatant by this provision. *Protocol I*, *supra* note 12. pmbl. and art. 2(b).

176. It would also exclude those parties whose actions are merely ancillary to the creation of a threat, such as those who cook for combatants. *See* Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FUR DIETER FLECK 505, 506 (Horst Fischer et al eds., 2004); *see also Targeted Killings Case*, *supra* note 26, at §§ 34-48.

distinction from the perspective of Classical Islam.[177] As such, those who direct and plan particular attacks might still be targeted under this definition. Counseling a general course of action is too remote from any single act to give rise to a designation of being a combatant.

The continuous combat function terminology and definition borrows from the ICRC Interpretative Guidance.[178] However, whereas the continuous combat function designation in the ICRC Interpretative Guidance only applied to those with a "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict,"[179] the definition proposed above would apply to any party–regardless of membership of armed forces. This article's formulation is very similar to one rejected during the drafting stage of the ICRC Interpretative Guidance.[180]

The "abandonment of continuous combat" criterion prevents combatants from simply "chang[ing] their hat"[181] at will and rendering themselves immune from attack at virtually all times. The standard for becoming a combatant (direct causal participation) is different from that required to regain civilian status (abandonment of continuous combat function). In many situations,

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177. Perhaps the targeted killing of the physically frail Sheikh Ahmed Yassin, one of the founders of Hamas, by Israel in 2004 might be seen as a modern analogy to this. *Hamas Chief Killed in Air Strike*, BBC NEWS, Mar. 22, 2004, http://news.bbc.co.uk/2/hi/middle_east/3556099.stm. The Israel Defense Forces spokesperson, much like the US representatives following the killing of Bin Laden, emphasized the fact that Yassin was not just a spiritual leader, but a practical commander who had played a direct and continuing role in planning and approving terrorist attacks. Press Release, Israel Ministry of Foreign Aff., *IDF Strike Kills Hamas Leader Ahmed Yassin* (Mar. 22, 2004), *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Ahmed+Yassin.htm. *See also*, *Yusuf Al-Qaadawi Tells BBC Newsnight that Islam Justifies Suicide Bombings*, BBC NEWS, July 7, 2004, *available at* http://www.bbc.co.uk/pressoffice/pressreleases/stories/2004/07_july/07/newsnight.shtml.

178. ICRC Interpretive Guidance, *supra* note 30, at 995.

179. *Id*. at 1007.

180. Nils Melzer, International Committee of the Red Cross (ICRC), *Revised Draft: Interpretive Guidance on the Notion of "Direct Participation in Hostilities,"* 60 (2006), *available at* http://www.icrc.org/eng/assets/files/other/2008-02-background-doc-icrc.pdf (last visited April 28, 2011):

> Civilians lose their protection against direct attack for such time as they directly participate in hostilities or, alternatively, for such time as they cease to be civilians due to their continuous assumption of combat function within an organized armed group. Such loss of protection does not mean that the concerned persons fall outside the law. It only entails that the lawfulness of the use of force against the concerned persons is no longer exclusively governed by the standards of law enforcement and individual self-defense, but that operations may now also be based on the standards of the conduct of hostilities.

181. *See Targeted Killings Case*, *supra* note 26 (where respondents had the same fear).

they will be coextensive. To the extent that they are different, it is easier to become a combatant than it is to cease being one. This provision is designed to both deter violence and better accord to the realities of warfare from the point of view of a putative combatant's adversary.

If a party has carried out one attack but then ceases to take any part in hostilities, they will regain civilian status. However, where a known individual has engaged in a long-term continuous course of hostilities (for example, participating in several attacks over a period of months), it is reasonable for their adversary to suppose–in the absence of contrary evidence–that this status will endure. In such a situation, it may be necessary for the party ceasing hostilities to take some active steps to demonstrate that they have abandoned a continuous combat function. This definition will hopefully solve problems as to the temporal scope of when a person becomes and ceases to be a combatant.

Returning to the issue highlighted at the outset, the question as to whether Bin Laden would be considered a combatant would depend on whether the US reasonably believed he was playing a continuing and direct role in the planning of specific new attacks. This causal hurdle would be a difficult one to surpass.[182] Whoever launches an attack bears the burden of proof to show that the target actually is a combatant and that such an attack is proportionate to any collateral damage. Of course, even were he to be considered a civilian criminal suspect, if Bin Laden resisted arrest with force, then–issues of jurisdiction aside–the U.S. military might well have been justified in using deadly force against him. At the time of writing, circumstances surrounding his death remain unclear.

Turning now to the second deficiency of the current IHL identified in this paper, it has been established above that the initial relationship of reciprocity between the obligation to distinguish between an adversary's civilians and combatants and differentiating a party's own combatants and civilians has been largely abandoned in contemporary IHL. For the reasons discussed earlier, it is submitted that these obligations are nearly impossible to put into practice, especially in modern asymmetric conflicts, unless they are seen as mutually reinforcing.

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182. It is perhaps for this reason that the US has been keen to emphasize Bin Laden's role as not just a spiritual figurehead of Al Quaeda (which would not render him a combatant under the new definition proposed here), but rather that he "provided tactical and operational guidance, and directed daily operations." Al Pessin, *CIA Releases bin Laden Videos, Says He was Active Terrorist Commander*, VOICE OF AMERICA, May 7, 2011, *available at* http://www.voanews.com/english/news/CIA-Releases-bin-Laden-Videos-Says-He-Was-Active-Terrorist-Commander-121440829.html.

As Dinstein identifies, some of the confusion regarding Article 37 of the First Additional Protocol can be seen in that it attempts to cover two topics: treachery and perfidy.[183] It is submitted that the two are better viewed as separate crimes. Treachery is not concerned with civilian status. Rather, it refers to illegitimate exploitation of some other ground to render the combatant no longer a target, such as feigned surrender.

Perfidy, on the other hand, is predominantly an act of feigning non-combatant status in order to attain improper protection. This distinction is also reflected in the Islamic literature, which extensively discusses when it is proper to renege on a truce.[184] The discussions of *al-tatarrus* by Classical as well as contemporary Islamic scholars strongly indicates that human shields ought not to be used. The Koran, at verses 3:161, 8.62, and 22:60 demonstrate the obligation not to use deception as a tactic in war. In order to better reflect this divide, Part 1 of Article 37 should be rewritten as follows:[185]

Prohibition of Treachery

1. It is prohibited to kill, injure or capture an adversary by resort to treachery. Acts inviting the confidence of an adversary to lead him to believe that–though still a combatant–he is entitled to protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute treachery. The following acts are examples of treachery:

    a. The feigning of an intent to negotiate under a flag of truce or of a surrender;
    b. The feigning of an incapacitation by wounds or sickness.

The main changes that have been made are the replacement of the word "perfidy" with "treachery," and the removal of the reference in parts c and d to the feigning of civilian or neutral status. In order properly to reflect the importance of the principle of differentiation and the accompanying ban on perfidy, the following new article should be inserted into the First Additional Protocol:

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183. DINSTEIN, *supra* note 21, at 202.

184. *See* Daniel Pipes, *Lessons from the Prophet Muhammad's Diplomacy*, THE MIDDLE EAST Q., Sept. 1999, *available at* http://www.meforum.org/480/lessons-from-the-prophet-muhammads-diplomacy.

185. Part 2 relates to "Ruses of War," which are not discussed in this article.

Prohibition of Perfidy

1. In the conduct of military operations, combatants are obliged to take all possible precautions to avoid deliberately or recklessly endangering civilians, whether they are considered enemy, friendly or neutral.
2. In order to achieve this, combatants are obliged to differentiate themselves from civilians to the greatest extent possible. The intentional failure to do so may constitute the war crime of perfidy. The following are examples of perfidy:

    a. Carrying out attacks in the presence of a civilian or other protected person in order to render certain points, areas or military forces immune from military operations;
    b. Feigning civilian status in order to gain an operational advantage during the planning or course of an attack;
    c. Feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not parties to the conflict.

Part 1 lays down the theoretical framework for the new provision; the language mirrors that found elsewhere in the First Additional Protocol.[186] This is in order to create an analogy between the obligation in this clause and those clauses which pertain to the principle of distinction. However, unlike other areas of the First Additional Protocol which concentrate solely on minimising damage to enemy civilians, this provision extends the obligation to all civilians. Part 2(a) of this provision roughly mirrors the language of the "War Crime" enunciated under Article 8(2)(b)(xxiii) of the Rome Statute. Part 2(b) builds on the prohibition of feigning civilian status originally found in Article 37 of the First Additional Protocol. The definition of perfidy in Part 2(b) should also be added to the list of War Crimes laid down in Article 8(2)(b) of the Rome Statute in order to remedy the surprising gap in the enforcement of this crime.

At no point does a perfidious combatant alter the status of civilians around him. Even where a party to a conflict is aware that

186. *Cf. Protocol I*, *supra* note 12, at arts. 48, 51 (article 48 sets out the basic rule while article 51 discusses protection of the civilian population).

their adversary is deliberately fighting from a civilian area, the considerations of double-effect and proportionality in causing unintended civilian casualties will still apply. This rule would not render every combatant who fights from a location where civilians are present a criminal. Fighting in such a location for a purpose unrelated to an attempt to feign civilian status would not constitute perfidy. For example, it is unthinkable that those who participated in the Warsaw Ghetto uprising would be so characterised.[187] To put this point another way, the mens rea element of the new crime would be the deliberate attempt to feign civilian status.

Just as combatants use proportionality calculations to decide whether to launch an attack that may cause civilian casualties, so too should combatants use proportionality calculations when deciding from where to launch their attacks. However, protecting combatants by disguising them as civilians would never constitute a "direct and concrete" military advantage relevant to a proportionality calculation[188]–to allow this would be morally unacceptable and also lead to circular calculations. If only a very slight military advantage could be gained by launching an attack from a residential area then it is most unlikely that such benefit would be proportional to the danger created to civilian bystanders.

Cassesse has suggested that there are only two "fundamental principles" of IHL: distinction and proportionality.[189] To these, should be added the principle of differentiation. This proposal represents a change of emphasis, rather than a significant alteration in the substantive law. The principle of differentiation can play a vital prophylactic role in reducing the instances where civilians are collaterally attacked. The elevation of the principle of differentiation and its corollary, the crime of perfidy, to a new normative level may well impact upon actors' decisions, particularly when coupled with the added legitimacy provided by the supporting *fiqh*.

CONCLUSION

Clearly, legal reforms alone will not solve the problems created by asymmetric warfare. The legislative solution proposed here is by no means a panacea, nor indeed is it the only possible formulation that might address these issues. One of the most important elements regarding the success or failure of a project to reform IHL using Islamic *fiqh* would be the process whereby such provisions

187. *See generally* DAN KURZMAN, THE BRAVEST BATTLE: THE TWENTY-EIGHT DAYS OF THE WARSAW GHETTO UPRISING (1976).

188. *Protocol I*, *supra* note 12, at art. 51(5)(b).

189. ANTONIO CASSESSE, INTERNATIONAL LAW 415-16 (2005).

are adopted. Transactional considerations and input legitimacy are key factors in generating the crucial internal attitude of obedience discussed above.[190]

Increasingly, international conferences are including non-state members such as NGOs, corporations, and leading experts when drafting new provisions. The World Economic Forum is a good example of this.[191] In one sense, this represents a shift away from the classical model of international law–where it applies solely to state entities–towards a more individualised one. To this extent, the jurisprudence of international law may be said to have converged with the "personal" methodology of Islamic law, discussed above. A conference or a series of conferences, including States and prominent Islamic and Western jurisprudential authorities on IHL might be organised in order to investigate the possibility of creating a fusion of the type proposed here.

Why stop at Islamic law? Why not attempt to incorporate norms of other non-Western systems into modern IHL? Aside from considerations of brevity, the purpose of this paper is to propose developments in the laws of war which would make them more appropriate for current conflicts, many of which involve fighters motivated by Islam. This may or may not be the case in the future. However, the laws of war must at the very least keep pace with modern developments rather than lag behind. If and when the predominance of conflicts in the world ceases to involve Islamist forces, then further consideration can be given to the issues. Until that point, it is hoped that the solutions proposed here might influence some debate on how the current law is to be reformed. There is reason to hope that the common ground identified between traditional Western IHL and Islamic law is also shared by other traditions, reflecting our mutual humanity. That, however, is a topic to be explored in another article.

190. *See* Koh, *supra* note 84.
191. World Economic Forum, http://www.weforum.org (last visited April 15, 2011).

TAKING FROM THE STATE AND GIVING TO THE UNION: DISSOLVING MEMBER STATE SOVEREIGNTY THROUGH THE NOBLE GOAL OF ESTABLISHING A COMMON MARKET

ASHBY CARLTON DAVIS

TABLE OF CONTENTS

INTRODUCTION

Member States of the European Union are faced with the problem of balancing market integration and maintaining control over economic policy within their borders. This is evident in the decisions of the European Court of Justice (ECJ) concerning Articles 34 and 35 of the Treaty of the Functioning European Union (TFEU), especially in light of the ECJ's recent tendency to favor social policy despite the economic impacts. A close analysis of the ECJ's jurisprudence on issues regarding the establishment of the common market shows a correlation between the diminishment of the Member States' economic regulatory power and the amplification of the European Parliament and Council's capabilities in the

same area. Stripping states of economic regulatory power while concurrently expanding centralized regulatory power conjures distinct comparisons to the United States' own experience. This article will focus on the role of the courts in the United States and the European Union, and will argue that the trend in the European Union is strikingly reminiscent of the Supreme Court's jurisprudence dating back to the New Deal and culminating in *United States v. Lopez*, *Gonzales v. Raich*, and the current litigation concerning the Affordable Health Care Act. The United States Supreme Court abrogated state economic power while compounding federal economic regulatory power through a broad interpretation of the Commerce Clause, a method mirrored in the ECJ's jurisprudence. Through comparison to similar decisions by the ECJ, this article will show how the ECJ's self-appointed legal supremacy, political insulation, and tendency to conduct teleological reasoning warrant Member States to take action to develop a limitation on the power of the Council and the ECJ to expand unchecked economic regulatory power, should they so desire. Member States should develop a doctrine which: 1) unambiguously defines the contours of Union economic regulatory powers; 2) preserves the power of the Union to establish a common market; and 3) allows the ECJ to nullify economic policies promulgated by the Community which are inconsistent with the purpose of establishing a common market.

It would be prudent to state the assumptions on which this article relies to conduct the following comparison and proposition and also point out what this article does *not* attempt to do. There are many sides to any story, which includes the analysis of the evolution of legislation and legal doctrines. This article does not attempt to suggest any motive or design for the usurpation of state regulatory power while expanding centralized regulatory power, but rather merely points out the similarities between the Supreme Court and the European Court of Justice's approaches. Analysis of the caselaw of each will illustrate the power of the state or Member State versus the power of the federal government or the Community to regulate economic activity and in so doing, bring to the forefront rationales by which the courts from each system are upholding increased centralized economic power. This observation should be enlightening for Member States, such as Germany, who more heavily value the principle of subsidiarity, and this proposal should provide them with a means to preserve state autonomy.

I. ORIGINS

The United States and the European Union traveled down very distinct paths to get to where they are today politically and economically. The United States, born out of a need to distance itself from an absolute monarch ruling from hundreds of miles away, was built on notions of individual freedom and limited government. The European Union, on the other hand, had very different origins. While the idea of a united Europe goes back further than Rousseau and Kant's vision of a social contract or form of perpetual peace, the foundation of what is now called the European Union did not truly begin to take shape until after World War II.[1] Created partially out of a desire to never repeat the mistakes that led to the two World Wars, but mainly to reduce the costs of doing business within Europe, the Member States that now belong to the European Union began their journey much differently than the 13 colonies that gave birth to the United States.[2] However, the different starting points of the United States and the European Union have not prevented their paths from crossing in a number of areas.[3] One especially important crossroad is the establishment of the internal market and the means by which each system has achieved this. By looking at how the respective governments approached this end, the parallels could help inform Member States regarding the Union's direction and how to counter it, if they so desired.

The following will illustrate that because the United States and the European Union share such a common governmental structure–a federal structure–their similar evolution is natural and inevitable. Therefore, it follows that the Member States of the European Union should analyze closely the evolution and common trends of both the Union and the United States in order to protect themselves from further abrogation of their powers. In each case, that evolution is demonstrated by an initial delegation of powers to the supranational government, the Court's establishment of judicial supremacy, and finally, the Court's expansion of the suprana

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1. DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 5 (2nd ed. 2010).

2. The European Union began with the Netherlands, Belgium, Luxembourg, Italy, France, and Germany signing the Treaty of Paris in 1951. *See* CHALMERS, *supra* note 1, at 10.

3. *See, e.g.*, James D. Wilets, *A Unified Theory of International Law, the State and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 U. PA. J. INT'L L. 753, 789-90 (2010) (arguing that EU law is similar to U.S. domestic federal law in four respects: EU law's supremacy over Member State law, EU law's immediate direct effect on Member State law, the ECJ's power of judicial review over Member State's judicial decisions concerning EU law, and the implied powers of the EU law-making bodies).

tional entity's capabilities to regulate the market while diminishing the state or Member States' power to do the same.

II. FEDERALISM, SUPREMACY, AND ECONOMIC REGULATORY POWER

A. Federalism

While federalism is difficult to define completely, a broad understanding of the term places the United States and the European Union on a similar governmental plane. "The essence of federalism . . . is a formal contractually based limitation of power among the institutional participants of the federation."[4] In the United States, the federal government was created and granted powers by the people through the consent of the states. Similarly, the central governing body of the European Union was structured and granted authority by the Member States. The constituent parts of these systems–the states, the Member States, and the citizens that comprise them–uphold that residual power which was not ceded to the federal government. "The general or supra-constituent layer of government operates within the constraints of the concession made to it by these residuaries."[5] This being the essence of federalism, the following will address how these grants of powers evolved in the United States and the European Union.

B. The United States

Upon the failure of the Articles of Confederation, the Founders created a system which divided sovereignty between the federal and state governments. James Madison stated that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[6] The Tenth Amendment of the Constitution also illustrates the balance of power in the United States, holding that the states or the people retain the powers not granted to the federal government.[7]

Those powers held by the states and the people were arguably at their highest ebb beginning with the ratification of the Constitution and continuing until the Civil War. However, after the Civil War the United States Congress began to pass more laws that

4. Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 197 (2001).
5. *Id.*
6. THE FEDERALIST No. 45 (James Madison).
7. U.S. CONST. amend. X.

pushed the limits of its constitutionally conferred power. After the American Civil War, federalism was premised on 1) sovereign power divided between the national government and states; 2) supremacy of the national government over the state governments; 3) competency of the national government's courts being limited to defining the scope of its constitutionally granted powers; and 4) the grant to the national government of a direct relationship to the citizenry of the nation via the power ceded to it.[8] As this paper will argue, the shift in power from the states to the federal government, aided by the decisions of the Supreme Court, has pushed the limits of the federal government's constitutionally enumerated powers.

Although there has been a noticeable shift in power from the state governments to the federal government, the supremacy of the federal government in regard to its specifically delegated Constitutional powers has long been established. Chief Justice Marshall defined the supremacy of the federal government and the Supreme Court's powers in *McCulloch v. Maryland*.[9] The Chief Justice famously stated that "the government of the Union, though limited in its powers, is supreme within its sphere of action," and therefore "[t]he government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.' "[10]

While the United States federal government enjoys multiple and well-defined enumerated powers–the power to tax or the power to raise and support armies, for instance–perhaps the most significant and controversial is the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[11] The Supreme Court emphasized that the purpose for this grant of power was to open up trade among the states and to prevent them from erecting barriers to trade.[12] However, the precise definition of commerce and to what extent exactly Congress

8. Backer, *supra* note 4, at 180.
9. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
10. *Id.* at 405-06.
11. U.S. CONST. art I, § 8, cl. 3.
12. H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533 (1949) ("When victory relieved the Colonies from the pressure for solidarity that the war had exerted, a drift toward anarchy and commercial warfare between the states began . . . [E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view."); *see also* THE FEDERALIST No. 7, at 37 (Alexander Hamilton) (conflicting State regulations would lead to disagreements and eventually wars), No. 42, at 282 (James Madison) (without a national commerce power there would inevitably be constant disputes amongst the States).

can regulate it is the subject of much dispute–a dispute that is mirrored across the Atlantic.

C. The European Union

"In the twentieth and twenty-first centuries, the European Union is emerging as a new form of federal union."[13] The European Union stands in contrast to the United States because it is united by the Treaty of Lisbon, which is made up of two treaties of equal value: The Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). While the Europeans chose not to call the international agreement a constitution, the TEU and TFEU arguably are the legal equivalent of the Constitution of the United States. The TFEU grants exclusive powers to the Union though Article 3[14] and limits its powers through Article 5 of the TEU.[15] It follows that although the Union does not de-

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13. Backer, *supra* note 4, at 175-76.

14. The text of Article 3 is as follows:

> 1. The Union shall have exclusive competence in the following areas:
> (a) customs union;
> (b) the establishing of the competition rules necessary for the functioning of the internal market;
> (c) monetary policy for the Member States whose currency is the euro;
> (d) the conservation of marine biological resources under the common fisheries policy;
> (e) common commercial policy.

Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1), Mar. 30, 2010, 2010 O.J. (C 83) 59 [hereinafter TFEU].

15. The House of Lords Select Committee on the European Union summarized Article 5 as follows:

> Article 5 of the amended TEU states that 'The limits of Union competences are governed by the principle of conferral", under which "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." The amended TEU (Article 4) confirms for the first time and in the clearest terms that "competences not conferred upon the Union in the Treaties remain with the Member States". The Union "shall respect [Member States'] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."
>
> Article 5 clarifies that "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level". This is the principle of subsidiarity; the Treaty refers, for the first time, to the sub-state level. Furthermore, "Union action shall not exceed what is necessary to achieve the objectives of the Treaties"–the principle of proportionality. The application of the subsidiarity and proportionality principles is described in detail in a Protocol to be annexed to the Treaties. These principles were previously included, in less specific terms, in

clare itself to be a federal government like the United States, it still holds true to the above definition.

These treaties would not have carried much force but for the essential role of the ECJ. As Larry Catá Backer points out, "[t]he power to declare fundamental rules at one level of government is the power to limit the possibility of the assertion of power by all subsidiary governments. Historically, the European Court of Justice (ECJ) has itself acquired the power to articulate fundamental norms."[16] This is distinct from the United States in that the ECJ lacks a Supremacy Clause. The ECJ established a very American notion of supremacy in *van Gend & Loos*, where the Court stated that the establishment of the internal market implied additional obligations on the part of the Member States.

> [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[17]

The *van Gend & Loos* decision not only stated that the Community constituted a "new legal order," but also established the doctrine of direct effect which established the direct relationship between the Community and the citizens of the Member States.[18] The ECJ stated that Article 28 of the TFEU "must be interpreted as producing direct effects and creating individual rights which national

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> Article 5 of the TEC. The Lisbon Treaty gives national parliaments power to police the principle of subsidiarity . . . .

Select Committee on European Union, Tenth Report, at para. 2.22-23 (Feb. 26, 2008) *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/6205.htm.

16. Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union,* 12 EMORY INT'L L. REV. 1331, 1338 (1998).

17. Case 26/62, N.V. Algemene Transport– en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12.

18. *Id.*

courts must protect."[19] This decision is essentially the ECJ's *McCulloch*.[20]

D. The Establishment of a European Common Market

The formation of the European Union, unlike that of the United States, primarily centered around establishing a common European market. The following will show that the focus of the treaties which eventually led to the Treaty of Lisbon was primarily concerned with opening up trade among the Member States. This history will aid in putting the doctrinal evolution of ECJ jurisprudence on market integration into context and will bolster the argument that the EU has a reason to fear unchecked, centralized economic regulatory power. Further, the conclusion of this portion will also focus on one Member State's criticism of what the EU has become and point out the Treaty of Lisbon's troubling repercussions for democracy in the EU.

The Spaak Report, published in 1956, laid the foundation for the Treaty Establishing the European Economic Community (EEC Treaty).[21] Notably, the Spaak Report called for limited supranational oversight to matters affecting the common market while leaving Member States responsible for "more general matters of budgetary, monetary and social policy."[22] The EEC Treaty's focus was the establishment of the common market, which can be broken into seven parts: 1) the customs union, 2) the four freedoms,[23] 3) a competition policy, 4) the regulation of state intervention in the economy, 5) the regulation of Member State's fiscal policies on the importation of goods, 6) a common commercial policy, and 7) a general cooperation provision in the field of economic policy.[24] While the EEC Treaty established the end–the common market–it also established the institutional means.

It would be helpful to give a brief overview of the institutions that the EEC Treaty established. First, it established the Commission, a body of legislators independent from the Member States that is charged with "proposing legislation and checking that the Member States and other institutions complied with the Treaty

19. *Id.* at 12.

20. *Van Gend & Loos* is distinguishable from *McCulloch* in that the Supreme Court relied on the text of the Constitution to establish supremacy. The ECJ, however, relied on no such clause.

21. CHALMERS, *supra* note 1, at 11.

22. *Id.*

23. The four freedoms prohibited restrictions on "the movement of goods, workers, services and capital." *Id.* at 12.

24. *Id.*

and any secondary legislation."[25] Second, it established the Assembly,[26] composed of national parliamentarians that "had the right to be consulted in most fields of legislative activity and was the body responsible for holding the Commission to account."[27] Third, it established the Council, the institution that was composed of national governments.[28] The Council served as the final check on "almost all areas of EEC activity."[29] The final and most relevant institution that the EEC Treaty created, for the purposes of this article, was the ECJ, which "was established to monitor compliance with the Treaty. Matters could be brought before it, not only by the Member States but also by the supranational Commission, or be referred to it by national courts."[30] Some significant changes to these institutions have taken place since the EEC Treaty came into force. This article will next map the development of the ECJ's jurisprudence relating to the establishment of a common market as well as keep track of the changes to the formative treaties while ECJ case law evolved.

In response to the recession of the early 1980s, the leaders of the Member States developed A Solemn Declaration on European Union in 1983.[31] Among other suggested reforms, the Declaration sought to increase focus on achieving the four freedoms as set out in the EEC Treaty.[32] This renewed focus led to the signing of the Single European Act (SEA) of 1986. Although the SEA seemingly gave "formal recognition to pre-existing policies and institutions," one of its most important achievements was the "commitment to establish the internal market by 31 December 1992."[33] The goal of establishing the internal market is set out in Article 26(2) TFEU: "The internal market shall compromise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."[34]

The next major treaty was the TEU, signed in Maastricht on December 10, 1991.[35] The TEU "marked very definitely a change in

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25. *Id.*
26. *Id.* (although it is now called the European Parliament).
27. *Id.*
28. *Id.* at 12-13. The Council and the Commission merged by way of the Merger Treaty of 1965. *Id.* at 14, *citing* P.-H. Houben, *The Merger of the Executives of the European Communities*, 3 CML REV. 37 (1965).
29. CHALMERS, *supra* note 1, at 13.
30. *Id.*
31. *Id.* at 19.
32. *Id.*; *see* Solemn Declaration of European Union (EC) Bulletin 6/1983 of 19 June 1983.
33. CHALMERS, *supra* note 1, at 21.
34. TFEU, *supra* note 14, at art. 26(2).
35. CHALMERS, *supra* note 1, at 23.

tone" from the SEA, and it "created a new form of political project" in which a new form of polity emerged.[36] The TEU established the three pillars, which, combined, equated to a single institutional framework.[37] The first pillar was the European Community, the second was the Common Foreign and Security Policy, and the third was Justice and Home Affairs.[38] The TEU did not enter into force smoothly, however. Member States had various concerns regarding economic policy and integration of social and democratic issues.[39] Polarization due to these concerns resulted in a delayed draft treaty, and the final Treaty of Amsterdam was thus not signed until 1997.[40]

The Treaty of Amsterdam's achievements were limited.[41] However, the treaty was expansive in the areas of freedom, security, and justice defined in Article 67 of the TFEU.[42] Also, the treaty led to further supranational democratization through the codification of qualified majority voting in social policy matters and recognized a more balanced integration with the Protocol of the Application of the Principles of Subsidiarity and Proportionality.[43] After Amsterdam, despite the Treaty of Nice's institutional reforms to deal with the increased number of Member States[44] and the failure of the Constitutional Treaty,[45] the next major legal occurrence was the Treaty of Lisbon.[46]

Notably, the various treaties began with a focus on market integration and progressed to encompass more social policies. Under the Treaty of Lisbon, the Union is now a cause of concern for a major player among the member states, Germany.[47] In *Gauweiler v. Treaty of Lisbon*, the German Constitutional Court contended that the Union lacked democratic legitimacy according to national standards.[48] Germany's and other Member States' questioning of the democratic legitimacy of the Treaty of Lisbon further calls into

36. *Id.; see also* Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) art. 1 ("This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe . . .").

37. CHALMERS, *supra* note 1, at 24.

38. *Id.*

39. *Id.* at 25-27.

40. *Id.* at 27.

41. *Id.* at 34.

42. *Id.* at 28.

43. *Id.* at 29.

44. *Id.* at 35-36.

45. *See id.* at 38 ("In short, citizens did not buy into the need to create a new form of political community to which they would have loyalty and affinity and which had to be 'democratically regenerated' by them.").

46. The relevant aspects of this treaty are outlined *supra* notes 14 and 15.

47. CHALMERS, *supra* note 1, at 44-46.

48. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, (Ger.).

question some of the ECJ's rationale for striking down Member State laws under a political isolation theory. Given the foundation, growth, and current status of the Union, the focus of this article will now shift to the role the courts played in expanding economic regulatory power in the United States and European Union.

E. The Role of the Courts

Several reasons exist for the common shift of power from the state governments to the federal level in the United States and the European Union and despite the differences between the two systems, the EU should pay attention to the trends of the United States. First, the governmental structures of the United States and the European Union tend naturally to cause courts in each system to act in a certain way, expanding centralized regulatory power.[49] Second, the courts have facilitated the centralization of power because they are the most effective and legitimate institutions to achieve this.[50] It follows that a supranational government could have a much greater interest in exercising its economic regulatory power to the fullest extent and would be unable to do so without the aid of the court. The power to regulate the market directly or indirectly through legislation is perhaps one of the greatest powers that a sovereign could maintain. Regulating the market exerts direct and tangible control over constituents in a way that other legislation simply does not. By controlling supply and demand through regulation, the central government also has a direct connection to the constituents–a connection that has traditionally been maintained by the subsidiary governments in each system. The courts' participation in the centralization of economic regulatory power may be a combination of these two reasons or just one of them, but whatever the cause, the following doctrinal observations will make it clear that the EU is headed down a road very similar to that of the United States. The following will not only show a similar path followed by the Supreme Court and the ECJ,

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49. Governmental structure basically means a central government with enumerated powers and subsidiary governments holding those powers not conferred upon the central government. This structure might cause the courts to naturally cede more power to the central government because the central government's powers are definite and thus easily expanded through interpretation. One is less likely to infer that residual powers were retained.

50. See Backer, *supra* note 16, at 1351 ("The EU uses its courts to create norms to regulate the internal actions of the Member States; these courts also interpret limiting principles, such as subsidiarity, which are also the product of centralizing legislation. Subsidiarity itself concedes power to the center and away from the Community's Member States. Therefore, subsidiarity must assume a role within the federal legislative process which is also subordinate to the fundamental principles on which the Community operates.").

but will also provide a critical look at what the respective courts are saying versus what they are actually doing.

III. PREVENTING STATES FROM OBSTRUCTING COMMERCE OR THE ESTABLISHMENT OF A COMMON MARKET?

Not only do the United States and the EU share similar federal systems, but the two also recognize the benefits of striking down protectionist or discriminatory laws promulgated by their constituent states. Both governments also use the same means to prevent such laws enacted by their constituent states: the courts. While the respective courts take strong stances against discriminatory or protectionist laws that would inhibit free trade, they also in effect erode the states' power to regulate within their borders even when such laws are passed for a public, and not private, purpose. Alarmingly, while the courts hold the constituent states to the strictest scrutiny for measures allegedly prohibited by the national government's power to regulate the market, the courts allow the national governments to pass laws under the same grant of power which is only indirectly connected with that said power.

By comparing the United States Supreme Court's Dormant Commerce Clause jurisprudence to the ECJ's interpretation of Articles 34 and 35 of the TFEU, two common themes will emerge. On the one hand, the respective courts strike down laws that place burdens on out-of-state interests, unless such laws are enacted to serve a valid public policy purpose. On their face, such decisions give the courts an appearance of facilitating free trade and market integration by preventing protectionist measures.[51] On the other hand, the courts are decreasing the economic regulatory power of states even if the law in question was promulgated pursuant to a valid public policy purpose. Striking down such laws implies degradation of the states' authority to enact laws that are within their sovereign power. In so doing, the respective Courts rely on at least three theories in striking down the laws: 1) purely political theory,[52] 2) purely economic theory,[53] and 3) a mixed political and eco-

51. Notably, this helps to establish the legitimacy of the courts while further centralizing power.

52. Purely political theory posits that because State and Member State laws are passed pursuant to the interests of their constituents, the interests of those outside their borders are not considered. Therefore, the interests of out-of-state actors are unfairly absent from the ears of State legislators. GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSCHNET, PAMELA S. KARLAN, CONSTITUTIONAL LAW, 231 (2005).

53. Purely economic theory posits that it is more economically beneficial to strike down protectionist or discriminatory laws because such laws decrease efficiency by increasing transaction costs. *Id.*

nomic theory.[54] Through the Dormant Commerce Clause and Articles 34 and 35, the Courts essentially seem to be acting to limit the power of the states' economic regulatory power. The result is a shift in power from the states to the federal government or from the Member States to the Union. One might argue that no shift in power occurs because the power to regulate commerce or the market in the United States and the EU is expressly reserved to the federal government and Union respectively. However, while these powers are granted, they are given force and defined by the Supreme Court and ECJ. While the law-making bodies in each sought to exercise the power conferred upon them, the courts in each system upheld the laws and thus acquiesced and helped to define the extent to which lawmakers could exercise their power. In both the United States and the European Union, the courts appear to facilitate this shift through broad interpretation of federal or Union economic regulatory powers.

A. The Dormant Commerce Clause in the United States

The United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[55] The Tenth Amendment holds that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively."[56] Assuming that the complete authority to regulate commerce among the states resides with the federal government, one must ask what authority is left to the respective States to do the same within their boundaries.

The United States Supreme Court first articulated a view on the Dormant Commerce Clause in *Gibbons v. Ogden*.[57] *Gibbons* not only addressed Congress's regulatory power under the Commerce Clause but also set out the States' power to regulate activities affecting interstate commerce absent a federal statute.[58] Chief Justice Marshall stated, "We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general *concurrent power*, in the regulation of foreign and domestic trade, as still residing in the States."[59] Chief Justice Marshall further stated that the broad wording of the Commerce Clause is "so very general and extensive" that it should be construed as confer-

54. *Id.*
55. U.S. CONST. art I, § 8, cl. 3.
56. U.S. CONST. amend. X.
57. Gibbons v. Ogden, 22 U.S. (9. Wheat.) 1 (1824).
58. *Id.*
59. *Id.* at 13.

ring a plenary power upon Congress to legislate.[60] While Chief Justice Marshall did not explicitly define the power of the states to regulate activities affecting commerce, he did find "great force" in Justice Johnson's argument that Congress enjoyed exclusive power to regulate interstate commerce.[61]

The Supreme Court's interpretation of the Dormant Commerce Clause has evolved tremendously since 1824. The test that the Supreme Court now uses can be summarized as follows: 1) if the state law is discriminatory on its face, then it is per se invalid; 2) if the state is acting as a market participant, then an exception applies; 3) if the state law is not discriminatory on its face, then a court applies rational basis scrutiny and conducts a balancing test to determine if there is only an incidental burden on interstate commerce.[62] The test developed by the Supreme Court and its application show how narrowly the Court has construed the ability of states to regulate and also the manner in which the Court substituted its own policy concerns before concluding that the laws were invalid.

1. Where a State Law Is Discriminatory on Its Face

In *City of Philadelphia v. New Jersey*, the Supreme Court addressed a New Jersey law that prohibited the importation of waste collected outside of the state.[63] Here the Supreme Court found that the New Jersey law was facially discriminatory, stating that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."[64] Even though New Jersey might have had valid grounds to prohibit the importation of waste for various reasons beneficial to the state and its residents, ranging from reducing the cost of waste disposal to reducing pollution within the state, the appellees contended that the actual purpose of the statute was to stifle competition and reduce costs for New Jersey residents.[65] The Court, however, asserted that the purpose of the legislation was immaterial, and that although a state may wish to protect the economic and environmental interests of its residents, New Jersey could not achieve that end "by discriminating against articles of commerce coming

60. *Id.* at 14.
61. *Id.* at 209.
62. *See Id.*
63. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
64. *Id.* at 624. *See also* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533 (1949) (holding that a New York law prohibiting the exportation of milk for processing violated the Commerce Clause because the primary purpose of the statute was a prohibition on competition).
65. *City of Philadelphia,* 437 U.S. at 625-26.

from outside the State unless there is some reason, apart from their origin, to treat them differently."[66]

City of Philadelphia represents the economic theory that the Supreme Court used to strike down state laws by looking mainly at the economic effect of preventing the importation of a certain good: waste, in this case. For the Supreme Court, notably, the fact that the state sought to prevent the importation of waste for health and environmental concerns means the Court's application of strict scrutiny left little room for a public policy justification. When the Court finds a state law to be facially discriminatory, it is deemed unconstitutional unless the law survives strict scrutiny.

If a state law is discriminatory on its face, it may nevertheless be upheld if it survives strict scrutiny. Justice Blackmun,[67] writing for eight justices in *Maine v. Taylor*, stated that when a state statute is found to be discriminatory, it could only survive if the statute "serve[s] a legitimate local purpose" and that purpose could not be served by any "available nondiscriminatory means."[68] The statute at issue in *Taylor* prohibited the importation of out-of-state baitfish because of the threat to Maine's fisheries.[69] At trial, scientific experts testified that out-of-state baitfish posed a threat to local fish due to three types of parasites carried by the out-of-state baitfish and also threatened the ecology of the Maine fishery by competing with in-state species for scarce prey.[70] Further, the trial court found that there was no way to inspect the imported baitfish.[71]

The Supreme Court held that the Maine law survived strict scrutiny.[72] First, the Court stated that Maine had a legitimate purpose in guarding against environmental risks, "despite the possibility that they may ultimately prove to be negligible."[73] Second, the Supreme Court found that the Maine law did not appear to be a result of a protectionist measure despite a contrary

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66. *Id.* at 626-27; *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S 511, 522-24 (1935); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928); Edwards v. California, 314 U.S. 160, 173-74 (1941).

67. Justice Blackmun also dissented in *City of Philadelphia.*

68. Maine v. Taylor, 477 U.S. 131, 140 (1986); *see* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); *see also*, *e. g.,* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 957 (1982); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

69. *Taylor*, 477 U.S. at 132.

70. *Id.* at 140-41.

71. *Id.*

72. *Id.* at 131.

73. *Id.* at 148. The Court further commented, "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." *Id.* (alteration in original) (citation omitted).

holding by the Court of Appeals.[74] Finally, the Court found that although there may have been a way to develop a testing procedure and that baitfish could just swim into Maine waters from New Hampshire, "impediments to complete success . . . cannot be a ground for preventing a state from using its best efforts to limit [an environmental] risk."[75]

2. Where a Statute Is Not Facially Discriminatory

In *Pike v. Bruce Church*, the Supreme Court developed a balancing test to decide when the state statute at issue is not facially discriminatory against interstate trade.[76]

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a local legitimate purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[77]

This standard equates to strict scrutiny, which leaves states little guidance as to which laws the Supreme Court would uphold and which local interests it would find compelling enough to allow any burden on commerce. The following will illustrate examples of how the Supreme Court applied the *Pike* balancing test, while concurrently calling into question the Court's valuation of local interests.

In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court invalidated a North Carolina law that prohibited closed containers of apples shipped into the state from displaying state grades or classifications.[78] A Washington state agency challenged the law, which required the apples to display the applicable U.S. grade standard.[79] The agency brought suit to represent the interests of the apple growers and the state. The Court noted

74. *Id.* The Court of Appeals relied on comments from the Maine Department of Fish and Wildlife which suggested that the Department favored the ban in order to bolster Maine's bait market. *Id.* at 149.

75. *Id.* at 151 (citation omitted).

76. Pike v. Bruce Church, 397 U.S. 137 (1970).

77. *Id.* at 142 (citation omitted).

78. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

79. *Id.*

the breadth of the apple industry in Washington and described the stringent and effective grading system with which Washington apple growers were statutorily obligated to comply.[80]

North Carolina attempted "to eliminate [the] source of deception and confusion by replacing the numerous state grades with a single uniform standard" and further contended that it "sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that [the] statute applie[d] to all apples sold in closed containers in the State without regard to their point of origin."[81] The Court asserted that "when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,' we are confronted with the task of effecting an accommodation of the competing national and local interests."[82]

The Court found that the statute not only had the effect of burdening interstate commerce, but also that it was discriminatory in varying ways. First, the statute increased the cost for Washington apple growers to do business in North Carolina because they would have had to alter their packaging methods in order to sell their product in North Carolina.[83] "North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment."[84] Second, the Court found that the statute had the effect of stripping from "the Washington apple industry the competitive and economic advantages it . . . earned for itself through its expensive inspection and grading system."[85] Third, by depriving the Washington apple growers from advertising under their state grade, it had a leveling effect that set North Carolina producers on an equal plane as their competition.[86] The Court stated that "[s]uch 'downgrading' offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit."[87] Although the Court found numerous examples of economic protectionism in the record, it asserted that it did not need to address the clearly discriminatory purpose of the statute.[88] Upon concluding an analysis of those effects, the Court

80. *Id.* at 336.
81. *Id.* at 349.
82. *Id.* at 350 (*citing Pike*, 397 U.S. at 142).
83. *Id.* at 350-51.
84. *Id.* at 351.
85. *Id.*
86. *Id.*
87. *Id.* at 352.
88. *Id.*

next addressed whether the means justified the ends. The Supreme Court stated, "[t]he several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades."[89]

Following soon after *Hunt*, in *Exxon Corp. v. Governor of Maryland*, the Supreme Court upheld a Maryland statute prohibiting producers or refiners of petroleum from operating retail service stations within the State.[90] Although Exxon owned 36 retail service stations in Maryland and was thus prevented from continuing the operation of those stations, the Court found that since the statute did not discriminate against interstate goods or favor local producers and refiners, there was no claim that the statute favored in-state over out-of-state interests.[91] The Court focused on the fact that "the Act create[d] no barriers whatsoever against interstate independent dealers; it [did] not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market."[92] The Court attempted to distinguish *Exxon* from *Hunt* by noting that the Maryland statute was not discriminatory towards out-of-state refiners because "refiners will [only] no longer enjoy their same status in the Maryland market."[93] The Court stated that just because there was some burden on interstate commerce, it was not sufficient to constitute a violation of the Commerce Clause.[94] *Exxon* is indicative of how the Supreme Court chose to uphold local interests, yet avoided addressing the true economic effects of the law.

Justice Blackmun, dissenting, did not have a similar view of the discriminatory effects of the Maryland statute. Blackmun asserted, "[G]iven the structure of the retail gasoline market in Maryland, the effect . . . is to exclude a class of predominantly out-of-state gasoline retailers while providing protection from competition to a class of nonintegrated retailers that is overwhelmingly composed of local businessmen."[95] While the state claimed that the statute applied equally to in-state and out-of-state actors, Blackmun pointed out that "[o]f the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms."[96] Further, Blackmun pointed out that the stat-

89. *Id.* at 353.
90. Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978).
91. *Id.* at 125.
92. *Id.* at 126.
93. *Id.*
94. *Id.*
95. *Id.* at 137.
96. *Id.* at 138.

ute would exclude producers and refiners who produced outside of the state from enhancing brand recognition, monitoring consumer preferences, and experimenting with different marketing techniques in Maryland.[97] Blackmun showed that the in-state stores did not share the same obstructions.

Notably, the majority made a passing reference to the purpose of the statute as arising out of a shortage of petroleum in 1973.[98] However, Justice Blackmun pointed out evidence of an alternative purpose. Blackmun stated that "the State's interest in competition is nothing more than a desire to protect particular competitors–less efficient local businessmen–from the legal competition of more efficient out-of-state firms."[99] Interestingly, despite the evidence that Blackmun alluded to, the majority upheld the law primarily because the statute did not restrict the flow of petroleum products into the state.

From *Gibbons* to *Exxon*, the Supreme Court held firm to the notion espoused by Justice Marshall that Congress has broad plenary power when it comes to regulating commerce and that discriminatory state laws stand in opposition to the purposes of the Commerce Clause to promote free trade among the states. However, the Supreme Court also failed to consistently apply its own standard, and invalidated laws that were arguably within the state's police power, especially laws like the one in *City of Philadelphia*. Further, the standard that the Court articulated in *Pike*

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97. *Id.* at 139-40.

98. *Id.* at 121.

99. *Id.* at 141. Also, Justice Blackmun cited to a quote from the executive director of the Greater Washington/Maryland Service Station Association testifying before the Maryland Senate:

> Now beset by the critical gasoline supply situation, the squeeze by his landlord-supplier and the shrinking service and tire, battery and accessory market, the dealer is now faced with an even more serious problem.
>
> 'That is the sinister threat of the major oil companies to complete their takeover of the retail-marketing of gasoline, not just to be in competition with their own branded dealers, but to squeeze them out and convert their stations to company operation.
>
> 'Our oil industry has grown beyond the borders of our country to where its American character has been replaced by a multinational one.
>
> 'Are the legislators of Maryland now about to let this octopus loose and unrestricted in the state of Maryland, among our small businessmen to devour them? We sincerely hope not.
>
> The men that you see here today are the back-bone of American small business . . .
>
> We are here today asking you, our own legislators to protect us from an economic giant who would take away our very livelihood and our children's future in its greed for greater profits. Please give us the protection we need to save our stations.'

Id. at 141 n.8.

left little guidance to the state legislatures as to their ability to legislate even in fields that were traditionally left to the states. These two trends of the Court's evolution of the Dormant Commerce Clause doctrine–unpredictability and lack of consistency–are similar to the ECJ's interpretation of the Member States' ability to promulgate laws that would affect the common market.[100]

B. Articles 34 & 36 and the European Dormant Commerce Clause

Article 34 of the TFEU provides, "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."[101] Article 36 TFEU provides:

> The provisions of Articles 34 and 35[102] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[103]

The cases litigated under Article 34 attempted to define what constituted a "quantitative restriction." Together, scholars suggest these two Articles form the equivalent of the United States Dormant Commerce Clause.[104] The following will track the most significant decisions interpreting the aforementioned Articles, point out the parallels between the ECJ's caselaw and the Supreme Court's approach, and, most importantly, show how the

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100. *See infra* Section VI. I will address the questionable amount of room that is left to the States and Member States to promulgate laws that would affect the common market.

101. TFEU, *supra* note 14, at art. 34.

102. Article 35 of the TFEU prohibits restrictions on exports. It applies to regulations that have a greater negative effect on export sales than domestic sales. *See id.* at art. 35.

103. *Id.* at art. 36.

104. *See* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE ECONOMIC CONSTITUTION 7 (1998); Ian H. Eliasoph, *A "Switch in Time" for the European Community? Lochner Discourse and the Recalibration of Economic and Social Rights in Europe*, 14 COLUM. J. EUR. L. 467, 481-82 (2008); Giuliano Marenco, *Competition Between National Economies and Competition Between Businesses–A Response to Judge Pescatore*, 10 FORDHAM INT'L L. J. 420, 420 n.2 (1987).

ECJ's approach is more aggressive and expansive than that of the United States Supreme Court.[105]

The parallels between the Supreme Court's Dormant Commerce Clause jurisprudence and the ECJ's interpretation of Articles 34 and 35 converged in two respects. First, the Courts analyzed laws that indirectly or arguably erected barriers to trade. Secondly, both seemingly contradicted themselves by striking down laws based on an economic theory while concurrently applying value choices to the states' or Member States' purposes in promulgating the laws. However, the most significant differentiation between the jurisprudence of each system is the values the respective Courts applied. As shown previously, the United States Supreme Court tended to concern itself only with whether the State law blatantly discriminated against out-of-state actors, or whether the State law's burden in commerce was excessive in relation to its benefits. The ECJ, as will be evident, greatly valued market integration over any other factor; it "opted to give primary consideration to the rules underpinning the construction of a completely unified market around the principles of economic freedom, free enterprise and free competition."[106]

In *Procureur du Roi v. Dassonville*, for example, the ECJ struck down a Belgian law that prohibited the importation of "products bearing . . . 'designation of origin' without a certificate from the authorities of the state of production to prove that this designation was correct."[107] Dassonville, a Belgian trader, bought cheaper Scotch whisky in France and imported it into Belgium. He had a problem, however, because he could not resell the liquor without certification from British customs. Because the French importers typically removed the designation when they received the product, Dassonville lacked the needed designation to resell the whisky in Belgium.[108] The ECJ stated, "All trading rules[109] enacted by Member States which are capable of hindering, directly, or indirectly, actually or potentially, intra-Community trade

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105. *See* Eliasoph, *supra* note 104, at 486 ("[T]he ECJ's Article 28 jurisprudence sparked criticisms reminiscent to those aimed against Lochnerism in the United States. By expanding the scope of Article 28 to virtually all regulations burdening the market and subjecting such regulations to a proportionality test, the ECJ opened itself to the institutional critique that it had stepped out of its judicial role and assumed the garb of policymaker.").

106. STEFANO GIUBBONI, SOCIAL RIGHTS AND THE MARKET FREEDOM IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE 94 (Rita Inston trans., 2006).

107. CHALMERS, *supra* note 1, at 747.

108. *Id.*

109. Later cases have replaced "all trading rules" with "all rules" or "all measures." *See* Case C-88/07, Comm'n v. Spain, 2009 E.C.R. I-1353; Case C-319/05, Comm'n v. Germany, 2007 E.C.R. I-9841; Joined Cases C-158/04 & C-159/04 Alfa Vita Vassilopoulos AE v. Dimosio, 2006 E.C.R. I-8156.

are to be considered as measures having an effect equivalent to quantitative restrictions."[110] The ECJ seemingly limited this assertion in the next paragraph when it proposed that a Member State could seek to prevent unfair practices as long as was "reasonable."[111] Notably, the ECJ also stated–as the Supreme Court has previously regarding the Dormant Commerce Clause in *Hunt*–that regardless of Article 34, Member States could not propound to be protecting consumers while actually using that as justification to discriminate.[112]

Dassonville and *Hunt* are not only analogous factually, but also analogous in how the ECJ and the Supreme Court reached their conclusions. Both cases involved labeling products, which resulted in discrimination towards out-of-state products due to the increased cost of complying with the labeling requirements. The two cases are distinguishable by the stated purposes for the labeling requirements. The Belgians sought a certificate of origin in order to insure that the whisky was from where the product's label indicated. In *Hunt*, however, the Carolinians were primarily concerned with leveling the playing field for in-state apple producers. Further, the ECJ case differs because of its strong stance against any law hindering intra-community trade. This stance would have arguably been better grounded if the ECJ faced a labeling law that was as discriminatory in its effect and purpose as the North Carolina law, yet the ECJ took the opportunity to assert its position against questionable restrictions on imports. Nonetheless, both courts grounded their holdings in preventing barriers to trade under the guise of protecting consumers.

The ECJ applied *Dassonville* to an array of market-access cases, and the Court liberally applied Article 34 where there was some showing of a hindrance of imports.[113] Although *Dassonville* primarily concerned regulations on imports, the ECJ did not stop Article 34's applicability there.

Due to rapidly expanding product development, the inability for European institutions to harmonize, and political stagnation, the ECJ took an even further leap forward in its application of Ar-

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110. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 837. Scholars note this assertion by the ECJ as an example of the Court conferring broad supervisory powers upon themselves through the preliminary reference procedure. The ECJ saw this amplification of power as a timely move due to the entrenchment of national protectionist traditions. *See* CHALMERS, *supra* note 1, at 749-50.

111. *See Dassonville*, 1974 E.C.R.110 at 837.

112. *Id.*

113. "If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways." Joined Cases 177/82 & 178/82, Van De Haar, 1984 E.C.R. 1797, 1813.

ticle 34 to products regulation in *Cassis de Dijon*.[114] In *Cassis*, the ECJ invalidated a German law that set mandatory liquor content for certain types of liquor at 25 percent. In effect, the law made it necessary for those who wished to import their liquor into Germany to either comply or not do business. The Court developed a sort of balancing test. The ECJ stated in paragraph 8, "In the absence of common rules relating to the production and marketing of alcohol . . . it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory."[115] However, in the same paragraph, the ECJ added that the Member State regulation had to be "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."[116]

The Germans intended the law to protect the public health and consumers because alcoholic beverages with low alcohol content could increase tolerance, whereas beverages with higher alcohol content did not have the same effect.[117] The ECJ, however, dismissed both of these justifications. First, consumers could purchase a wide range of alcoholic beverages in Germany with alcohol contents under 25 percent.[118] Second, as to the consumer protection argument, the ECJ stated that the concern could be remedied by printing the alcohol content on the label of the bottle.[119] The Court ruled that the purpose, as espoused by the Germans, was outweighed by the "requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community."[120] The ECJ ruled that the German law constituted a measure having equivalent effect to quantitative restrictions on imports, thus violating Article 34.

The ECJ's holding in *Cassis* had a great effect on the European Union.[121] Not only did the ECJ develop a balancing test under

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114. Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [hereinafter *Cassis*]; CHALMERS, *supra* note 1, at 761.

115. *Cassis*, 1979 E.C.R. 649 at 662; *cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824) ("[I]n exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution . . . .").

116. *Cassis*, 1979 E.C.R. 649 at 662.

117. *Id.* at 662-63.

118. *Id.* at 663.

119. *Id.* at 664.

120. *Id.*

121. *See* CHALMERS, *supra* note 1, at 763; *see also* Eliasoph, *supra* note 104, at 483 ("With this holding, the parameters of state sovereignty were constricted and a wide array of laws came into question.").

which to analyze Member State laws regarding product standards, but it also developed the principles of mutual recognition and general requirements. Mutual recognition, as spelled out in *Cassis*, is the idea that "if products comply with the laws of the Member State where they are produced, then there is no reason why they should not be sold in all other Member States."[122] Mandatory requirements, better understood as public interest objectives, serve as an exception to the mutual recognition principle. If the law were necessary to achieve the public interest objective, then it would be upheld.[123] Through these two principles, the ECJ struck down Member State laws ranging from the shape of wine bottles to packaging for margarine.[124] Laws relating to product standards and consumer protection were not the only ones struck down by the ECJ for violating Article 34.

Cassis, when compared to the United States' jurisprudence, seems to be a bit more expansive than even the United States Supreme Court would be willing to go.[125] However, the balancing test established by the ECJ does closely mirror the *Pike* balancing test, which would probably be applicable should a state within the United States pass a law similar to the German one at issue in *Cassis*. The ECJ's balancing test is stricter and more far-reaching than the *Pike* balancing test. The principle of mutual recognition is absent from United States Dormant Commerce Clause jurisprudence. Perhaps this is because the Dormant Commerce Clause is more a result of an interpretive inference not codified in the United States Constitution, whereas Articles 34 and 36 are relatively well-defined when compared to the Commerce Clause.[126] Where the two tests do converge is the exception to the mutual recognition principle: mandatory requirements. The ECJ required that the means by which the Member States sought to achieve the mandatory requirements, or public interest objectives, be necessary. While the *Pike* test does not call for the means to be *necessary* to justify the valid end, the words of the Supreme Court give it the same effect.[127] The ECJ applied this strict standard in subsequent cases and continued to increase its reach under Article 34, applying the mutual recognition and mandatory requirement principles to environmental and morality laws.

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122. *See* CHALMERS, *supra* note 1, at 763.

123. *See Cassis,* 1979 E.C.R. 649 at 662; *see also* CHALMERS, *supra* note 1, at 763.

124. *See* Eliasoph, *supra* note 104, at 483.

125. *Id.* at 483-84 (stating that with *Cassis*, the ECJ placed itself at the center of "substantive policy dilemmas").

126. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

127. Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (stating that it be taken into account "whether it could be promoted as well with a lesser impact on interstate activities.").

While Article 36 generally governs environmental issues, the ECJ approached some Member States' environmental laws as a mandatory requirement falling under Article 34. In *Commission v. Denmark*, the ECJ struck down a Danish law that required beer and soft drinks to be sold in reusable containers in order to establish a viable deposit-and-return system.[128] The ECJ found that "the system for returning non-approved containers . . . affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports."[129] Thus, the Court found that the law was disproportionate in light of the purpose of the law.[130] The ECJ failed to consider the economic reality that the cheapest way to recycle is to deal with a limited range of packaging types, and the fact that the ECJ relied on "merely the theoretical fact that other kinds of containers were in principle also recyclable, suggested that environmental protection was not being taken seriously, and would be subordinated to trade."[131]

This disregard for the Member States' environmental objectives closely mirrors the Supreme Court's own disregard for New Jersey's environmental concerns in *City of Philadelphia*. Unlike the Supreme Court in *City of Philadelphia*, the ECJ struck down the Danish law despite the fact that it was enacted pursuant to a public interest objective codified in Article 36 and not facially discriminatory. Comparably, in *C & A Carbone, Inc. v. Clarkstown,* the Supreme Court struck down a city recycling scheme despite the city's interest in recycling because it favored local enterprises through regulation.[132] However, what was even more significant about the ECJ's decision in *Commission v. Denmark* was the fact that the Court seemingly favored economic policy over environmental policy. This fact also sets *Commission v. Denmark* apart from the Supreme Court's decision in *Exxon* where the Court chose to ignore the true economic effects of the state law and to uphold it only because it did not treat in-state actors differently than out-of-state actors. The ECJ continued to allow the establishment of the internal market to take precedent over Member States' objectives in the Sunday trading cases discussed below.

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128. Case 302/86 Comm'n v. Denmark, 1994 E.C.R. 4607.

129. *Id.* at 4632.

130. *Id.*

131. CHALMERS, *supra* note 1, at 771. While the ECJ received quite a bit of criticism for disregarding Denmark's assertion that the recycling scheme was essential to their environmental protection goals, the Court has recently upheld Member State laws promulgated pursuant to environmental objectives. *Id.*

132. C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

The ECJ went a step further in considering the types of laws that fell within the scope of Article 34 in *Torfaen Borough Council v. B & Q*.[133] In *Torfaen*, the ECJ held that the United Kingdom's laws regarding Sunday trading fell under Article 34 because forcing shops to close on Sunday equated to a limitation on imports. Although the Court conceded that "national rules governing the hours of work . . . constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty," it stated that "the prohibition laid down in Article [34] covers national measures governing the marketing of products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules."[134] Ultimately, the ECJ found that the United Kingdom's Sunday trading laws were valid under Article 36. However, the fact that such laws fell under Article 34 greatly threatened the Member States' regulatory schemes.[135]

The ECJ arguably narrowed the scope and applicability of Article 34 in *Keck*.[136] The Court distinguished between selling agreements, the issue in *Keck*, and products regulation by stating that Member State restrictions or prohibitions on selling agreements would not hinder trade among the Member States as long they were applied equally to the marketing of domestic products and the marketing of products from other Member States.[137] The ECJ held, "Article [34 TFEU] of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss."[138] While *Keck* did not necessarily reverse *Cassis* and *Dassonville*, it "restricted *Cassis de Dijon* to measures relating to product-requirements and reinterpreted *Dassonville* but only with reference to measures restricting or prohibiting 'selling arrangements.' "[139] Further, as Ian H. Eliasoph pointed out, the ECJ's decision in *Keck* signaled that a "substantial sphere of regulatory space was returned to the exclusive province of Member States."[140] However, the ECJ failed to define the parameters of the application of Article 34 and therefore is still liable to revert back to a more interventionist approach towards the Member States' ability to regulate.[141] Further, Eliasoph noted that *Keck*

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133. Case C-145/88, Torfaen Borough Council v. B & Q, 1989 E.C.R. 3851.

134. *Id.* at 3889. At the time, Article 34 was still known as Article 28 of TEC.

135. *See* MADURO, *supra* note 104, at 7.

136. Joined Cases C-267/91 & C-268/91, Keck & Mithouard, 1993 E.C.R. I-6126.

137. *Id.* at I-6131.

138. *Id.* at I-6132. At the time, Article 34 was still known as Article 28 of TEC.

139. *See* Eliasoph, *supra* note 104, at 497 (citation omitted).

140. *Id.*

141. *See id.* at 498 ("*Keck* . . . [failed to] set clear guideposts for the very limits [it] introduced, thus retaining for the Court substantial power to police the borders of

was "also a protective response against a jurisprudence that endangered the Court's very legitimacy."[142]

Legitimacy became an issue for the ECJ mainly as a result of its activism in interpreting Article 34. This activism should give Member States pause when comparing the ECJ's jurisprudence in this area to that of the United States. While the Courts in each system used the need to establish the common market and to deregulate, the means they used to do so are questionable when compared to the rationales and methods the Courts used to uphold supranational intervention in commerce. The ECJ's stance is especially questionable given Eliasoph's and Miguel Poiares Maduro's observations. As Eliasoph stated:

> the Court tended only to invalidate regulations that were more restrictive than those common in other Member States and . . . the Court, with one exception, never invalidated Community intervention in the marketplace . . . [T]he ECJ's deregulatory jurisprudence is more likely attributable to the Court's attempt "to widen Community control over national regulation in the common market . . . ."[143]

This approach by the ECJ is not new or novel; one need only look at the United States' Commerce Clause doctrine. The expansion of centralized power does not occur at only one level. While deregulation helped to establish the common market it also increased the Community's institutional legitimacy and competency in ever-broadening areas. In the United States, the Supreme Court's broad interpretation of the Commerce Clause blurred the lines between trade and production regulations and social regulations. By giving a brief snapshot of what the United States Commerce Clause originally meant to the Founders and comparing it to what it means today, it is evident that the power of the central government under this clause has greatly increased. While Community legislation has not come to encompass such broad power, recent case law implies that it too is headed in the same direction.

IV. EXPANSION OF CENTRALIZED POWER

Given the similarities between the United States Dormant Commerce Clause and the ECJ's interpretation of Article 34, the

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Community competence.").

142. *Id.* at 497.

143. *Id.* at 487 (citation omitted).

two systems are obviously on similar doctrinal paths in regard to their positions on the powers of the subsidiary governments to legislate. However, the analysis ought not stop there because the extent of the abrogation of the states' and Member States' economic regulatory powers is not clear until viewed in the light of the Supreme Court and ECJ's stance on the centralized power to regulate commerce.

The understanding of what "commerce" actually meant at the time of the founding of the United States is much debated. However, some suggest that the word meant "the activities of buying and selling that come after production and before the goods come to rest."[144] Further, one scholar counted the times that the word "commerce" appeared in Madison's notes at the Constitutional Convention and in *The Federalist*, finding that of the ninety-seven times the word appeared, commerce never referred to anything specifically beyond trade and exchange.[145] Despite the generally narrow understanding of what commerce was, the Supreme Court quickly began to supplement it with its own interpretations, beginning with *Gibbons v. Ogden*[146] and culminating with *Wickard v. Filburn*.[147]

After *Gibbons* in 1824, the Supreme Court addressed issues arising under the Commerce Clause mainly to strike down state laws interfering with commerce until 1888. Then, the Court narrowly construed Congress's power to affirmatively regulate commerce and did not alter its position until 1935.[148] Throughout this period the Supreme Court struck down multiple laws, which arguably dealt with commerce but were actually made to effect social policy choices, and also established the distinction between laws with only an indirect vs. direct connection with interstate commerce.[149] With Roosevelt's New Deal, however, came *N.L.R.B. v.*

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144. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce,* 25 HARV. J.L. & PUB. POL'Y 849, 861 (2002).

145. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114-16 (2001).

146. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

147. Wickard v. Filburn, 317 U.S. 111 (1942).

148. *See* Kidd v. Pearson, 128 U.S. 1, 20-21 (1888) (Commerce does not include manufacturing; it "consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."); United States v. E.C. Knight Co., 156 U.S. 1, 12-16 (1895) (manufacturing monopoly does not fall under commerce power); Adair v. United States, 208 U.S. 161 (1908) (Congress cannot make it a crime to fire employee because of labor union membership under the Commerce Clause); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Congress cannot prevent goods made by child labor from being shipped); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Congress's commerce power does not extend to regulation of working hours, wages, or conditions).

149. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (the distinction between the two is a fundamental one because without it "there would be virtually no limit to the federal power and for all practical purposes we should have a

Jones & Laughlin Steel Corp.,[150] *United States v. Darby*,[151] and *Wickard v. Filburn*,[152] which "greatly expanded the previously defined authority of Congress under [the Commerce] Clause."[153]

Wickard constituted one of the most substantial expansions of Congress's regulatory capacity. The Supreme Court upheld the Agricultural Adjustment Act of 1938 that attempted to control the supply of wheat. A farmer, Roscoe Filburn, was penalized under the statute for exceeding his allotted limit, even though the Court assumed that it was for personal consumption.[154] The Supreme Court stated that even if the activity by the farmer was not commerce, "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "[155] The Court then established the aggregation principle, asserting that even if the farmer's activity in the market was trivial, if other similarly-situated farmers did the same thing then the effect would be "far from trivial."[156] After *Jones & Laughlin*, *Darby*, and *Wickard*, the Supreme Court failed to strike down any federal law for violating the Commerce Clause until *Lopez* in 1995.

The Supreme Court's holdings in *Lopez*, *U.S. v. Morrison*, and *Gonzales v. Raich* outline the extent of Congress's present Commerce Clause power and indicate that Congress retains far-reaching power under the Clause. In *Lopez*, the Court defined three broad categories that it could regulate based on the aforementioned cases: channels of interstate commerce, instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce.[157] In *Lopez*, the Court found that the gun-control statute at issue failed to have a substantial relationship with interstate commerce.[158] The Court stated that to uphold the regulation as substantially related would make it "difficult to perceive of any limitation on federal power."[159] *Morrison* seemed to

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completely centralized government.").

150. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.").

151. United States v. Darby, 312 U.S. 100 (1941) (overruling *Hammer* and reaffirming the doctrine of substantial effect).

152. *Wickard*, 317 U.S. 111.

153. United States v. Lopez, 514 U.S. 549, 556 (1995).

154. *Wickard*, 317 U.S. at 118.

155. *Id.* at 125.

156. *Id.* at 128.

157. *Lopez*, 514 U.S. at 558-59.

158. *Id.* at 567.

159. *Id.* at 564. The Court also stated:

continue the contraction of the Supreme Court's Commerce Clause jurisprudence by striking down the Violence Against Women Act of 1994.[160] However, the Supreme Court called into question the alleged contraction of the doctrine in *Raich*, which arguably rivaled *Wickard* as the most far-reaching Commerce Clause case.

In *Raich*, the Supreme Court upheld the Controlled Substances Act's prohibition on home-grown cannabis. The Court stated, "Congress can regulate purely intrastate activity that is not itself 'commercial,' [in that it is] not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[161] Differing from *Wickard* in that the regulated substance was illegal, the Court nonetheless stated, "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[162]

From *Gibbons* to *Raich* one can see the massive expansion in Congress's Commerce Clause power that the United States Supreme Court facilitated and justified. By lengthening the necessary connection between commerce and the law at issue, the Supreme Court sowed the seed for entitlement laws such as Social Security, Medicare, and Medicaid. Further, if the Supreme Court upholds the Affordable Health Care Act, some allege that Congress will wield the power to force consumers to purchase certain products.[163] This expansion is troubling, especially when compared to the Dormant Commerce Clause jurisprudence. The Court requires states to meet the highest level of scrutiny in order to justify laws which impede trade, yet Congress may pass laws where the purpose is clearly not to regulate commerce or integrate the market with merely a rational connection. While Congress's Commerce Clause power is enumerated, the apparent absence of a limit

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> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68 (citations omitted).

160. United States v. Morrison, 529 U.S. 598, 598 (2000).

161. Gonzales v. Raich, 545 U.S. 1, 18 (2005).

162. *Id.* at 19.

163. Brief for State Respondents on the Minimum Coverage Provision, U.S. Dep't of Health & Human Servs. v. Florida (U.S. filed Feb. 6, 2012) (No. 11-398).

to that power leads to the inference that none exists. This is especially clear in cases like *Wickard* and *Raich*. However, the Supreme Court's decisions in *Lopez* and *Morrison* suggested that a complete lack of a nexus between commerce and legislation might be the ceiling.

It still ought to be troubling to members of the European Union that a system as analogous to theirs, traditionally less concerned with social rights, has moved so far from where it began. What ought to be even more troubling is the fact that the EU's jurisprudence in economic regulation so closely mimics that of the United States, and yet the ECJ is poised to follow in stride with the Supreme Court Commerce Clause jurisprudence even though the Community was founded on neoliberal principles. The Member States need not only examine the Supreme Court's facilitation of broad commerce power in order to cast doubt on the unchecked power of the ECJ–they just have to look at their own recent case law. The European Union's equivalent to the United States Commerce Clause, as some scholars suggest, is codified in the four freedoms of the movement of people, goods, services, and capital.[164] Recent cases illustrate the ECJ's current tendency to place social concerns on equal, if not greater, footing as the four freedoms.

While human rights issues typically fell within the purview of the European Court of Human Rights, the ECJ has recently become more involved in enforcing Community social rights against state actors. For instance, in *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, the ECJ balanced the four freedoms against objectives pursued by social policy, which included improved living and working conditions, proper social protection, and dialogue between management and labor.[165] Another example is the ECJ's decision in *Mangold v. Helm*, where the Court struck down a German law that made an exception to short-term employment contracts for citizens over the age of 52.[166] The ECJ held that Germany's law, grounded solely on the basis of age, threatened to disproportionally deprive the members of the age group with stable employment.[167] Very recently the ECJ struck down a Belgian law made pursuant to an exception to an EU Directive that allowed insurance companies to treat men and women differently in calculating insurance premiums in *Association Belge des Consommateurs Test-Achats ASBL*.[168] The ECJ stated, "[I]t is the

164. Wilets, *supra* note 3, at 791.

165. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767, ¶ 105.

166. Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-10013.

167. *Id.* at ¶¶ 64-65.

168. Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL, 2010

EU legislature which, in the light of the task conferred on the European Union by the second subparagraph of Article 3(3) TEU and Article 8 TFEU, determines when it will take action, having regard to the development of economic and social conditions within the European Union."[169] Even though insurance companies had legitimate purposes for the discrepancies in premiums, the use of actuarial factors based on gender was inconsistent with the equal treatment of men and women, and thus, the exemption violated Articles 21 and 23 of the Charter.[170] The ECJ's stance in the *Lanval*, *Mangold*, and *Test-Achats* cases indicates the Court's willingness to favor social concerns over economic concerns when the two conflict.

Like the United States Supreme Court, the ECJ has begun to expand acceptance of social legislation after a period in which the Court took a highly interventionist approach towards facilitating market integration. While it does not appear that the Community relied directly on the four freedoms in promulgating the laws at issue in the preceding cases, the ECJ nonetheless gave deference to social policy over the establishment of the common market, a move which the United States Supreme Court mirrored in *Darby* when it overruled *Hammer v. Dagenhart*.[171] When the United States Dormant Commerce Clause and Commerce Clause jurisprudence are placed side by side with the ECJ Article 34 jurisprudence and stance on the four freedoms, the speed with which the ECJ caught up with the Supreme Court indicates that the European Union is quickly headed towards a jurisprudence in which economic concerns are secondary to social concerns. While the Supreme Court struck down economically discriminatory laws passed by the states prior to *Wickard*, the Supreme Court has since developed the *Pike* balancing test, which is essentially a strict scrutiny standard. When one looks at the ECJ's jurisprudence and puts it in historical context, much of the aggressive stance that the Court took was due to political stagnation and the desire to establish the common market. While the court receded from this stance somewhat in *Keck*, the court nonetheless established broad and unchecked power to interpret what the Member States could and could not regulate. This deserves pause because given the similar federal systems on which the United States and EU are based, it appears that the EU did what the United States did in this area– but the EU did this in about fifty years and with no Supremacy

EUR-Lex CELEX LEXIS (Sept. 30, 2010).

169. *Id.* at ¶ 20.

170. *Id.* at ¶ 32.

171. United States v. Darby, 312 U.S. 100 (1941) (overruling *Hammer* and reaffirming the doctrine of substantial effect).

Clause or Constitution to cite as support. If Member States wish to slow this progression, I suggest the codification of a Directive to define commerce fairly narrowly in text, so as to preserve the Court's ability to construct a common market without giving the ECJ peripheral powers over national economic or social policy.

V. SUGGESTED DIRECTIVE

Member States that wish to maintain policy-making capabilities and concurrently prevent Community law from adversely affecting the market though social directives might attempt to codify something that constricts Community capabilities in economic regulation. As the Supreme Court's interpretation of the Commerce Clause indicates, an originally narrowly understood construction of what the supranational entity may regulate failed to prevent an expansion of centralized regulatory power. However, since the Union seems to favor social rights, the answer may be to codify what the Lochner Era court attempted to do. This might be creating a substantive right in the freedom of trade and competition. Such a right could be codified as the Freedom of Trade and Competition (FTC):

> *The Community shall make no law abridging the freedom of trade or competition, unless necessary to the establishment of the common market.*
>
> *Review of Member State laws that directly impede on the freedom of trade and competition is impermissible unless promulgated pursuant to a valid public purpose. A valid public purpose must be justified on grounds of public morality, public policy, or public security; the protection life of humans, animals, or plants; the protection of national treasures possessing artistic, historic, or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*
>
> *Upon an initial showing of a discriminatory or protectionist purpose beyond a preponderance of the evidence, the Member State shall have the burden of proving by clear and convincing evidence that no such purpose existed.*

The FTC would serve dual purposes. First, it would maintain Community competence to strike down protectionist or discriminatory laws promulgated by Member States. Second, it would prevent the Community from passing Directives outside of its competency and act counter to the establishment of the common market, the original goal of EEC Treaty. Further, my suggestion would allow Member States to retain the residual power to promulgate laws based on their own policy choices as long as they met the requirements of Articles 34, 35, and 36. This does not imply that Member States ought not retain the capability to promulgate laws pursuant to valid public policy concerns. On the contrary, it places the same obligation on the supranational level as on the State level to narrowly tailor laws that would impede free trade.

The Member States' retention of power to legislate pursuant to public policy concerns is also justified due to democratic shortfalls at the supranational level under the Treaty of Lisbon. The German Constitutional Court outlined the shortfalls of the Treaty:

> As a consequence of the transfer of sovereign powers . . . decisions which directly affect the citizen are moved to the European level. Against the background of the principle of democracy, which is made a possible subject of a challenge . . . as an individual right under public law, it can, however, not be insignificant, where sovereign powers are transferred to the European Union, whether the public authority exercised at European level is democratically legitimised. Because the Federal Republic of Germany may . . . only participate in a European Union which is committed to democratic principles, a legitimising connection must exist in particular between those entitled to vote and European public authority, a connection to which the citizen has a claim according to the original constitutional concept . . . .[172]

Germany's opposition retained the possibility of future review, but the concerns it espoused support the reason it is important to allow the states to retain the power to promulgate laws pursuant to valid public policy purposes. As previously stated, one justification for the Dormant Commerce Clause is that protectionist laws are inherently unfair because they deprive out-of-state participants in the market the right to vote on the subject. However, when the supranational entity passes laws and the electorate does

172. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, ¶177, 2 BvE 2/08, (Ger.).

not know whom to hold politically accountable, a democratic deficit is present.

A problem still exists with the approach that the ECJ could take evaluating State laws under the FTC. The FTC as worded would alter greatly the current approach of the ECJ. If the current test remained, issues of predictability and consistency would also remain. The FTC, however, would place the initial burden on the opponent of the Member State law, which would show respect for the Member State while holding it accountable should the burden shift. Further, the evidentiary standard would prevent the ECJ from substituting its own value choices through a balancing test, which are outside the competency of the judiciary and lack predictability. Only after an opponent establishes that 1) a direct impediment on the freedom of trade and competition exists; 2) the purported public policy justification for the Member State law is overshadowed by protectionist or discriminatory purposes; and 3) those purposes are shown to exist will the Court be able to first determine whether the Member State has met its burden. While this process may be costly for a challenger, it would deter Member States from passing discriminatory or protectionist laws while stripping the ECJ of the vast discretion it currently enjoys.

CONCLUSION

Close analysis of the governmental structures of the United States and the European Union coupled with the shift of economic regulatory power from the state to the central government reveals trends that may help to inform the direction of both systems. This direction ought to give pause to the Member States within the European Union should they desire to retain their sovereign right to make policy decisions regarding issues close to home. Codification of the Freedom of Trade and Competition would allow Member States to retain such control while placing a limit on the conferred powers of the Union.

UTILIZING SOLVENCY II TO IMPROVE INSURER SOLVENCY REGULATION IN THE UNITED STATES

DAVID HAYES

The very serious and extremely costly problem of insurer insolvencies is prevalent throughout the world. Governments have to adopt various regulatory systems to combat the extensive costs associated with these insurer insolvencies. In the United States, solvency regulation is predicated on a risk-based capital (RBC) system. The National Association of Insurance Commissioners (NAIC) created a model RBC system that most states have adopted, at least in some form. Despite the RBC system and the efforts of regulators, insurer insolvencies remain a serious issue in the United States. The continuing insolvencies raise questions about how to improve the RBC system as the United States begins to reform its solvency regulation system.

Utilizing the Coase theorem as an analytical framework, this article identifies the costs associated with the insurance transaction. Furthermore, it explains how regulation seeks to mitigate these costs and avoid insolvencies. The article specifically addresses the RBC system in the United States and the regulatory system currently being implemented in Europe–Solvency II. By examining the RBC system from an economic perspective, this article helps identify the costs, possible shortfalls, and potential areas of improvement associated with the system. As the United States begins its own solvency regulatory reform, it enjoys the luxury of learning from the successes and failures of solvency regulation systems in other parts of the world. Accordingly, this article examines Solvency II and identifies certain characteristics that may be useful in improving the RBC system. This article also explains how implementing specific aspects of Solvency II could help increase total economic welfare and ultimately improve the United States' insurer solvency regulation system from an economic perspective.

TABLE OF CONTENTS

INTRODUCTION

The notion of insurance is fairly basic–a buyer pays money to an insurer in the present who, in return, promises to pay the buyer in the event of certain circumstances. Insurance essentially serves as a safety net for policyholders during a time of need. But one cannot be certain that the insurer will still exist in that time of need. The reality of insurer insolvencies has been prevalent throughout history. These insolvencies generate numerous costs to the insurer, the policyholder, other insurers, and the general public. The extensive costs and the misguided incentives involved in the insurance transaction rationalize solvency regulation for the insurance industry.

The current solvency regulation in the United States is predicated on a risk-based capital (RBC) system.[1] The National Association of Insurance Commissioners (NAIC) created a model RBC system that has been adopted in some form by most states.[2] The RBC system consists of two main parts: (1) a formula to establish a hypothetical minimum level of capital an insurer must hold and (2) a grant of regulatory authority to state regulators to take action against firms that fall below a specified threshold.[3] The logic behind the RBC system is that by requiring companies to hold certain levels of capital related to risk, they will remain financially sound and capable of paying off any potential future claims.[4]

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1. J. David Cummins & Richard D. Phillips, *Capital Adequacy and Insurance Risk-Based Capital Systems*, 28 J. INS. REG. 25, 25 (2009).

2. NAT'L ASS'N OF INS. COMM'RS, *Risk-Based Capital General Overview* (July 15, 2009), http://www.naic.org/documents/committees_e_capad_RBCoverview.pdf [hereinafter *Risk-Based Capital*].

3. Cummins & Phillips, *supra* note 1, at 50.

4. J. David Cummins, Scott E. Harrington & Robert Klein, *Insolvency Experience, Risk-Based Capital, and Prompt Corrective Action in Property-Liability Insurance*, 19 J.

The problem of insurer insolvencies is not limited to the United States; rather it is prevalent throughout the world.[5] Europe is currently in the process of implementing an updated solvency regulatory regime called Solvency II.[6] Solvency II, the second phase of solvency reform in Europe, seeks to dramatically improve insurance regulation by utilizing a principles-based approach that provides greater flexibility to insurers.[7] The United States can benefit from the implementation of Solvency II by paying close attention to its successes and failures as a regulatory system.

As the United States begins to reform its own solvency regulatory regime, it should apply the lessons learned from Solvency II to create a more efficient system. Nonetheless, the United States must take caution to not over-regulate. From an economic perspective, regulation is only necessary when it will help facilitate mutually beneficial transactions that would otherwise not occur because of transaction costs.[8] Although a risk-based system cannot replicate the outcomes of a competitive environment with adequate information, the RBC system can move towards this ideal.[9]

This article aims primarily to recommend potential improvements to the United States' RBC system that would ultimately increase total economic welfare by examining the Solvency II system in Europe. Using the Coase theorem as a theoretical framework, this article analyzes the transaction costs associated with insurance transactions and explains the need for regulation. The article then examines how regulation (the RBC system) intended to make transaction costs negligible, but fell short of its goal. Those that developed Solvency II had the luxury of analyzing the RBC system and could improve upon those limitations. As the United States undertakes its own solvency reform, it will have the opportunity to look to Solvency II for guidance.

I. ECONOMICS OF REGULATION

In his renowned article *The Problem of Social Cost*, economist Ronald Coase demonstrated that the law can act to increase total economic welfare through its ability to reduce transaction costs.[10] Transaction costs are all of the costs (money, time, resources, for-

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BANKING & FIN. 511, 512-15 (1995).

5. *See* Cummins & Phillips, *supra* note 1, at 26.
6. *Id.*
7. *Id.* at 53-54.
8. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-18 (1960).
9. Cummins, Harrington & Klein, *supra* note 4, at 511-15.
10. Coase, *supra* note 8, at 2-15.

gone opportunities) incurred during an economic exchange.[11] Transaction costs may manifest themselves in a variety of ways–costs associated with finding a bargaining partner, enforcement costs, and oversight costs, to name a few.[12] The law can act as a mechanism to reduce transaction costs and increase aggregate economic welfare when implemented efficiently. Conversely, the law can impede economic efficiency if it does not properly economize transaction costs. In a world without transaction costs, the Coase theorem suggests not only that the law will impede economic efficiency, but also that a liability regime is immaterial.[13] In such a world, the parties involved in a given transaction would bargain until a mutually beneficial outcome is reached, regardless of who shoulders the burden of responsibility for damage.[14] Individuals' self-interests would make liability irrelevant; they would not account for external costs and would rather seek to maximize their own situation. With both parties acting in their own self-interest and without outside incentives, an agreement would maximize economic welfare.[15] Stated more succinctly, absent transaction costs, individuals would maximize total economic welfare by bargaining to mutually beneficial transactions.[16] Under these circumstances the law would only add costs and additional incentives that would stifle economic efficiency. Accordingly, the law would serve no economic purpose in a world without transaction costs.[17]

With the introduction of transaction costs into a situation, a liability regime becomes relevant. While individuals remain self-interested, they must now consider transaction costs. Transaction costs may be so burdensome that a party would forego an otherwise mutually beneficial transaction because it is in his or her best interest. For instance, if it is extremely costly to obtain necessary information about a bargaining partner, then a party may chose to forego the bargain all together. Individuals will continue to act in their own best interest; however, altering incentives–by introducing transaction costs–may not lead to the most economically efficient outcome. The disconnect between the ideal outcome and the actual outcome provides an opportunity for the law to impede and improve upon aggregate economic welfare. An advantageous law

11. *Id.* at 15.
12. *Id.*
13. *See id.* at 2-15.
14. *Id.*
15. *Id.*
16. *Id.* at 2-6.
17. Matthew L. Beville et al., *An Information Market Proposal for Regulating Systemic Risk,* 12 U. PA. J. BUS. L. 849, 851 (2010).

must successfully reduce the transaction costs that would otherwise impede mutually beneficial transactions.[18]

A. *The Insurance Transaction in a World Without Transaction Costs*[19]

On the surface, it appears that buying insurance should be a simple transaction–the consumer pays a premium to the insurer now and the insurer promises to pay the consumer later subject to a specified event or events. The insurer uses the collected premiums to pay other claims and to invest in order to generate investment income. From the consumer's perspective, it may appear counter-intuitive to pay money now just to receive money later; however, individuals use insurance as a form of protection against adverse circumstances. Consumers willingly give up a certain amount of money now knowing that they will receive money in the future if certain unfavorable conditions come to fruition. Individuals recognize that having money available later will be more valuable to them than having that money now. As a result, people maximize their economic welfare by giving up money while in a richer state knowing that they will receive money when in a poorer state.

The insurance transaction would occur as previously described in a world where everyone has equal information and negligible transaction costs.[20] One would expect the policyholder and the insurer to bargain to a mutually beneficial outcome based on their respective incentives. The policyholder would have the incentive to pay a higher premium for a financially sound insurer. A financially stable insurer would be more likely to pay potential claims in full. The insurer would have the incentive to ensure the company does not take excessive risks but remains financially sound. The financial stability and ability to ensure the payment of claims would attract more buyers at a higher price.

Neither party involved in the transaction could take advantage of the other party because of market discipline. If an insurance company took on excessive risk, policyholders would demand lower premiums or purchase insurance elsewhere. Essentially, an insurer could not become unstable or excessively risky because of the market reaction to that risk.[21] The firms that manage risk most

18. *Id. See generally* Coase *supra* note 8.

19. *See generally* Coase *supra* note 8; Beville et al., *supra* note 17.

20. *See* Beville et al., *supra* note 17.

21. *See* Therese M. Vaughan, *The Implications of Solvency II for U.S. Insurance Regulation* 13-14 (Networks Fin. Inst., Policy Brief No. 3, 2009), *available at* www.networksfinancialinstitute.org/Lists/Publication%20Library/Attachments/132/2009-PB-03_Vaughan.pdf.

effectively and provide assurance of claims at the lowest possible price would succeed in a competitive insurance market.

Without having to consider transaction costs, parties would simply bargain to a mutually beneficial outcome where the consumer would pay a premium in exchange for assurance that the insurance company will pay any future claims. Recalling the notion that the law serves a minimal economic purpose with negligible transaction costs, it follows that any law regulating the insurance industry would be unnecessary and economically inefficient. Unfortunately, we do not live in a costless transaction world. Transaction costs are very real and often very significant. The presence of transaction costs poses an opportunity for the law to impede and reduce costs in an effort to increase total economic welfare.

B. The Costs Associated with the Insurance Transaction

1. Costs to Parties Directly Involved in the Transaction

Numerous costs associated with an insurance transaction manifest themselves in different ways. Using the Coase theorem framework, any regulation of the insurance industry should fall on the insurer because it's in a better position to mitigate costs. Identifying the associated costs of an insurance transaction creates a clearer picture of when and how the law can intervene to diminish costs and improve economic welfare.

There are many costs imposed on the buyer's side of the insurance transaction. Consumers must monitor the solvency of insurers to ensure they purchase insurance from a firm capable of paying future claims.[22] The complexity of the insurance market and the insurance transaction make it very difficult for buyers to monitor the solvency of companies. A buyer could hire a private firm to effectively monitor the solvency of an insurer–a costly alternative for the buyer.

Monitoring the solvency of firms also will produce opportunity costs. Individuals will have to dedicate time and money that could be spent elsewhere in a more economically beneficial manner. A buyer would have strong incentives to monitor the solvency of an insurer, but consumers will ultimately bear the costs of such monitoring.[23] If the monitoring costs prove too high, the consumer may explore other options outside of insurance.

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22. *See* Vaughan, *supra* note 21, at 60.

23. J. David Cummins, Scott Harrington & Greg Niehaus, *An Economic Overview of Risk-Based Capital Requirements for the Property-Liability Insurance Industry*, 11 J. INS. REG. 427, 436 (1993).

From the insurer's perspective, insurers will face costs related to keeping the firm financially sound and maintaining a risk portfolio that appeals to buyers while still generating significant profit. Insurers will not know their costs until they actually incur them, a unique feature of the insurance industry. An extremely costly catastrophe like a hurricane could render a financially sound company unstable. Despite the potential for catastrophes, insurance companies remain profit-driven businesses. Managers are often evaluated on their ability to generate revenue while keeping costs at a minimum, thus maximizing profit. Therefore, managers will want to use available capital to generate investment income to ensure financial stability instead of incurring the costs of holding extra capital. Insurers will have to weigh the marginal benefit of the investment income against the marginal costs of holding capital. Self-interested, people–and insurers–will not consider the external effects of their decisions.[24] If the costs of holding capital are too high, the insurer may opt to invest remaining capital instead of holding capital to protect against potential future catastrophes.

The introduction of transaction costs potentially alters the decisionmaking process of the insurer and the buyer. These altered decisions could lead to an increasing number of financially unstable or insolvent firms. Financially unstable companies can quickly become insolvent from "reductions in asset values (for example . . . reductions in the market value of investments) and/or increases in liabilities for claims" (from a catastrophic event like a hurricane).[25]

The costs associated with insurer insolvency are significant and far-reaching. For the insurer, it will lose future income from investments.[26] The insurer's reputation and ability to attract new capital will also suffer dramatically, making a rebuilding effort incredibly difficult. The employees of the insurance company will also face costs when they lose their jobs and are forced to find work elsewhere.[27] The loss in salary and the time spent looking for other employment opportunities are extremely costly to the employees. Policyholders also bear the burden of the shortfall when outstanding claims with the insolvent insurer are not paid in full.[28] Policyholders that did not have an outstanding claim are forced to find a new insurer which requires time, effort, and money. The switching costs can be significant, and the policyholder may be wearier of insurers.

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24. *See* Beville et al., *supra* note 17, at 850.
25. Cummins, Harrington & Niehaus, *supra* note 23, at 429.
26. *Id.* at 431.
27. *Id.* at 441.
28. *Id.* at 436.

Guaranty funds, state-generated pools of money, protect policyholders with outstanding claims from insolvent insurers to some extent by allowing them to receive a portion of their claim.[29] However, the presence of guaranty funds exacerbates the potential for insolvency and more costs.[30] Assessments to solvent insurance companies finance the guaranty fund.[31] This protection of claims alters the incentives of the insurer and the policyholder while simultaneously generating costs.

Recalling a world of perfect information and no transaction costs, insurance companies would have incentives to manage risk efficiently because policyholders would act adversely to unnecessary risk.[32] Similarly, policyholders have an incentive to monitor the solvency of the insurance companies to ensure coverage of their claims. However, with the knowledge of guaranty fund coverage of their claims, policyholders have less incentive to both purchase insurance from a financially sound company and monitor the solvency of insurers.[33]

From the insurer's prospective, it now has a greater incentive to engage in risky behavior because it is not checked by market discipline. The insurer knows that the guaranty fund will bear any potential insolvency losses.[34] As a result, the insurer has the opportunity to increase the value of equity without being penalized by the market.[35] Because an insurer will act in its own best interest without considering the external effects, it will likely engage in riskier behavior.

Adding to an already unfortunate situation, an insurer will become even less risk-adverse as its financial condition deteriorates. An insurer can become economically insolvent but still have the cash flow to pay its current claims to allow it to continue operating.[36] An already insolvent firm–or one that recognizes looming insolvency–will have added incentive to take extreme risks with the hope of generating large returns. The strategy to essentially

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29. Cummins & Phillips, *supra* note 1, at 35.

30. *See* J. David Cummins, *Risk-Based Premiums for Insurance Guaranty Funds*, 43 J. OF FINANCE, 823, 825 (1988); *see also* Vaughan, *supra* note 21, at 14-15.

31. Cummins & Phillips, *supra* note 1, at 35.

32. *See supra* notes 13-18 and accompanying text.

33. Vaughan, *supra* note 21, at 14; Martin F. Grace, Robert W. Klein & Richard D. Phillips, *Insurance Company Failures: Why Do They Cost So Much?* 13 (Ga. State Univ. Ctr. for Risk Mgmt. and Ins. Research, Working Paper No. 03-1, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=463103.

34. Vaughan, *supra* note 21, at 14.

35. Cummins & Phillips, *supra* note 1, at 39-43.

36. Cummins, Harrington, & Niehaus, *supra* note 23, at 429.

"go for broke" prevails with the knowledge that others will bear the costs of failure.[37]

All of the altered incentives created by the guaranty fund generate costs and prevent parties from reaching mutually beneficial transactions. The risky behavior of the insurer coupled with the reduced incentives for consumers to monitor solvency of insurers creates a less stable insurance industry environment that results in greater costs.

2. Costs to Third Parties

The parties directly involved are not the only ones who bear transaction costs; third parties also feel such costs through external effects.[38] For instance, policyholders of solvent insurers partially bear assessments to guaranty funds. Guaranty fund assessments to solvent insurers are not made until the insolvent insurer actually fails; consequently, solvent companies cannot account for assessments ahead of time. As a result, the costs of these assessments may pass onto the solvent firm's policyholders through rate surcharges or to taxpayers through tax increases.[39]

If a consumer of a solvent insurer may face costs due to the failure of another insurer, then that consumer will have an interest in monitoring all the other insurers in the state that could cause a guaranty fund assessment to his insurer. The consumer would incur significant costs.

To illustrate potential costs to third parties in another manner, consider the following example. My neighbor, a policyholder with an insolvent insurer, does not have his claim paid in full after a fire destroyed his home. Instead of having enough money to fix his home, my neighbor only has enough to move into an apartment. I am currently interested in selling my house, but it is now next door to a burned-down eyesore of a house. The property value of my house falls because my neighbor did not receive the money from the insurance company to fix his home. Now I feel the effects of an insurer failure. While this may be an extreme example, it is certainly possible. If this is a serious concern for an individual, not only would he need to monitor the solvency of his insurer, but he would also want to monitor the solvency of his neighbor's insurer. This situation demonstrates that the costs of

37. Vaughan, *supra* note 21, at 14; Cummins, Harrington, & Niehaus, *supra* note 23, at 431-32.

38. *See* Beville et al., *supra* note 17, at 849.

39. Grace, Klein, & Phillips, *supra* note 33, at 9.

an insurer's insolvency are not limited to the parties directly involved in the insurance transaction.

II. THE NEED FOR REGULATION

The wide range of costs that stem from insurer insolvency–the "[c]ostly monitoring of insolvency risk by policyholders, reduced incentives for policyholder monitoring because of guaranty funds," the insurer's incentive to engage in risky behavior due to a lack of liability, etc.,[40]–show the importance of encouraging financial stability in insurance companies. This provides an ideal opportunity for the law to intervene. If regulation can efficiently reduce transaction costs by forcing parties to internalize these costs, then we will see an increase in total economic welfare. However, the marginal costs of implantation and enforcement of an overly burdensome law will outweigh its marginal benefits. As Coase notes in his article, regulators must determine "whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm."[41]

Globally, lawmakers recognized the regulatory opportunity associated with the insurance transaction; their challenge was to create a regulatory system that would reduce transaction costs and facilitate mutually beneficial transactions.

A. *The Risk-Based Capital System*

A competitive market best achieves economic efficiency. Accordingly, regulation should strive to duplicate a competitive market where all parties have relevant information.[42] This article has illustrated how the insurance transaction would occur in a pure, competitive market and how associated transaction costs prevent the ideal insurance transaction. Regulation can close the gap between the ideal and the reality. Because many costs associated with the insurance transaction stem from the potential of insurer insolvency, regulation should focus on solvency. Specifically, "solvency regulation should: (1) provide proper incentives for insurers to reduce insolvency risk, (2) facilitate, where possible, the rehabilitation of weak insurers," and (3) encourage regulators to take timely action.[43]

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40. Cummins, Harrington, & Niehaus *supra* note 23, at 432.
41. Coase, *supra* note 8, at 27.
42. Cummins, Harrington, & Niehaus, *supra* note 23, at 432.
43. *Id.*; Martin F. Grace, Scott E. Harrington & Robert W. Klein, *Risk-Based Capital*

The United States sought to develop an effective solvency regulation system during the late 1980s and early 1990s when the country saw a surge of insurer insolvencies in the property/casualty insurance market.[44] In response to these insolvencies, the National Association of Insurance Commissioners (NAIC) created a risk-based capital (RBC) system to provide a risk-related capital adequacy standard.[45]

While an insurance commissioner at the state level regulates the insurance industry, this article focuses on regulation generally affecting all states. The NAIC does not have any actual regulatory power but it does create model acts that may be adopted by specific states. This article focuses on the NAIC Risk-Based Capital Insurers Model Act (Volume II-312) which applies to property/casualty insurers.[46] Most states have adopted some form of legislation similar to the NAIC's Risk-Based Model Act.[47]

When lawmakers created the RBC system, the main goals were to have a capital standard related to risk, create a safety net for insurers, create uniformity among states, and provide for timely regulatory authority.[48] The RBC system attempted to reach these goals through its two primary components: (1) the risk-based capital formula, which calculates a hypothetical minimum capital level that is then compared to the company's actual capital level, and (2) a model law that confers authority to the state insurance regulator to take specific action against insurers that do not meet required levels of capital.[49]

The first component focuses on a formula to establish a quantitative hypothetical minimum level of capital. Property/casualty insurance has a separate RBC formula from life insurance because of different material risks unique to each type. Because this article primarily concerns property/casualty insurance, we will not explore the formula for life insurance.

The property/casualty RBC method uses a generic formula that focuses on six risk factors: asset risk for investments in subsidiaries, asset risk for fixed income investments, asset risk for equity investments, asset risk relating to credit, underwriting risk associated with estimating reserves, and underwriting risks associated

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and Solvency Screening in Property-Liability Insurance: Hypothesis and Empirical Tests, 65 J. RISK & INS. 213, 217 (1998).

44. Cummins, Harrington, & Klein, *supra* note 4, at 511-12.

45. *See Risk-Based Capital*, *supra* note 2.

46. *See id.*

47. *See id.*

48. *See id.*

49. Cummins & Phillips, *supra* note 1, at 50.

with net written premiums.[50] These factors are percentages that will vary for each company. For instance, a company heavily invested in low rated bonds will have a higher fixed income risk factor than a company invested in highly rated bonds. Once determined, each factor is used in conjunction with an amount from the company's statutory financial statements to generate a RBC risk charge.[51]

After calculating the risk charges, they are combined and made into a covariance adjustment. A covariance adjustment is necessary because all of these risks are unlikely to be adversely affected simultaneously.[52] An unfavorable experience with one factor more likely will be offset by a favorable experience with another.[53] Consequently, each factor is statistically independent[54] with the one exception of the asset risk relating to affiliates. After combining the factors and making the covariance adjustment, the final RBC formula is generated:

$$RBC = R0 + \sqrt{R1^2 + R2^2 + R3^2 + R4^2 + R5^2}$$

Where R0 = asset risk (subsidiaries); R1 = asset risk (fixed income); R2 = asset risk (equity); R3 = asset risk (credit); R4 = underwriting risk (reserves); R5 = underwriting risk (net written premiums).[55]

The calculated RBC establishes a primary point of reference for regulatory action. Here the second component of the RBC system–granting authority to the state insurance commissioner to take regulatory action–comes into play. We compare the calculated RBC to a company's total adjusted capital.[56] This ratio dictates the level of regulatory action that the company will face. The regulatory action levels are as follows: [57]

50. *Id.* at 51.
51. *See Risk-Based Capital*, *supra* note 2.
52. Cummins & Phillips, *supra* note 1, at 51-52.
53. *Id.* at 52.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*; *see also Risk-Based Capital*, *supra* note 2.

Ratio ≥ 2.0	No action
1.5 ≤ Ratio < 2.0	**Company Action Level:** The insurer must prepare and file a report that identifies the reasons for the company's financial condition and contains a specific plan to correct the financial condition. Failure to file this report will trigger the "Regulatory Action Level" response.
1.0 ≤ Ratio < 1.5	**Regulatory Action Level**: The insurer must also file an action plan. The regulator is required to analyze the company's operations and issue necessary corrective orders.
0.7 ≤ Ratio < 1.0	**Authorized Control Leve**l: The regulator is authorized to take control of the insurance company even though the company may still technically be solvent.
Ratio < 0.7	**Mandatory Control Level**: The regulator is required to take control of the company even if the company is still solvent.

The second component of the RBC system focuses on granting authority to or sometimes even requiring the state regulator to take action against troubled insurers. This component was seen as vitally important for the success of the RBC system.[58] Prior to RBC, regulators faced legal hurdles when attempting to take action against companies not technically insolvent but financially unstable.[59]

This component of the RBC system was also deemed critically important because it prevented regulatory forbearance where regulators would not take quick action against companies. Previously, regulatory forbearance had resulted from a combination of political pressure from insurers and regulators' lack of authority to intervene in a technically solvent insurance business.[60] The height of regulatory forbearance occurred during the 1980s savings and loan

58. Cummins & Phillips, *supra* note 1, at 50.
59. Grace, Harrington, & Klein, *supra* note 43, at 217.
60. Cummins & Phillips, *supra* note 1, at 50-53.

crisis. Regulators of the savings and loan institutions eased regulatory requirements during the onset of the crisis. Insurance businesses continued to operate and engage in risky behavior, which increased costs when they eventually failed.[61] By granting authority to regulators, the RBC system largely avoids regulatory forbearance problems.

The regulatory action component of the RBC system was established to prevent failing insurance companies from increasing deficits and taking on higher risk ventures that could ultimately lead to higher guaranty fund assessments upon the insurer's failure. The RBC system creates incentives for the insurance companies to remain financially strong, not excessively risky, and reassures consumers that these companies are monitored.

To further reduce the risk of regulatory forbearance and enhance transparency of the RBC system, the results of the RBC calculation and any regulatory action taken against an insurer are made available to the public.[62] The availability of this information provides additional incentives for insurers to effectively monitor their solvency and risk.

The RBC system helps identify troubled insurers early in the process and grants the authority to take proper action. A well-designed system would have the potential to reduce the expected costs of insolvencies by providing incentives for insurers to operate safely despite weak market incentives generated by the presence of guaranty funds and information asymmetry between insurers and policyholders.[63] Using the Coase theorem analysis, one would want to hold liable the party that can mitigate costs most effectively.[64] Regulators put liability on the insurance companies because they are in a better position to reduce transaction costs. Through the implementation of controls to help ensure the viability of insurers, consumers will more confidently purchase insurance and willingly pay premiums closer to what one would see in a competitive market.

Through the analysis of costs associated with insurer insolvencies, clearly some sort of solvency regulation is necessary; however, that regulation must not impose more costs than the benefits it generates.[65] We want the most efficient regulatory system possible. That begs the question about the current solvency regulation:

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61. Vaughan, *supra* note 21, at 17-18; Cummins & Phillips, *supra* note 1, at 50.

62. Cummins & Phillips, *supra* note 1, at 60.

63. Cummins, Harrington, & Klein, *supra* note 4, at 512; Cummins, Harrington, & Niehaus, *supra* note 23, at 433.

64. *See* Coase, *supra* note 8.

65. Cummins, Harrington, & Niehaus, *supra* note 23, at 435-36.

Does the RBC system mitigate transaction costs as effectively as possible?

III. THE SHORTFALLS OF RBC

A prudent, risk-based capital system should help identify financially troubled insurers early enough to either aid in the rehabilitation of insurers or efficiently remove those insurers from the market. It should also provide incentives for insurers to reduce their risk of insolvency by holding more capital.[66] The RBC system has undergone slight modification since its introduction in 1994.[67] However, over time a number of inherent shortfalls in the RBC system have emerged.[68] As new solvency systems continue to develop in other parts of the world, the United States' RBC system has come under even closer examination, revealing some of its downsides.[69]

One of the primary concerns about the RBC system is its inability to predict and prevent insolvencies.[70] Insolvencies in the insurance industry are continuing at a rather steady pace as "there has not been a statistically significant overall drop in the property/casualty impairment frequency since RBC was adopted."[71] The impairment rate is the number of insolvencies divided by the number of insurers in the market at the beginning of the year.[72] In April 2010, the State of Florida alone saw at least seven insurance companies fall into financial turmoil.[73] While clearly no solvency system can protect against failure absolutely, studies of the insolvencies that have occurred since the adoption of the RBC system revealed a major flaw in the system. "Relatively few insurers that later failed" had ratios of actual capital to risk-based capital that fell within the regulatory action ranges set forth in the RBC system.[74] In other words, almost all of the companies had a total adjusted capital twice that of the minimum RBC threshold the year prior to insolvency. Because these insurers fell outside of the regulatory guidelines, the assumption arose that they had enough capital to continue operating so no regulatory

66. *Id.* at 433.
67. *See* Cummins & Phillips, *supra* note 1, at 26.
68. *See* Vaughan, *supra* note 21, at 2, 13-23.
69. *Id.*
70. Cummins & Phillips, *supra* note 1, at 67.
71. *Id.* at 29.
72. *Id.* at 27.
73. Whitney Ray, *Florida Insurance Insolvency,* WJHG NEWS, (Apr. 22, 2010), http://www.wjhg.com/home/headlines/91854424.html.
74. Grace, Harrington, & Klein, *supra* note 43, at 226; Cummins, Harrington, & Klein, *supra* note 4, at 526.

action was taken. Unfortunately, this assumption proved incorrect when these insurers collapsed.

Some argue that the RBC system was never intended to actually predict and prevent insolvencies, but rather to provide regulators with authority to act on troubled companies.[75] If this system merely encourages regulatory authority, then the law is completely misguided. Imposing minimum costly capital standards is unnecessary and inefficient if the purpose of RBC is only to provide regulatory authority. The law needs to focus on the area associated with the greatest costs in the insurance transaction– insurer insolvencies.

The costs that the RBC system imposes elicit other concerns. Aside from the obvious costs of implementation, oversight, and enforcement, other costs exist associated with potential misclassification of companies.[76] Firms likely to fail may be classified and treated as financially sound (Type I error), while healthy firms may be classified as troubled and face regulatory action (Type II error).[77] Type I errors can result in insurer failure and all the associated costs previously discussed.[78] Type II errors generate costs due to wasted time and resources for both the insurer and the regulator. Both Type I and Type II errors produce numerous extraneous costs to the insurers, the policyholders, the regulators, and the market as a whole.

The RBC system has also been characterized as a "one size fits all" system.[79] It relies solely on a rule and factor based formula.[80] Although these factors vary according to risk, a company has no opportunity to utilize internal models more tailored to it to demonstrate viability to a regulator.[81]

Another potential concern, the RBC system does not account for some very significant risks, such as catastrophe risk or operational risk.[82] Moreover, it relies on statutory accounting values when determining risk charges.[83] Due to their level of uncertainty, accounting values do not necessarily provide a good indication of actual market value.[84] Regulators will still not know whether an

75. Cummins & Phillips, *supra* note 1, at 67.
76. Vaughan, *supra* note 21, at 15.
77. *Id.*
78. *Id.*
79. Cummins & Phillips, *supra* note 1, at 58.
80. *Id.* at 50-51.
81. Vaughan, *supra* note 21, at 16.
82. Cummins & Phillips, *supra* note 1, at 60.
83. *Id.* at 58-59.
84. *Id.* at 59.

insurer overstates its capital through a manipulation of reported assets and liabilities.[85]

A final shortfall of the RBC system lies in its failure to consider the quality of management and corporate governance of a firm.[86] Quality of management and corporate governance could prove imperative in a company's ability to remain financially healthy. Qualitative aspects of a firm serve as strong determinants of insolvency risk.[87]

IV. SOLVENCY II

Solvency II has been under development for a number of years, allowing the developers the opportunity to analyze other solvency regulatory regimes in the world. As one would expect, Solvency II addresses many of the shortfalls of the United States' RBC system. To gain a clear understanding of how Solvency II addresses those shortfalls, this article will examine the background of the regime.

Solvency II, a large scale reform to the insurance regulation system in Europe, will come into effect by the end of 2012.[88] This regulatory system will provide a principles-based approach to solvency regulation for countries throughout Europe.[89] Solvency II is premised on three different levels or "pillars" of regulation.[90] Pillar 1, the quantitative element, focuses on an insurer's economic balance sheet. Pillar 2 is concerned with supervision and governance, and Pillar 3 pertains to public transparency promoting market discipline.[91] Although addressed independently, the pillars must operate together for an effective regulatory scheme.

A. Pillar I

The first pillar provides rules and requirements for insurers' assets, liabilities, and capital.[92] While a general requirement maintains that insurers should only invest in assets where the risk can be properly identified, measured, monitored, etc., insurers

85. *See* Grace, Harrington, & Klein, *supra* note 43, at 217; Vaughan, *supra* note 21, at 17.

86. *See* Cummins & Phillips, *supra* note 1, at 39-43.

87. Conference of Insurance Supervisory Services of the Member States of the European Union, Frankfurt, Ger., Dec. 2002, *Prudential Supervision of Insurance Undertakings*, 9, DT/UK/232/02/REV6 (by Paul Sharma) [hereinafter *Sharma Report*].

88. Tim Scott, *An Introduction to Solvency II,* 21 INS. L.J. 71, 71-72 (2010).

89. Cummins & Phillips, *supra* note 1, at 58.

90. Scott, *supra* note 88, at 73.

91. *Id.*

92. *Id.* at 76-86.

have some independence in determining what types of risks and investments they will take.[93]

Nonetheless, insurers must to ensure that their investment portfolio remains financially sound. To ensure financial stability, Pillar 1 requires insurers to hold a target level of capital based on market value, called the Solvency Capital Requirement (SCR).[94] The SCR represents the amount of capital that would be required for an insurer to be 99.5% confident that it can continue to meet its liabilities.[95] Accordingly, companies with a higher risk profile will have a higher SCR and be required to hold more capital.[96] Each company will annually calculate its own SCR using a standard formula, an approved internal model, or a combination of both.[97] The SCR standard formula incorporates the following six risk components to generate an insurer's SCR: non-life underwriting risk (which includes catastrophe risk), life underwriting risk, health underwriting risk, market risk, counterparty risk, and operational risk.[98]

One of the more important innovations of Solvency II is allowing an insurer to utilize an internal model to determine its SCR.[99] Internal models should be more accurate and provide a better understanding of a specific insurer's financial situation than a standard model.[100] A supervisor must approve an internal model before it can be used.[101]

No matter how the SCR is calculated, an insurer must strive to hold capital at least equal to that amount. If an insurer falls below its SCR, it could face sanctions and lead to discussions with a supervisor.[102] A firm below its SCR can continue to operate and will still be deemed solvent, but a dip below the SCR level may be an indication of potential financial trouble in the future.[103]

While an insurer must hold the SCR as the target capital, it must also hold at least the Minimum Capital Requirement (MCR).[104] The MCR should be the amount of capital needed for an

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93. *Id.* at 77.
94. *Id.* at 79.
95. Id.
96. René Doff, *A Critical Analysis of the Solvency II Proposals*, 33 GENEVA PAPERS ON RISK & INS. 193, 196 (2008).
97. Scott, *supra* note 88, at 79.
98. *Id.* at 80-81.
99. Martin Eling et al., *The Solvency II Process: Overview and Critical Analysis*, 10 RISK MGMT. & INS. REV. 69, 73 (2007).
100. *Id.*
101. Scott, *supra* note 88, at 79.
102. Eling et al., *supra* note 99, at 73.
103. *Id.* at 82.
104. *Id.*

insurer to be 85% confident that it will be able to continue to meet its liabilities.[105] While a firm's falling below its MCR does not necessarily destine it to fail, falling below this level exposes policyholders to an unacceptable risk of failure making the insurer prudentially insolvent.[106] Consequently, a firm breaching its MCR will face intervention from a supervisor.

Not only must an insurer have a necessary quantity of capital, but it must also have a necessary quality of capital. On a basic level, an insurer's capital will fall into one of three tiers, with tier one being the highest quality of capital. To satisfy the SCR an insurer must hold more than one-third tier one quality capital and less than one-third of tier three quality capital. To satisfy the MCR, at least half of an insurer's capital holdings must be of tier one quality and no capital may be of tier three quality.[107] These requirements are only the minimum; some believe that these percentages should be much higher.[108]

B. Pillar II

Pillar II focuses on governance, risk management and supervision.[109] Pillar II achieves its focus through the "supervisory review process" (SRP) and the "own risk and solvency assessment" (ORSA). The SRP is a common and relatively basic supervision of an insurer. The ORSA is a more unique and compelling version of supervision. ORSA requires a firm to look internally and address its overall solvency, compliance with the capital requirements, and any deviations in its risk profile from the assumptions underlying the SCR standard formula or the internal model.[110] The ORSA is beneficial for a firm's decisionmaking process, but it is also useful to help a supervisor better understand the risk profile of a firm.[111] ORSA puts the onus on a firm to provide some self-supervision and governance rather than relying solely on an outside regulator.[112] A firm's management will ultimately have the responsibility of maintaining a prudent risk portfolio instead of following specific, predefined requirements.[113]

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105. *Id.*
106. *Id.*
107. *Id.* at 82-86.
108. *Id.* at 85.
109. *Id.* at 86.
110. *Id.*
111. Vaughan, *supra* note 21, at 6.
112. Nikolaus von Bomhard, *The Advantages of a Global Solvency Standard*, 35 GENEVA PAPERS ON RISK & INS. 79, 87 (2010).
113. *Id.*

C. Pillar III

Pillar III is premised on making insurer information transparent and available to the public. Insurers must produce an annual solvency and financial condition report (SFCR), to which the public has access.[114] The SFCR will contain a description of the insurer's business, performance, governance, risk profile, quantity and quality of capital, assets and liabilities, and a variety of other information.[115] Any major changes to an insurer's SFCR triggers a requirement that the insurer update the report for the public.[116] In theory, the increased transparency should lessen the need for regulation because market discipline will force appropriate behavior.[117] Whether this will happen in practice, however, is not entirely clear.[118]

V. USING SOLVENCY II AS A GUIDE FOR SOLVENCY REGULATION IN THE UNITED STATES

No solvency regulatory system will be perfect; all systems will have costs and shortcomings. Nonetheless, the RBC system can be improved to be more efficient and effective. The upcoming implementation of Solvency II in the European Union has acted as a catalyst for the United States to re-evaluate the RBC system. The NAIC began its Solvency Modernization Initiative (SMI) in June of 2008 which entails a complete review of the solvency framework in the insurance industry.[119] The SMI considers a number of possible revisions relating to management risk, use of internal models, corporate governance, and uses of economic capital among many others.[120] While numerous potential ways to improve the RBC system exist, this article focuses on three main characteristics of Solvency II that could improve the RBC system by reducing transaction costs and improving overall efficiency.

The first recommendation for improvement to the RBC system involves permitting insurers to utilize internal models to determine appropriate levels of capital. The standard RBC formula

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114. Scott, *supra* note 88, at 87.
115. *Id.*
116. *Id.*
117. Eling et al., *supra* note 99, at 81.
118. *See* Scott, *supra* note 88, at 87.
119. NAT'L ASSOC. OF INS. COMM'RS, *Solvency Modernization Initiative* (Sept. 3, 2009), http://www.naic.org/documents/committees_ex_isftf_smi_overview.pdf. The SMI project is expected to be completed by the end of 2012.
120. *Id.*

could remain in place, but firms with the capability should have the option to develop and use internal models instead. Internal models are generally accepted as more accurate and useful to a firm.[121] As a result, firms using internal models can hold capital sufficient for that firm's risk profile and not incur the costs associated with holding too much or too little capital. This will allow the firm to operate more efficiently and without a stifling one-size-fits-all approach.

Admittedly, "internal models may be more accurate but [they] have correspondingly high transactions costs."[122] Developing the model, approving the model, and providing supervision to ensure a firm does not stray from the model incurs costs. The costs associated with an internal model could prove especially harmful to smaller insurers.[123] The smaller firms may face the options of choosing a standard model (that may not adequately address their risk profile) or exiting the market (dropping out or undergoing acquisition).[124] Loss of these insurers creates a smaller market and thus a less efficient market.[125] Nonetheless, the larger firms will most likely be able to afford to develop internal models that accurately reflect the firm's risk profile and help protect it from insolvency. While almost all insolvencies are costly, a large firm becoming insolvent is particularly harmful because of the number of people affected. Ultimately, the determination of whether internal models would be beneficial will hinge on whether their marginal benefit will outweigh their marginal costs. Luckily, the United States will have the opportunity to analyze the effectiveness of internal models as Solvency II becomes reality.

Secondly, this article recommends adding a qualitative element, similar to Pillar I and II of Solvency II, to the RBC system. Currently the RBC system relies solely on a quantitative system for determining levels of regulatory action. However, "effective regulatory monitoring systems must go beyond a reliance on capital" and require consideration of qualitative characteristics.[126] Implementing a system that provides a determination of the quality of capital a company holds will help firms not only hold enough capital, but also hold the right capital.[127] The tiered system in Solvency II ensures a sound risk profile; something similar in the

121. *See* Vaughan, *supra* note 21, at 11.
122. Eling et al., *supra* note 99, at 79.
123. *Id.*
124. *Id.*
125. *Id.*
126. Vaughan, *supra* note 21, at 17.
127. Scott, *supra* note 88, at 82.

United States could help reduce insolvencies by adding another incentive for firms to have a financially stable risk profile.[128]

Solvency II also incorporates a consistent monitoring and "evaluation of management quality and provide[s] incentives for the adoption of improved risk management."[129] Implementing something similar in the United States would provide regulators the authority to intervene in firms that display indicators of impending problems. For instance, excessive growth, excessive use of reinsurance, or inconsistent investment strategies could be signals of financial distress. Early regulatory intervention will lead to dramatic cost savings from reduced risk-taking and increased transparency of the firm.[130] Additionally, identifying potential management problems at the outset could prevent the manifestation of problems that otherwise might develop.[131]

The reduction of operational risk could arise as a secondary effect of qualitatively assessing management. Operational risks could include a variety of different risks such as losses due to fraud, employee misconduct, or failure to meet obligations; business disruptions and system failures; and management of execution, delivery, and process.[132] All firms face some level of operational risk; however, "firms with serious flaws in their management or governance systems are particularly vulnerable to potentially catastrophic operational events."[133] A qualitative assessment would provide insurers incentives to have quality management and provide authority for a regulator to intervene if necessary. The higher quality of management will lower the operational risk and lead to cost savings.[134]

The final improvement recommendation is to make the results of the RBC system more easily accessible to the public as suggested by Solvency II's Pillar III. As the system currently stands, the firm's publically available, statutorily required financial statements report the results of the RBC ratios.[135] In reality, most investors and insurance purchasers will neither access this information nor know how to interpret it.[136] Making the results of the solvency assessments more readily available to the public would provide market discipline to weaker insurers and would discourage

128. Doff, *supra* note 96, at 196-98.
129. Cummins & Phillips, *supra* note 1, at 44.
130. Grace, Klein, & Phillips, *supra* note 33, at 31.
131. *See Sharma Report*, *supra* note 87, at 60-63, 70.
132. Cummins & Phillips, *supra* note 1, at 42.
133. *Id.*
134. *Id.* at 43.
135. *Id.* at 60.
136. *Id.*

regulatory forbearance.[137] Creating a more public system would help reduce the information asymmetries between the insurer and the buyer that generate many transaction costs. A world where consumers are provided with greater information and tools to monitor insurers' solvency is more similar to the ideal situation where transaction costs are negligible.

Any solvency regulation will have its shortfalls, but the previously discussed recommendations could improve the current RBC system from an economic standpoint. The SMI makes it clear that the issue of solvency regulation needs to be addressed. SMI is an excellent step toward improving the United States solvency regulation system, but it will face numerous challenges in the current highly politicized landscape.[138] The recent reforms in the healthcare and financial industries have created a strong backlash against any regulatory reform. These recommendations require significant changes to the RBC system that insurers would likely resist strongly. However, changes to reduce transaction costs will ultimately increase efficiency and total economic welfare.

CONCLUSION

We should watch the developments of NAIC's Solvency Modernization Initiative with great interest as many of the SMI ideas worthy of being explored in much greater depth have the potential to greatly improve solvency regulation in the insurance industry. The three recommendations proposed in this article are steps that could lead to an overall improved system. These ideas effectively address costs that remain with the current RBC system. Although these changes would likely impose additional costs, the benefits would greatly outweigh the incurred costs.

Modification to the current RBC system appears imminent. Whether those modifications will be significant or minimal is yet to be seen. The effectiveness of Solvency II in the European Union could provide one indication of the potential magnitude of changes to the RBC system. The United States has the opportunity to analyze the strengths and weaknesses of the European Union solvency regulations and incorporate that analysis into modifications of the RBC system. While the political and cultural differences could create resistance to adopting certain aspects of Solvency II, an economic analysis showing reduced transaction costs and increased aggregate economic welfare could overcome this. The United

137. *See* Grace, Harrington, & Klein, *supra* note 43, at 21.
138. *See* Grace, Klein, & Phillips, *supra* note 33, at 32.

States would be wise to fully understand the changes being made elsewhere in the world as it explores changes to its own solvency regulation system.