

PROPORTIONATE DEFENSE

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I. INTRODUCTION

Proportionality in defense is a relation between the good and bad effects of a defensive act. Stated crudely, proportionality requires that the bad effects of such an act not be excessive in relation to the good. If this seems simple, the apparent simplicity is an illusion. The purpose of this essay is to explore some of the hitherto unappreciated complexities in the idea of proportionality. I will explain how a requirement of proportionality differs from a requirement of necessity, distinguish among various types of proportionality, and examine the ways in which proportionality in defense differs from proportionality in punishment. I will also suggest that certain good or bad effects may have less weight than others, or even no weight at all, in the assessment of proportionality. Finally, I will argue that proportionality is not just a matter of the consequences of action but is also sensitive to the ways in which consequences are brought about.

Although I will discuss proportionality in the law of private defense and the law of armed conflict, my main concern is with proportionality itself—that is, with proportionality as a moral constraint on action. I assume that acts of self-defense or defense of others can be disproportionate in the absence of law, and therefore independently of the law. That such acts are disproportionate is, I further assume, an objective moral fact that is independent of what we may believe or what our customs or practices are. Whereas proportionality constraints in law are statutory or customary in origin, proportionality constraints in morality are not designed but are discovered or discerned. Proportionality in morality is thus logically prior to proportionality

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in law and provides the standard against which proportionality constraints in law are to be evaluated. My aim in this essay is thus not to report how proportionality is understood in the law, or to suggest an interpretation of proportionality in the law, but to offer an understanding of the nature of proportionality as a constraint on defensive action that may help to guide the evaluation and possibly the reform of the ways in which proportionality is understood in the law.

II. PROPORTIONALITY, NECESSITY, AND THE OPPORTUNITY COSTS OF DEFENSIVE ACTION

The concept of proportionality is often conflated with the concept of necessity, particularly in some of the legal literature, as I will indicate later. It is important, therefore, to clarify at the outset the precise nature of the distinction between a requirement of proportionality and a requirement of necessity as they apply to acts of defense.

The difference between necessity and proportionality is in the different comparisons they require. The determination of whether an act of defense is necessary as a means of avoiding a threatened harm requires comparisons between its expected consequences and those of *alternative means* of achieving the same defensive aim. An act of defense violates the requirement of necessity if there is an alternative act that has an equal or higher probability of preventing a threatened harm but would cause less harm in relevant ways. As with my crude statement of the requirement of proportionality, this simple formula conceals a great many complexities. For example, an act of defense may satisfy the requirement of necessity even if it would cause greater harm overall than some alternative defensive act, provided that it would cause less harm to those who are not morally liable to be harmed. And it is not strictly correct that an act of defense satisfies the requirement of necessity provided there is no less harmful act that would have at least an equal probability of success. For there must be trade-offs between the likelihood of success of different possible means of avoiding a threatened harm and the harms that these different means might inflict on innocent people as a side effect. An act of defense may be ruled out as unnecessary if, for example, there is an alternative act that would have only a slightly lower probability of success but would cause significantly less expected harm to bystanders. In this case, the significantly decreased harm to innocent bystanders might outweigh the slightly lower probability of success. But because my topic is proportionality

rather than necessity, I will pass over these and other complexities in the requirement of necessity.¹

Whereas necessity requires comparisons between an act of defense and alternative means of avoiding a threatened harm, proportionality requires a comparison between an act of defense and *doing nothing* to prevent the threatened harm. Another way of making this point is to say that necessity compares the expected consequences of an act of defense with those of other means of defense, negotiation, or retreat, while proportionality compares the consequences of an act of defense with those of submission or, in the case of third party defense, nonintervention.

This helps to explain why the failure of an act of defense to satisfy the proportionality requirement may be worse than a failure to satisfy the necessity requirement. If an act of defense satisfies the proportionality requirement but fails to satisfy the necessity requirement, there must be an alternative means of avoiding the threatened harm. But if an act of defense satisfies the necessity requirement but fails the test of proportionality, the potential victim has no morally permissible alternative but to submit to the threatened harm.

When an individual is threatened with attack, doing nothing to avoid the harm usually involves nothing other than being harmed. But in other cases, doing nothing to prevent a harm necessarily involves doing something else. For example, not engaging in third-party defense, preventive defense, collective defense, or humanitarian intervention involves an individual or a state doing something other than engaging in defensive action. Yet there are indefinitely many things an individual or a state can do rather than defend another person or other people. Suppose, for example, that one state is considering conducting a humanitarian intervention in another state and the question arises whether the intervention would be proportionate. With which of the many courses of action the state could take were it not to go to war should its going to war be compared?²

One possibility is that the consequences of the state's going to war should be compared with the consequences of its doing whatever it would be most likely to do if it were not to go to war.³

1. For illuminating discussions of many of the subtleties and complexities in the requirement of necessity, see Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFFAIRS 3 (2012).

2. This problem of specifying the relevant counterfactual situation with which the consequences of an act of defense must be compared was first noticed, to the best of my knowledge, by Gregory Kavka, *Was the Gulf War a Just War?*, 22 J. SOCIAL PHIL. 20 (1991). For an extended discussion of the problem, see generally David Mellow, *Counterfactuals and the Proportionality Criterion*, 20 ETHICS & INT'L AFFAIRS 439 (2006).

3. See Kavka, *supra* note 2, for a defense of this proposal.

But this suggestion is vulnerable to various objections, one of which seems decisive. If what the state would be most likely to do if it were not to conduct the humanitarian intervention (for example, carry out a genocide) would cause more harm than the intervention would cause, the intervention would be proportionate no matter how much harm it would cause.⁴

Other terms of comparison might be suggested—for example, what the state would have been most likely to do among the permissible alternatives, or whatever would be the best of the permissible alternatives. But the first of these seems arbitrary, in that it makes proportionality depend on contingent inclinations, while the second would convert proportionality into a maximizing requirement. Thomas Hurka has proposed a different comparison—namely, that “we should compare the net effect of war with that of the least beneficial alternative that is morally permitted.”⁵ But suppose that the worst of a state’s permissible alternatives to war would involve its working to collect debts owed to it by poor countries that it would not collect if it were to go to war. It seems arbitrary to suppose that the benefit to the poor countries of the state’s going to war should weigh against the war’s bad effects, such as the killing of innocent bystanders as a side effect of military action, in determining whether the war is proportionate.

Proportionality in defense does not, it seems, take account of either the opportunity costs (that is, the good effects the agent was prevented from causing) of defensive action, or the “opportunity benefits” (the bad effects the agent was prevented from causing, such as the further impoverishment of poor countries through the collection of debts). Proportionality, it seems, takes account only of good and bad effects that defensive action *causes*. It does not take account either of those effects it allows to occur, because engaging in the defensive action prevents the agent from being able to prevent them, or of those effects it allows not to occur because the defensive action prevents the agent from being able to cause them. Proportionality, in other words, does not require a comparison between entire possible worlds. It requires only a comparison between the relevant bad effects that defensive action (including war) would cause, either directly or indirectly, and the relevant good effects it would cause—in particular, the prevention of harms that would otherwise be caused by others. What a person or a state would or could do if he or it were not to engage in some defensive

4. For this and other objections, see Jeff McMahan & Robert McKim, *The Just War and the Gulf War*, 23 CANADIAN J. PHIL. 501, 508 (1993).

5. Thomas Hurka, *Proportionality and Necessity*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 127, 130 (Larry May ed., 2008).

action is irrelevant to the determination of whether the defensive action is proportionate.

This is not to say that the opportunity costs (or benefits) of defensive action are irrelevant to the permissibility of the action; it is just that they are not relevant to *proportionality*. Nor are they relevant to necessity. Necessity is concerned with alternative means of achieving the *same ends* that some act of defense would be intended to achieve. But it may well be that an act of defense is impermissible because it excludes action that is morally required because it is necessary to achieve a *different* end. Suppose, for example, that a state has resources that are sufficient either to fight a just war of humanitarian intervention or to eradicate a fatal disease in a certain area of the world. But its resources are insufficient to do both. If the state goes to war, it will prevent 10,000 innocent people from being wrongly killed. But if it uses its resources instead to eliminate the disease, it will save 100,000 people. It is at least arguable that even if the war would satisfy both the necessity and proportionality requirements, it would still be impermissible because the state is morally required to use its resources to eradicate the disease instead. This might be true even if both fighting the war and eradicating the disease would, considered separately, be supererogatory. For even if it were permissible for the state to do neither, it might be that if it decides to use its resources to do one or the other, it ought to do what would save 90,000 more lives, especially given that going to war would inevitably involve the killing of innocent bystanders as a side effect and the sacrifice of soldiers' lives, whereas eradicating the disease would involve the sacrifice only of money.

This is, of course, controversial. There is, I think, one type of case in which it is uncontroversial that one of two possible supererogatory acts is impermissible because the other is conditionally required. In this type of case, it is permissible, because of the cost involved, not to aid anyone. But suppose one decides to incur the cost by aiding someone. One then has two options. One can either prevent a certain harm to a person or prevent that harm and a further harm to the same person at no additional cost. Or, when there are many potential beneficiaries, one can aid only some of them or aid those and others as well at no additional cost. In cases such as these, while it is permissible not to prevent any harm, it is impermissible to prevent only some *rather than* all of the avoidable harm, for to prevent only some is to allow harm to occur when one could prevent it at no cost to oneself.

But few choices between an act of defense and some other beneficial act are like this. The usual situation is that the relevant

alternative to preventing harm through a supererogatory act of defense is to prevent harm or provide benefits to entirely different people through a different supererogatory act. And it is less clear in such cases that there can be a requirement to choose the act of supererogation that would prevent the most harm or provide the greatest benefits. Yet it does seem plausible to suppose that if the difference between the amount of harm prevented by one supererogatory act would be very substantially greater than that which different people would be prevented from suffering by a different supererogatory act, and no other considerations (such as special relations) favor one over the other, it may be impermissible to prevent the lesser harm rather than the greater harm.

If that is right, just war theory must include a new principle of *jus ad bellum* that states the conditions in which war is impermissible specifically because it would exclude the pursuit of different, more important goals. But, while it may be necessary for just war theory to incorporate such a principle, the law of *jus ad bellum* cannot plausibly include a principle of this sort. It would be futile, and indeed counterproductive, to try to hold states legally liable for resorting to war solely on the ground that they could have done even more good by doing something else instead.⁶

III. NARROW AND WIDE PROPORTIONALITY

Particularly in the legal literature, discussions of proportionality in individual self-defense are typically concerned with the question whether the harm the defender inflicts on the threatener is proportionate in relation to the harm the defender thereby averts. If, for example, the only way one can prevent oneself from being viciously pinched is to kill the potential pincher, the necessary defensive action would be disproportionate and one must submit to being pinched.

The literature on proportionality in war, by contrast, is almost exclusively concerned with the question whether harms that a war or act of war would inflict on innocent bystanders (usually identified with civilians) as a side effect of military operations would be proportionate in relation to the aims of the war or act of war. The harms that a war or act of war would inflict on enemy combatants are generally assumed to be irrelevant to questions of proportionality. This is true both in just war theory and in the law.

6. I have discussed the issue of war's opportunity costs with Victor Tadros but our views have developed, and to some extent converged, quite independently. For his views, see Victor Tadros, *Unjust Wars Worth Fighting For*, J. PRACTICAL ETHICS (forthcoming).

To the extent that people assume that proportionality in individual self-defense is a matter only of harm to aggressors, whereas proportionality in war is a matter only of harm to innocent bystanders, they are mistaken, at least as a matter of morality. There are in fact two distinct dimensions of proportionality.⁷ One of these is concerned with harms inflicted on people, such as wrongful aggressors, who are potentially liable to be harmed. People sometimes act in a way (for example, by posing a threat of unjustified harm) that involves the forfeiture of their right not to be harmed—or at least their right not to be harmed in a certain way, for a certain reason. In some instances these people may deserve to be harmed; in others they may only be morally liable to be harmed.⁸ I will elucidate the difference between desert and liability in section 6. Here I will confine the discussion to liability. When a person is liable to be harmed, there is in practice a limit to the amount of harm to which he can be liable. (Thus, although there have been many people who have been liable to be killed, there has never been anyone who was morally liable to be tortured continuously for many years.) When a person is liable to be harmed in defense of someone he will otherwise harm without justification, but the harm the defensive act inflicts on him exceeds the maximum harm to which he can be liable, the act is disproportionate in what I call the *narrow* sense. Narrow proportionality is thus a constraint on a liability justification for harming.

The other dimension of proportionality is concerned with harms to which the victims are not liable at all. The most common form of justification for harming people who are not liable to be harmed is a lesser-evil justification. This label should not be understood literally. The claim is not that it can be justifiable to harm a person whenever doing so would prevent a greater harm, even if the harm prevented would be only slightly greater. Rather, the claim is that it can be justifiable to harm a person who is not liable to be harmed when that is necessary to avoid a *substantially* greater harm to another, or to others, who are also not liable to be harmed. Whereas a liability justification for harming a person involves his having forfeited a right not to be harmed, a lesser-evil justification applies when the victim's retained right not to be harmed is *overridden*. When an act inflicts harm on a person to which he is not liable and that harm exceeds what can be justified as the lesser evil, the act is disproportionate in the *wide* sense.

7. The distinction between narrow and wide proportionality is drawn in JEFF MCMAHAN, *KILLING IN WAR* 20-21 (Julian Savulescu ed., 2009).

8. *Id.*

(The labels “wide” and “narrow” are intended to reflect the fact that in most situations there are more people who are not liable to be harmed than there are people who are liable to be harmed. The scope of harm to which people are not liable is therefore wider.)

People can sometimes make themselves liable to suffer defensive harm that is greater than the harm they would otherwise inflict. A person can, for example, make himself liable to be killed if killing him is the only way to prevent him from culpably torturing another person, even though death would be a greater harm than the torture. But while defensively inflicted harm that is greater than the harm it prevents can thus be proportionate in the narrow sense, it seems that it cannot be proportionate in the wide sense. It seems, in other words, that it cannot be permissible to inflict greater harm on a person who is not liable to be harmed as a means, or even as a side effect, of preventing a lesser harm to another person who is not liable to be harmed. (The only possible exception to this might be the infliction of a greater harm on a bystander as a side effect of preventing a somewhat lesser harm to someone to whom one is specially related in an important way, such as one's child.)

It is a corollary of this that the violation of wide proportionality is sufficient for impermissibility. That is, if there is no lesser-evil justification for harming a person who retains and has not waived her right not to be harmed, the infliction of that harm cannot be permissible. But the same is not true of narrow proportionality. An act of defense that is disproportionate in the narrow sense can nonetheless be permissible. It can be permissible if the harm it inflicts on the threatener beyond that to which he is liable can be justified as the lesser evil. Suppose, for example, that because of his partial responsibility for a threat of unjustified harm, a person is liable to be harmed up to degree x as a means or side effect of preventing the unjustified harm. But suppose further that the only way to prevent the threatened harm is to cause the person to suffer harm $x + n$. The infliction of the additional harm n would be disproportionate in the narrow sense. But if the harm for which he is partially responsible would be sufficiently great, there could be a lesser-evil justification for causing him to suffer the additional harm n as a means or side effect of preventing it. It would therefore be permissible to do the defensive act that would cause this person to suffer harm $x + n$. The harm up to degree x would have a liability justification while the additional harm n would have a lesser-evil justification. I call such a justification a *combined justification*.

The idea of a combined justification raises a potentially quite important question. Call the person who bears partial responsibility for the threat of an unjustified harm P_1 . He is liable to be harmed only up to degree x . But to prevent the unjustified harm, it is necessary to inflict harm $x + n$. In the previous example, the additional harm n had to be inflicted on P_1 . But suppose the unjustified harm could be prevented equally effectively by inflicting harm x on P_1 and inflicting the additional harm n on another person, P_2 , who is in no way responsible for the threat of unjustified harm and is thus not liable to be caused any harm at all. If there is a lesser-evil justification for inflicting n on P_1 , there should also be a lesser-evil justification for inflicting it on P_2 . After all, neither of them is liable to suffer harm n . Is it then a matter of moral indifference whether it is inflicted on P_1 or P_2 ? Ought one to flip a coin? Or is there a reason to inflict it on one rather than the other?

The question here is similar to the question whether there is a moral difference between punishing a guilty person by a certain amount more than he deserves and punishing a wholly innocent person by the same amount. Many people have the intuition that the punishment of an innocent person is worse than the over-punishment of a guilty person to an equivalent degree. It may seem, similarly, that it would be worse to inflict the additional harm n on P_2 , who is not liable to any harm at all, than to inflict it on P_1 , who is already liable to be harmed to some degree to prevent the harm for which he is partially responsible.

I am uncertain about this matter. But it is potentially quite important for the morality of war. Suppose, as I believe, that the criterion of liability to be harmed in war is moral responsibility for a threat of unjustified harm. When a state fights an unjust war, many civilians in that state bear some responsibility for the war and the unjustified harms it inflicts, though the degree of their responsibility is usually very slight. These civilians may therefore be liable to suffer a certain amount of harm, presumably quite small in most cases, as a means or side effect of thwarting their state's unjust aims. They might not, for example, be wronged by being made to suffer certain small harms as a result of the imposition of economic sanctions. Next, suppose that the constraint against inflicting harms to which the victims are not liable is weaker in the case of those who are already liable to some harm than in the case of those who are not liable to any harm. In that case, there would be a stronger lesser-evil justification for causing harms to civilians beyond the minor harms to which they might be liable than there would be to cause them those

same harms if they were not liable to any harm at all. That is, combining the idea that civilians can be liable to some harms with the idea that harms that exceed the victim's liability count less than equivalent harms inflicted on wholly non-liable people leads to a more permissive view of the morality of harming civilians in war. This, to me, is disturbing.

One possible response for those who believe that a harm in excess of liability counts less than an equivalent harm to a wholly non-liable person would be to claim that the extent to which harms beyond liability are discounted varies with the degree of harm to which the victim is liable. On this view, a fixed harm beyond the harm to which the victim is liable has less weight if the victim is already liable to suffer great harm than it would if the victim were liable to suffer only a small harm. Then, assuming that most civilians in a state that is fighting an unjust war are liable at most to only relatively small harms, the acceptance of the view that harms beyond liability have less weight than equivalent harms inflicted on wholly non-liable people would not increase the moral vulnerability of civilians by much.

IV. NARROW PROPORTIONALITY IN WAR

I noted at the beginning of the previous section that discussions of proportionality in the morality and law of individual self-defense tend to focus on the harm that defensive action inflicts on the threatener, so that these discussions are generally concerned with narrow proportionality only. But individual self-defense is also governed by a requirement of wide proportionality. It is just that it less frequently happens that individual self-defense harms or imposes unjustified risks on innocent bystanders. When, in 1984, Bernard Goetz shot four panhandlers in a New York subway car, he exposed other passengers who were trapped in the car to risks of harm that seem clearly excessive in relation to the threat of harm, if any, that he faced from the panhandlers. His repeated firings of the gun were thus instances of individual self-defense that were disproportionate in the wide sense (as well as in the narrow sense).⁹

In contrast with discussions of proportionality in individual self-defense, discussions of proportionality in war tend to ignore harms to threateners—that is, combatants—and thus to take account only of harms inflicted on bystanders who pose no threat—that is, civilians. In both just war theory and the law of war, there

9. See McMAHAN, *supra* note 7, at 20-21.

is one set of principles that govern the resort to war (*jus ad bellum*) and another distinct set of principles that govern the conduct of war (*jus in bello*). In just war theory, each set contains a principle of proportionality. Thus, for it to be permissible for a state to resort to war, the expected bad effects the state's war would cause must not be excessive in relation to the importance of achieving the just cause for war, together with any other good effects that may weigh against the bad. Similarly, for each individual act of war to be permissible, its expected bad effects must not be excessive in relation to its expected good effects. The bad effects that count in the assessment of *in bello* proportionality are the same as those that count in the assessment of *ad bellum* proportionality—namely, harms to those who are “innocent,” or not liable to be harmed. In the traditional theory of the just war, those who are not liable to be harmed are noncombatants (whom for present purposes we may identify with civilians, though the two categories are often defined in ways in which they are not coextensive). Proportionality in war is thus understood in the just war tradition as wide proportionality only. Narrow proportionality, which is concerned with harms to those who are liable to some degree of harm—combatants—is not recognized as a moral issue.

There are various mutually compatible explanations of why just war theory excludes harms inflicted on enemy combatants from the assessment of both *ad bellum* and *in bello* proportionality. Foremost among these is that the traditional theory assumes that all combatants are liable to be killed at any time during a state of war. That assumption leaves little scope for harming them in excess of the harm to which they are liable.

In law the situation is rather more vexed. Although there are references in the legal literature to the notion of proportionality in *jus ad bellum*, in neither statutory nor customary international law does there seem to be a legal prohibition of the resort to war when the war's expected bad effects would be excessive in relation to its expected good effects.¹⁰ Certainly there is no suggestion that a war as a whole could be disproportionate in the narrow sense—that is, that it could be disproportionate, and therefore illegal, because the expected harm it would cause to *enemy combatants* would be excessive in relation to the importance of achieving the just cause, such as national self-defense.

10. For references to the notion of proportionality in *ad bellum* law, though with indications that the notion has no practical function, see JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES, 14, 20, 22-23, 74 (James Crawford et al. eds., 2004).

There is, however, a statutory proportionality requirement in *in bello* law (sometimes referred to as the law of armed conflict or, more often, as international humanitarian law, or IHL). This requirement is in Article 51(5) of Additional Protocol I of the 1977 Geneva Conventions.¹¹ It prohibits any “attack which 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.”¹² This principle, to which I will return, is a principle of wide proportionality, in that it restricts only acts that are expected to harm civilians, who are not legally liable to attack. It says nothing about harms to those, such as enemy combatants, who are liable to attack.

It is widely held, however, that IHL also contains principles of proportionality that limit the harm that it is permissible to inflict on enemy combatants—that is, principles of narrow proportionality. It is even said that when proportionality was first introduced as a principle governing the conduct of war, its aim was the protection of combatants, and that a parallel principle aimed at the protection of civilians did not enter the law until later, after the ratification of the United Nations Charter.¹³ Yet references in the legal literature to proportionality in the harming of enemy combatants seem, on inspection, to be claims about necessity rather than proportionality. The relevant statutes concern prohibitions of certain types of weapon. Consider, for example, an early agreement to prohibit certain weapons—the St. Petersburg Declaration of 1868.¹⁴ Its preamble contains these phrases:

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment

11. *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, in DOCTRINES IN THE LAWS OF WAR 416 (Adam Roberts & Richard Guelff, eds., 1982), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AEEAC12563CD0051DC9E>.

12. *Id.*

13. GARDAM, *supra* note 10, at 29, 50.

14. Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration] available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C>.

of such arms would, therefore, be contrary to the laws of humanity.¹⁵

This is a clear statement of a requirement of necessity, which condemns weapons that inflict more harm on combatants than is necessary to disable them from participation in combat. Because the additional harms exceed what is necessary to achieve the legitimate aims of combat, they are gratuitous or wanton.

Statements such as this are the basis of subsequent regulations that prohibit certain weapons on the ground that they cause “superfluous injury” or “unnecessary suffering.” An injury is superfluous when it involves more damage to the victim than is necessary to incapacitate him or render him *hors de combat*—for example, an injury that inevitably kills rather than merely disabling. And suffering is unnecessary when it exceeds whatever suffering is unavoidable in rendering a combatant *hors de combat*. When it is claimed that a weapon inevitably causes superfluous injury or unnecessary suffering, there is an implicit comparison with other weapons that could incapacitate enemy combatants equally effectively without inflicting the additional injury or suffering. And comparisons between one way of achieving an aim and alternative means of achieving that same aim are, one may recall, precisely what is required to test for necessity. Thus, according to one commentator, “the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury.”¹⁶ This is a succinct statement of the test of *in bello* necessity, yet it is quoted by another writer as a formulation of “the proportionality equation.”¹⁷

There could scarcely be a clearer conflation of proportionality with necessity than a brief passage from the International Committee of the Red Cross (ICRC) commentary on anti-personnel mines, which observes that it is a “basic rule” of IHL that “it is prohibited to use weapons which cause unnecessary suffering.”¹⁸ Therefore, the use of weapons whose damaging effects are disproportionate to their military purpose is prohibited. *In bello* proportionality in law is indeed, as Additional Protocol I makes clear, a relation between the expected “damaging effects” of an act

15. *Id.*

16. Christopher Greenwood, *Command and the Laws of Armed Conflict*, 22 OCCASIONAL 24 (1993).

17. GARDAM, *supra* note 10, at 69.

18. International Committee of the Red Cross [ICRC], *Anti-personnel Landmines—Friend or Foe?: A Study of the Military Use and Effectiveness of Anti-Personnel Mines*, 24 (Mar. 1, 1996).

of war and the “military purpose” it is expected to achieve.¹⁹ But this is quite different from the relation between the suffering caused by one means of achieving a military purpose and that which would be caused by alternative means of achieving that military purpose. It is this latter relation that determines whether the suffering caused by the one means is unnecessary. An act of war is disproportionate if the harm or suffering it causes is excessive in relation to the military advantage it provides. The same act of war is unnecessary if the harm or suffering it causes exceeds that which would be caused by an alternative, equally effective means of achieving the same military advantage (or a different military advantage of equivalent importance). These are entirely different judgments about the act of war, one based on a comparison between an act’s good and bad effects, the other based on comparisons between its combined good and bad effects and the combined good and bad effects of alternative possible means of achieving the good effects.

Judith Gardam, whose book, *Necessity, Proportionality, and the Use of Force by States*, provides a scholarly survey of legal thought about proportionality in war, acknowledges that “[t]he use of the term ‘proportionality’ in relation to the rules that regulate the means and methods of warfare for the protection of combatants has been criticised.”²⁰ She goes on to observe, however, that “the relevance of proportionality to the assessment of weapons is borne out by the fact that many articulations of the test of superfluous injury or unnecessary suffering use this term,” citing as an example the passage from the ICRC quoted in the preceding paragraph.²¹ What this suggests is that the conflation between proportionality and necessity is quite systematic in legal thinking about proportionality in harms to combatants in IHL. As a consequence, it is doubtful whether IHL recognizes a genuine proportionality constraint on the harming of enemy combatants. I know of nothing in IHL that would rule out an act of war on the ground that the harm it would inflict on enemy combatants is too great to be justified by the military advantage the act would bring, given that it would afford *some* military advantage.

Although neither the traditional theory of the just war nor the law of war seems to recognize the possibility of narrow disproportionality either in the resort to war or in the conduct of war, morality itself clearly imposes a proportionality constraint on

19. *Id.*

20. GARDAM, *supra* note 10, at 15.

21. *Id.* at 69. *See also id.* at 15 n.57, (“commentators constantly use the word ‘proportionate’ in relation to the regulation of weapons to protect combatants”).

expected harms to enemy combatants, both in the resort to war and in the conduct of war. This may seem an almost a priori truth. Most just war theorists assume that many combatants are liable to be harmed in war, though they differ in their accounts of the bases of liability. In my view, there cannot be a just cause for war unless the combatants whom it is necessary to attack to achieve the aims of the war are liable to be attacked.²² But if many combatants are liable to be attacked in war, it seems that it must be possible to harm them in excess of the harm to which they are liable, just as this is possible in individual self-defense. Hence there must be a possibility of narrow disproportionality. Yet, as I noted, the traditional theory of the just war claims that all combatants are liable to be *killed* at any time in war. One might think that this entails that it is impossible to harm them beyond their liability.

There are two replies to this. One is the familiar point that there are harms worse than death, or at least worse than immediate death. Suppose a group of enemy combatants are occupying a relatively unimportant military facility. Gaining possession of the facility in an intact condition would confer a minor military advantage but the combatants occupying it cannot be killed or driven out in any of the ordinary ways without destroying it. The only way to take possession of the facility is to release a gas into it that will kill the combatants only after causing them to suffer incapacitating agony for a week. Even if these combatants are liable to be killed, they may not be liable to be killed in this way as a means of securing a minor military advantage.

The second reply is more important. It is that, as a matter of morality, not all combatants are liable to be killed during a state of war. I have argued at length elsewhere that “just combatants” who fight for a just cause, in a just war, and by permissible means are not morally liable to be harmed in any way.²³ I also believe, though I will not argue for it here, that not all “unjust combatants” who fight for an unjust cause in an unjust war are liable to be killed. There are some who pose only a minor threat of harm and are only minimally responsible for even that minor threat. They are not liable to be killed at all. And there are others whose liability to be killed is conditional on there being a limited number of them that would have to be killed to achieve a certain aim. If more than a certain number would have to be killed to achieve that aim, none may be liable to be killed. In the Falklands War, British

22. For elaboration, see Jeff McMahan, *Proportionality and Just Cause: A Comment on Kamm*, J. MORAL PHIL. (forthcoming).

23. MCMAHAN, *supra* note 7, at 7-15.

combatants had to kill 650 Argentine combatants to preserve British sovereignty over the Falkland Islands, which had only 1800 inhabitants at the time.²⁴ Perhaps those combatants were liable to be killed as a means of preventing the success of Argentina's aggression. But had it been necessary to kill an additional 100,000 Argentine combatants to secure victory, it is reasonable to believe that killing all of them would have been disproportionate in relation to the importance of preserving British sovereignty and hence that it would not have been permissible to kill any of them. In that case we should probably conclude that none of them would have been liable to be killed.²⁵ A parallel argument could be given for a proportionality restriction on individual acts of war that would kill a large number of unjust combatants when doing so would achieve no more than a minor military advantage.

From the fact that morality imposes a narrow proportionality constraint on the practice of war, it does not follow that either the law of *jus ad bellum* or IHL ought to include a narrow proportionality requirement. There are various reasons for thinking that the law ought not to mirror morality in this respect. I will mention only two. One derives from the fact that there is as yet no mechanism for the coordinated international enforcement of the prohibition of unjust war. It is therefore necessary for the deterrence of unjust war that victims of unjust aggression fight defensively rather than submit. And a legal *ad bellum* proportionality requirement, whether narrow or wide, that might inhibit defense against unjust aggression would therefore threaten to weaken deterrence. In determining whether the law ought to recognize any *ad bellum* proportionality constraint, this consideration would have to be weighed against the otherwise obvious appropriateness of the legal enforcement of the moral prohibition of disproportionate war.

The second reason for doubting that there should be a narrow proportionality requirement in the law of war is in tension with the first. It is that such a requirement would be pointless because it would not be taken seriously. It is hard to imagine any state refraining from engaging in an otherwise just war on the ground that the war would require harming enemy combatants to an

24. For an authoritative history of the war, see LAWRENCE FREEDMAN, *OFFICIAL HISTORY OF THE FALKLANDS CAMPAIGN: VOLS. 1 & 2* (2005).

25. For more on the ways in which narrow proportionality can be sensitive to the number of unjust combatants, see Jeff McMahan, *The Relevance to Proportionality of the Number of Aggressors*, in *THE ETHICS OF WAR: NEW ESSAYS* (Saba Bazargan & Samuel Rickless eds., forthcoming).

extent that would be disproportionate in relation to the importance of achieving the just cause.

V. THE RELATION BETWEEN
IN BELLO PROPORTIONALITY AND
AD BELLUM PROPORTIONALITY

Merely for the sake of simplicity, however, let us confine the discussion for the moment to wide proportionality in war, which has always been the focus of discussion in the moral and legal literature. Wide proportionality is proportionality in harms inflicted on people who are not liable to suffer those harms. According to traditional just war theorists, those who are not morally liable to be harmed in war are civilians. Similarly, in international law, while combatants are legally liable to attack in war, civilians are not. Thus, in both just war theory and international law, the bad effects that must be outweighed if a war or an individual act of war is to be justified are primarily harms inflicted on civilians as a side effect of military operations. As I noted near the beginning of the previous section, the relevant bad effects are the same whether the assessment is of *ad bellum* proportionality or of *in bello* proportionality.

One would naturally suppose, therefore, that the relevant good effects against which these bad effects must be weighed would also be the same in both *ad bellum* and *in bello* proportionality. In that case, a war would be guaranteed to be proportionate if all its constituent acts of war would be proportionate. But, in fact, traditional just war theory weighs harms to civilians against one set of expected effects in assessing *ad bellum* proportionality and against a wholly different set of expected effects in assessing *in bello* proportionality. To the extent that the law of war recognizes a proportionality constraint on the resort to war, it must do the same.

In just war theory, *ad bellum* proportionality is a matter of whether the harms to civilians the war can be expected to cause are excessive in relation to the importance of achieving the just cause for war, together with other relevant good effects (which I will discuss later in section VII). Suppose, for example, that one state has been wrongly invaded by another and that the only effective means of national self-defense will unavoidably cause extensive casualties among the aggressor state's civilian population. Just war theory asserts that defensive war is permissible only if the expected harm to enemy civilians will not be excessive in

relation to the achievement of the just cause of defeating the wrongful aggression.

It is worth mentioning that some contemporary just war theorists argue that it is possible that a war could be permissible even in the absence of a just cause.²⁶ These theorists interpret a just cause for war as providing a liability justification for the intentional harming and killing that war typically involves. They claim, that is, that there is a just cause for war only when those whom it is necessary to attack as a means of preventing or correcting a wrong are morally liable to be attacked as a result of their responsibility for that wrong.²⁷ But it is possible in principle, these theorists concede, that there could be a lesser-evil justification for a war fought against people who are not morally liable to be attacked. For a war of this kind to be proportionate, the good effects that it could be expected to achieve must substantially outweigh the harms the war would inflict on people who are not liable to be harmed (which in this case would include combatants on the opposing side). Such a war would be unjust, because it would infringe the rights of those warred against, but nevertheless morally justified. The rights infringed would be overridden.

I mention this possibility only for the sake of completeness and will not discuss it further. The important point here is that in virtually all actual cases of justified war, the expected harms to civilian bystanders must be weighed against the expected value of achieving the just cause to determine whether the war would be proportionate. If the aims of the war are unjustified, it is scarcely possible that the war could satisfy any plausible *ad bellum* proportionality requirement, as it would have few or no effects that could weigh against and counterbalance the inevitable harms to civilians. In short, a war that lacks a just cause, or at least a war that lacks justified aims, cannot satisfy the moral requirement of wide *ad bellum* proportionality.

Given that whether a war as a whole is proportionate depends on whether its expected good effects, which consist primarily of the effects that are constitutive of the achievement of the just cause, outweigh the harms it is expected to cause to civilians, one would naturally expect that just war theory's *in bello* proportionality constraint would require that the expected harms that an individual act of war would inflict on civilian bystanders be outweighed by the expected causal contribution the act would make to the

26. See, e.g., Michael Neu, *Why McMahan's Just Wars are only Justified and Why That Matters*, 19 ETHICAL PERSPECTIVES 235 (2012); Jeff McMahan, *Just War*, 19 ETHICAL PERSPECTIVES 257 (2012).

27. See McMahan, *supra* note 22.

achievement of the just cause, together with any other relevant good effects it might have. But traditional just war theory instead agrees with IHL that the expected harms from an act of war must be weighed against the military advantage the act can reasonably be expected to provide.

The situation in the law is similar to that in traditional just war theory. As we have seen, there is no generally recognized proportionality requirement—not even a requirement of wide proportionality—in the law of *jus ad bellum*. But if there were, it would almost certainly have to require that the expected harms to civilians not be excessive in relation to the legally legitimate aim of the war, which would normally be national self-defense or collective defense against aggression. It could not require that expected harms to civilians be weighed against the type of effect that IHL requires they be weighed against—namely, military advantage. For a legal *ad bellum* proportionality requirement could not plausibly say that a war as a whole can be proportionate only if the harms it is reasonably expected to cause to civilians would be outweighed by the expected military advantage the war would provide. Military advantage is good only instrumentally, and what it is instrumental to is usually victory in war. Wars are seldom, if ever, fought only for the sake of achieving a military advantage, either over the state warred against or over other states that would be militarily disadvantaged by the defeat of the state warred against. *Ad bellum* proportionality therefore could not in general be a matter of whether the harms a war would inflict on civilians would be outweighed by the military advantage that would be gained through victory. Thus, if there were a substantive legal criterion of *ad bellum* proportionality, it could not weigh harms to civilians against the same type of effect against which they are weighed by the *in bello* proportionality requirement in IHL.

The reason why traditional just war theory cannot assess *in bello* proportionality by weighing the harms that an act of war would cause to civilians against the contribution the act would make to the achievement of the just cause is that it insists that combatants can permissibly fight in an unjust war, provided that they do not violate the principles that govern the conduct of war—that is, the principles of *jus in bello*. But this means that they can fight permissibly only if it is possible to fight in an unjust war without violating the *in bello* principles, such as the requirement of proportionality. This would not be possible, however, if an act of war that harmed civilians could be proportionate only if it made a contribution to the achievement of a just cause, or of other justified

aims. For acts of war will not contribute to the achievement of justified aims if the war itself pursues only unjustified aims. It is therefore essential to traditional just war theory's claim that it can be permissible to fight in an unjust war that acts of war can be proportionate even in a war that has no morally justifiable aims. This is why traditional just war theory cannot assess *in bello* proportionality by weighing harms to civilians against an increase in the probability of achieving the aims of the war. It has to weigh harms to civilians against some kind of effect that both just and unjust combatants can consistently aim to achieve, such as military advantage.

The theoretical explanation of why the law of war also insists that *in bello* proportionality be assessed by weighing expected harms to civilians against expected military advantage is similar. But there is also a historical explanation. The law of war was developed gradually over a number of centuries. When states began to consolidate their power after the Treaty of Westphalia of 1648, it became increasingly possible to regulate the conduct of war through treaties and agreements among states.²⁸ Restraints on the conduct of war, if observed by all, could work to the advantage of all. And compliance could be monitored by states and violations punished by reprisal. By contrast, restraints on the resort to war remained largely infeasible because, in the absence of any means of enforcement, observing them would often be against the interest of powerful states. This practical obstacle to restraining the resort to war was compounded by the continued evolution of the doctrine of state sovereignty, which eventually recognized the resort to war as a sovereign right of states. These developments discouraged efforts to impose legal constraints on the resort to war, so that by the nineteenth century, *jus ad bellum* had effectively ceased to be an element in the law of war. Only *jus in bello* remained. Its principles, therefore, had to be formulated without reference to *jus ad bellum*. A criterion of *in bello* proportionality had to be found that was neutral with respect to the aims of a war. Military advantage was the natural aim against which harms to civilians could be weighed.

It is, however, highly problematic to suppose that *in bello* proportionality can be determined by weighing harms to civilians against military advantage. It allows, for example, for the bizarre possibility that a war that necessarily violates *ad bellum* proportionality, because all the aims it will successfully pursue are unjustified, could nevertheless consist entirely of acts of war that

28. Westphalia, Peace of, Treaty of, 1648, in *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* (John P. Grant & J. Craig Barker eds., 3rd ed. 2009).

are proportionate, because in each case the military advantage afforded by the act would somehow outweigh the harms it would inflict on civilian bystanders. I say “somehow outweigh” because there is an even deeper problem here. Proportionality is essentially a requirement that the bad effects of an act be justified by being outweighed by other effects. And only an effect that is *good* can outweigh and thus justify the causing of one that is bad. Yet military advantage is not itself good, impartially considered. Its value is entirely instrumental and whether it is good or bad, impartially considered, therefore depends on the ends it is instrumental to achieving. Only if the aims of a war are justified, and therefore good, is military advantage instrumentally good. If the aims are unjustified, and therefore bad, military advantage is derivatively bad as well.

It seems, therefore, that the idea that an act of war can be proportionate if the harms it causes to civilians are outweighed by the military advantage it affords is incoherent in its application to wars that are unjust because they will achieve only aims that are unjustified. This is particularly clear in cases in which the aim of a war is to do something that is impermissible even under the principles of *jus in bello*: for example, genocide, which involves the intentional killing of civilians. In a war that is fought with the aim of committing genocide, military advantage is instrumental to the killing of civilians. The understanding of *in bello* proportionality in the traditional theory of the just war and in IHL therefore implies that an attack on a military target in such a war is proportionate if the civilian deaths it causes as a side effect are outweighed by the instrumental advantage it provides in enabling the perpetrators to kill other civilians. This is clearly unacceptable; so, therefore, is the understanding of *in bello* proportionality found in the traditional theory of the just war and in IHL.

This problem is easily remedied in just war theory by making the criterion of *in bello* wide proportionality the same as that in *ad bellum* wide proportionality—that is, by weighing the harms an act of war causes to civilian bystanders against the contribution that the act makes to the achievement of the justified aims of the war. This, of course, entails that acts of war that harm civilians in a war that has no justified aims cannot be proportionate in the wide sense. Because the satisfaction of wide proportionality is a condition of moral permissibility, it follows that it cannot be permissible to harm or kill civilians, even as a side effect, in a war that lacks a justifying aim.

The problem is far more difficult in law. I have elsewhere explored some possible solutions, with disappointing results, but will not rehearse those arguments here.²⁹

VI. PUNISHMENT AND DESERT, DEFENSE AND LIABILITY

Proportionality is perhaps more familiar as a constraint on punishment than it is as a constraint on defense. It is therefore important to understand the ways in which proportionality in defense differs from proportionality in punishment.

As I mentioned earlier, proportionality in individual self-defense is normally assumed to be concerned only with the harm inflicted on the threatener by the defender—that is, it is assumed to be a matter of narrow proportionality only. A parallel assumption is generally made about punishment as well—that it is concerned only with harms inflicted on those who are punished. But this is a mistake that has had terrible consequences. Punishment often harms innocent bystanders as a side effect, just as military action in war does. This is particularly true of capital punishment. The death of a child is one of the worst misfortunes that a parent can suffer. And the death of a parent, perhaps especially by killing, can also be a dreadful misfortune for a child, particularly when the child is young. Yet capital punishment often inflicts these terrible harms on the parents or children of the person who is executed. This is an important moral reason in many cases to sentence an offender, no matter how evil or depraved, to life imprisonment rather than execution.³⁰

Proportionality in punishment is generally thought to be a relation between the wrongdoing a person has done in the past and the harm that is later inflicted on him as punishment. It is therefore essentially retrospective, in that it requires a comparison between past action and present harm. Disproportionate punishment inflicts harm that is excessive in relation to what the criminal has done in the past.

Many people assume that proportionality in defense, and particularly *ad bellum* proportionality in war, is similarly retrospective. During and after the Israeli invasion of Gaza in 2008, for example, many critics of the invasion claimed that it was disproportionate because the harms that the Israeli forces inflicted

29. Jeff McMahan, *War Crimes and Immoral Action in War*, in *THE CONSTITUTION OF CRIMINAL LAW* 178 (Antony Duff, Lindsay Farmer, Sandra Marshall & Victor Tadros, eds., 2013).

30. This point is developed at length in VICTOR TADROS, *THE ENDS OF HARM* 349, 356-59 (2011).

on Palestinian civilians were vastly excessive in relation to the harms that Palestinians in Gaza had inflicted on Israeli civilians, which provoked the invasion. These critics pointed out that the rockets that the Palestinians had fired into Israel had killed only a few Israeli civilians, whereas the invasion killed over a thousand Palestinian civilians.

If the Israeli attack on Gaza had been a *reprisal*, this way of assessing proportionality would have been appropriate. In law, a reprisal is a use of force intended to compel an adversary to halt or repair some breach of international law and it is generally held that the harm done by way of reprisal must be proportioned to the harm caused by the initial offense. In the International Criminal Tribunal for the Former Yugoslavia, for example, the Trial Chamber ruled that “reprisals must not be excessive compared to the precedent unlawful act of warfare.”³¹ But it would be a mistake to conflate proportionality in reprisal with proportionality in defense. The aim of defensive violence is the physical prevention of harm by a threatener. Proportionality in defense is therefore essentially prospective. It weighs the harms that an act of defense will *cause* against those that it will *prevent*. For this reason, the harms that Palestinians in Gaza had inflicted on Israeli civilians in the past were relevant to the proportionality of the Israeli invasion only insofar as they provided evidence of the Palestinians’ intentions and capabilities in causing further harm in the future.

That proportionality in punishment is retrospective while proportionality in defense is prospective is only one difference between them. It is generally thought that another difference is that proportionality in defense is simpler, in that it is concerned only with weighing harms caused against harms prevented, whereas proportionality in punishment must take account of the mental elements in the crime for which punishment is imposed. Proportionality in punishment must take account not only of how much harm an offender caused but also the extent of the offender’s culpability, for both of these considerations together determine how much harm the offender deserves. How much harm an offender deserves as punishment depends, therefore, what his motives and intentions were in committing the offense for which he is to be punished, what he knew or ought to have known, whether he acted recklessly or under duress, and so on.

That proportionality in defense does not take account of the mental elements that are essential to the determination of proportionality in punishment is a natural assumption for those

31. Prosecutor v. Kupresic, Case No. IT-95-16-T, Judgment, ¶ 535 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

concerned with proportionality in war, since it has been assumed that proportionality in war is wide proportionality only—that is, that it is concerned only with harms caused to civilians, who are not liable to be harmed. The mental states of civilians are clearly irrelevant to how much harm it can be proportionate to cause them as a side effect of military action. Yet the mental states of someone who is potentially liable to be harmed in certain ways are highly relevant to the determination of the degree of harm to which he is liable, and thus to how much harm it can be proportionate to inflict on him in defense. A threatener's mental states are, in other words, highly relevant to narrow proportionality. The degree of harm that it can be proportionate to inflict on a threatener in defense varies, for example, with the degree of his moral responsibility for the threat he poses and, in particular, with whether he is culpable and, if so, the degree of his culpability for posing the threat. If, as I argued in section IV, narrow proportionality can be a serious issue in war, then there is a dimension of proportionality in war that is sensitive to considerations of motive, intention, epistemic limitation, duress, and so on, just as proportionality in punishment is.

The main difference between narrow proportionality in punishment and narrow proportionality in defense is that while the former is concerned with harms that people allegedly *deserve*, the latter is concerned with harms to which people are *liable*. To understand the difference between narrow proportionality in defense and narrow proportionality in punishment, we must therefore understand the differences between desert and liability. Both desert and liability are corollaries of the forfeiture of rights, but the moral implications are different in the two cases.

It is generally agreed that to deserve to be harmed, a person must be culpable. Yet according to most accounts of the basis of liability to defensive harm, liability does not require culpability. There are, however, accounts of liability to defensive harm that claim that culpability is a necessary condition of liability. It is therefore not a conceptual difference between desert and liability that the former requires culpability whereas the latter does not.

There are two main differences between desert and liability. The first is that a person can deserve to be harmed even when harming her will have no good effects other than the fulfillment of her desert, whereas a person cannot be liable to be harmed unless harming her will have good effects, such as the prevention of a harm that she will otherwise unjustifiably cause. There are several ways of making this point. One is to say that while giving a person what she deserves can be an end in itself, a person can be liable to

be harmed only if harming her is a means or unavoidable side effect of bringing about some good effect, such as the prevention of a harm. It is a corollary of this claim that there is a necessity condition internal to the concept of liability. A person cannot be liable to be harmed in a way that is unnecessary for the achievement of some good effect.

Another way of making the same point is to say that liability is a matter of justice in the distribution of harm when *some* harm is unavoidable. Suppose, for example, that it is unavoidable that one person in a group of people will be harmed but it is a matter of choice which person it will be. If one person rather than any of the others is responsible for creating the threat, he is then liable to be harmed—though if harm could be avoided altogether, there would be no reason to harm him. By contrast, a person can deserve to be harmed even when further harm is wholly avoidable. Normally it is hoped that the infliction of deserved harm will, through defensive or deterrent effects, diminish the overall level of harm that people will suffer; but it is usually held that the infliction of deserved harm can be permissible even when it will not have any such good effects.

The second important way in which liability differs from desert is that the amount of harm a person is liable to suffer can vary with the circumstances whereas the amount of harm a person deserves to suffer cannot, or at least not in the same ways. The amount and perhaps even the kind of harm a person deserves to suffer is fixed by the nature of the wrongdoing of which he is guilty and the degree to which he is responsible for that wrongdoing. There is, of course, controversy in the philosophy of punishment about whether the nature of the wrongdoing that is the basis of desert can be a matter of chance—for example, whether a person who attempts a murder but fails as a result of conditions beyond his control deserves the same punishment as he would have if he had succeeded. But whatever position one takes on the relevance of luck to desert, it remains true that liability is vulnerable to chance in ways that desert is not.

Whereas the amount of harm a person deserves is fixed by the gravity of the wrong for which he is responsible and the degree to which he is responsible for it, these two factors do not determine the degree of harm to which a person may be liable but at most set a limit to it. There is always a limit to the amount of harm to which a person can be liable as a matter of defense. And it seems that this limit is determined by the amount of unjustified harm he will otherwise cause, together with the degree of his responsibility for the threatened harm. Yet there are various ways in which the

amount of harm to which he is liable can vary beneath the limit. I will mention two.

First, the harm to which a person is liable can vary with the action of others. Suppose that, as I believe, liability to harmful preventive action arises from moral responsibility for a threat of unjustified harm. On that assumption, if I alone am responsible for the fact that either I or another person will unavoidably suffer a harm, then I am liable to suffer that harm. It does not follow that it is permissible, all things considered, to impose it on me, for it is possible that liability can be outweighed by other considerations. But in the absence of other relevant considerations, I am liable to be harmed by the other person, or by a third party, if that is necessary to prevent the other person from becoming the victim of the threat for which I am responsible. Next, suppose that I and the other person share responsibility for the fact that one of us must be harmed, but that the greater share of the responsibility is his. In that case, although I may bear as much responsibility as I did in the case in which I alone was responsible, it is the other person who is liable to suffer the harm, assuming that all of the harm must go to one or the other of us. That is, whether I am liable to suffer the harm depends on whether someone else's responsibility for the fact that someone must be harmed is greater than my own. If, furthermore, the unavoidable harm is divisible between the other person and me, I may be liable to a share of the harm that is proportional to my share of the responsibility.

The amount of defensive harm to which a person is liable can also vary with the defensive options of others. Suppose, for example, that one person is charging toward another wielding a meat cleaver with the evident intention of lopping the other's head off. Suppose the only means of defense the potential victim has is a flame thrower. Assuming that chopping the intended victim's head off would be unjustified and that the threatener is morally responsible for the threat he poses, he is, in these circumstances, morally liable to be killed—that is, he has forfeited his right not to be killed. But suppose that in addition to the flame thrower, the potential victim happens also to have a pistol and is a skilled marksman. In that case, the threatener is not liable to be killed but is liable only to be incapacitated by being shot in the leg. This example illustrates my earlier claim that there is a necessity condition implicit in the notion of liability, so that a person cannot be liable to suffer a greater defensive harm if the infliction of a lesser harm would have an equal or greater probability of fully achieving the defensive aim.

One implication of the fact that the harm to which a person is liable can vary in these ways, though the harm a person deserves cannot, is that a person can be liable to suffer far more harm, or far less harm, than he deserves. A driver who is momentarily distracted by the use of her mobile phone is liable to be killed if that is necessary to prevent her from running over a pedestrian, but she certainly does not deserve to be killed. Similarly, a person whose attempt at murder can be thwarted by knocking him unconscious is liable only to be knocked unconscious, though he may deserve a substantially greater harm.

In concluding this section, it is perhaps worth mentioning a challenge to the idea that there is a limit to the amount of defensive harm to which a person can be liable that is a function of two variables I cited—namely, the amount of harm the person will otherwise cause and the degree of his responsibility for the threat of that harm. It may initially seem obvious that a person who will otherwise inflict only a tiny harm on another person—for example, a brief, minor pain—cannot be liable to be killed as a means of preventing him from inflicting the harm, even if he is fully culpable for doing so, in the sense that no excusing or mitigating conditions apply to his action. Consider, for example, a person who would like to cause pain to his enemy, who is in no way liable to suffer any pain. The most this person can do, however, is to press a button that will cause his enemy to experience a barely perceptible pain for several hours. It seems that while he is liable to be caused some small harm as a means of preventing him from doing this, he cannot be liable to be killed.

But now suppose that there are 999 other people who at the same time are also about to press a button that will have the same effect, so that these 1000 people's acts will together cause the one victim to suffer excruciating torture for several hours.³² Suppose further that the one person with whom we began knows that the slight pain that he will cause will be added to the pains caused by the 999 others, so that he knows that he will be making a tiny contribution to the torture of his enemy. Indeed, each of the 1000 knows that the other 999 will press their buttons at the same time, so that the effect of their combined acts will be the torture of one innocent person, and each of the 1000 is motivated to press his or her button by a malicious desire to inflict pain on the innocent victim. Suppose, finally, that the potential victim, or a third party, can kill all 1000 people before they push their buttons. It is not

32. This example is obviously indebted to case of the harmless torturers in DEREK PARFIT, *REASONS AND PERSONS* 80 (1986). The difference is that in Parfit's case, each of the 1000 button pushers causes a very slight pain to each of 1000 victims.

possible, however, to kill fewer than all 1000. Either they will all be killed or the one innocent victim will undergo a horrible torture. I know of no one who believes that it would be permissible to kill the one button pusher in the first case in which he alone will inflict a minor pain on one person. But some people, including several eminent moral philosophers with whom I have discussed this problem, believe that in the second case it would be permissible to kill all 1000 culpable button pushers in defense of the victim. Since it is worse for 1000 people to die than for one person to suffer intense agony for several hours, the justification—if there is one—for killing the 1000 button pushers cannot be a lesser-evil justification. In fact, there is no kind of justification it could be other than a liability justification. It seems, therefore, that those who believe that it would be permissible to kill all 1000 culpable button pushers to prevent them from together torturing their single victim must reject the idea that there is a limit to the amount of defensive harm to which a person can be liable that is fixed by the amount of harm he will otherwise cause and the degree of his responsibility for the threat he poses. For the harm the one button pusher will cause and the degree of his responsibility are the same in the two cases, yet those who believe the pusher is liable to be killed in the second case cannot plausibly believe that he is liable to be killed in the first case.

I do not have an intuition about the second case in which I have confidence. This seems to me a type of problem about which our intuitions cannot be expected to be reliable. It is a type of case for which we need guidance from a moral theory. But to the extent that I have an intuition, it is that it is not permissible to kill any of the malicious button pushers. Since this does not seem to be a case in which they are liable to be killed but the liability justification is defeated by other considerations, my tentative view is that none of them is liable to be killed. This is not because I think that whether a person is liable to be killed cannot depend on what other people are doing. As I just noted, I think it can; indeed, there are, I believe, cases in which a person is not liable to be killed if he acts alone but becomes liable to be killed if he does the same act when others are doing it as well.³³ The reason why it seems to me that none of the button pushers is liable to be killed is simply that each will otherwise cause only a tiny harm, so that killing any one of them would do no more than reduce one person's pain by a barely perceptible amount. Killing any one of them therefore cannot be proportionate in the narrow sense; hence none of them is liable to

33. Jeff McMahan, *What Rights May Be Defended by Means of War?*, in *THE MORALITY OF DEFENSIVE WAR* (Cécile Fabre & Seth Lazar eds., 2014).

be killed. This is what seems right to me, though many would disagree.

VII. THE DEONTOLOGICAL NATURE OF PROPORTIONALITY

It is often said that proportionality is the consequentialist element in doctrines of self-defense and just war. But if this is meant to indicate anything more than that proportionality is concerned with the consequences of action, it is highly misleading. The assessment of proportionality involves a great deal more than simply aggregating harms and benefits to see how the sums compare. It instead takes into account various principles and distinctions found in deontological ethics. In this final section I will examine some of the ways in which the weighing of harms and benefits in the assessment of proportionality is complicated by deontological considerations.

Thomas Hurka, author of several seminal and important articles on the nature of proportionality, was among the first to identify some of the deontological elements in proportionality and to appreciate just how extensive they are.³⁴ Much of the discussion in this section draws its inspiration from his work, though it also takes issue with some of his explanations of the non-consequentialist dimensions of proportionality. One of Hurka's claims is that certain harms caused by war are either excluded from or discounted in the assessment of proportionality, but there are reasons for doubting whether this is right.³⁵ He says, for example, that "if an aggressor nation's citizens will be saddened by its defeat, that does not count at all against a war to reverse its aggression."³⁶ Perhaps this is right. If so, the explanation is probably that this is an instance of a type of harm that people have no right not to be caused to suffer. Another instance is the frustration that a man suffers when the threat of punishment effectively deters him from engaging in child molestation. If this is the only kind of sexual fulfillment he could enjoy, it seems that he is harmed by being forced to live without it. But because he has no right not to be forced to endure this deprivation, his frustration

34. Hurka, *supra* note 5; see also Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFFAIRS 34 (2005) [hereinafter Hurka, *Proportionality*]; see also Thomas Hurka, *The Consequences of War*, in ETHICS AND HUMANITY: THEMES FROM THE PHILOSOPHY OF JONATHAN GLOVER 23 (N. Ann Davis, Richard Keshen & Jeff McMahan eds., 2010).

35. See Hurka, *supra* note 5.

36. Hurka, *supra* note 5, at 135.

does not weigh at all against the establishment and enforcement of the law.

This may not, however, be the right explanation in the case of sadness caused by defeat. Compare the sadness that parents on the unjust side in a war experience when their child is killed in combat. If their child is liable to be killed, perhaps they have no right not to be caused to grieve at his death. Yet it seems that *this* sadness must count in assessing the proportionality of an otherwise just defensive war. It counts in the assessment of wide proportionality. It may be that Hurka's example appears to be a type of harm that does not count at all only because it is too trivial a harm to be taken seriously in a context in which there are so many incomparably greater harms that have to be taken into account.

Hurka also suggests that harms inflicted on enemy combatants must be "discounted" both in the assessment of *ad bellum* proportionality and perhaps even more so in the assessment of *in bello* proportionality.³⁷ Yet this way of understanding the matter seems to derive from the failure to distinguish between narrow and wide proportionality. If there were only one proportionality constraint that applied equally to harms to culpable aggressors and harms to innocent bystanders, then at least those harms inflicted on combatants fighting for unjust aims in an unjust war would have less weight than equivalent harms inflicted on civilian bystanders. One could understand their lesser weight as a form of discounting. But once it is recognized that narrow proportionality is distinct from wide proportionality, harms inflicted on unjust combatants can be understood as counting fully in the assessment of narrow proportionality but nevertheless being fully proportionate in relation to the combatants' liability. They only seem not to count because they are fully justified by the combatants' liability to suffer them.

While Hurka believes that only a few types of harm are excluded from or discounted in the assessment of proportionality, he argues that "many types of benefit are irrelevant."³⁸ He cites various examples: the pleasurable excitement that one's own soldiers might get from combat, the stimulation of creativity in artists who will produce more profound works of art, and economic benefits, such as the United States' recovery from the Depression as a result of World War II.³⁹ Yet in determining whether or how such benefits might count in the assessment of proportionality, it

37. *Id.* at 136.

38. *Id.* at 135.

39. *Id.* at 131.

is again essential to distinguish between narrow and wide proportionality. Consider economic benefits, which Hurka says “seem incapable of justifying war” even when they are substantial.⁴⁰ “An otherwise disproportionate conflict cannot,” he says, “become proportionate because it will boost gross domestic product (GDP).”⁴¹ But he later qualifies this judgment by distinguishing between different ways in which a benefit may be caused in war. He argues that if an economic benefit “results from a means to the war’s just cause,” it does not count in the assessment of proportionality.⁴² But if “the benefit results from the achievement of the war’s just cause itself,” it does count.⁴³ His contention, in short, is “that economic goods count when they are causally downstream from a war’s just cause, but not when they result only from a means to that cause.”⁴⁴

This seems an inadequate explanation and justification of the intuitions that Hurka is trying to defend. Indeed, Hurka himself supplies a counterexample: “If a nation’s citizens get pleasure from its military victory, that seems irrelevant to the war’s justification even if the pleasure results from the nation’s achieving a just cause.”⁴⁵ There is, however, a different explanation of why some economic benefits count in the assessment of narrow proportionality while others do not. Consider two instances of economic benefits resulting from the same war. First, a state’s just war of defense against an aggressor state requires that it make substantial purchases of expensive armaments from a third state, thereby stimulating that third state’s economy. Second, the first state’s defeat of the aggressor involves the overthrow of its despotic regime, which has been forcibly imposing damaging economic constraints on a neighboring state. As a result of the regime’s overthrow in the war, the neighboring state’s economy begins to flourish. Hurka would say that the economic benefit from the arms sales does not count in the assessment of proportionality because it results from the means to the achievement of the just cause, but that the economic benefit to the neighboring state from the removal of imposed economic constraints does count because it results from the achievement of the just cause itself.

A better explanation, at least with respect to narrow proportionality, is that the benefits from the arms sales do not weigh against the harms to the aggressors because the aggressors

40. *Id.*

41. *Id.*

42. *Id.* at 133.

43. *Id.*

44. *Id.*

45. *Id.* at 134.

are in no way responsible for the fact that the third state has lacked the benefits of those sales. Only if the aggressors were responsible for the absence of those benefits would they be liable to be harmed as a means of providing them. By contrast, the economic benefits to the neighboring state do weigh against the harms to the aggressors because the aggressors are responsible for the conditions that prevented the neighboring state's economy from flourishing. The aggressors are therefore liable to be harmed as a means of eliminating the harmful economic constraints they have unjustifiably imposed.

There remains the question whether either of these economic benefits can weigh against harms to people who are not liable to those harms in the assessment of wide proportionality. Hurka's distinction between benefits that result from means to the achievement of the just cause and those that result from the achievement of the just cause seems irrelevant to whether the economic benefits can weigh against harms to non-liable bystanders. The question whether an economic benefit produced by the state fighting a just war can help to justify harms it causes to innocent bystanders as a side effect in the course of the same war seems unaffected by whether the benefit derives from the fighting or from the victory.

Yet there does seem to be one way in which either of the two economic benefits—the arms sales or the lifting of wrongly imposed economic constraints—can weigh against harms to non-liable people in the assessment of wide proportionality. These benefits can offset or compensate for economic harms suffered by the same people who receive the benefits. Suppose, for example, that a military operation by the state fighting a just war will have as an unavoidable side effect the destruction of an unoccupied warehouse in the territory of the third state that contains a stockpile of advanced and therefore expensive weapons. It seems that this economic harm should count against the military operation in the assessment of wide proportionality. But it also seems that it can be offset and rendered proportionate by the economic benefits that the owners of the warehouse are deriving from the increased sale of arms.

It may seldom happen, though, that civilians who suffer a certain type of harm as a side effect of military operations in war also receive benefits of a corresponding type as a further side effect. In practice, whatever benefits are produced as a side effect of war usually go to different civilians from those who suffer harms as a side effect. (Indeed, the benefits often go to civilians on one side while the harms go to civilians on the other.) And here

Hurka's intuitions about economic benefits seem correct. It may be doubtful, for example, that economic benefits to some non-liable civilians can weigh against and cancel economic harms to others. And it seems even less likely that economic benefits to some can outweigh and render proportionate certain other types of harm—such as death and wounding—inflicted as a side effect on others. But this is not, as Hurka suggests, because economic benefits as a type do not count at all in the assessment of proportionality, or that they count only when they are side effects of the achievement of the just cause. As we have seen, they do count in some instances, such as when they compensate the victims of economic harm. The issue seems to be the quite general issue of when acts that harm some people are rendered permissible because they also provide benefits for others.

There are many dimensions to this issue, which is much too large to be more than superficially addressed in the remainder of this article. But it is worth mentioning a few distinctive elements of deontological morality that seem highly relevant to the ways in which harms and benefits weigh against one another in the determination of narrow and wide proportionality.

One consideration that seems relevant to the weighing of harms and benefits is whether what is called a “benefit” is the conferral of a pure enhancement—for example, making the already affluent even more affluent—or the prevention or elimination of a harm—for example, preventing civilians from being wounded or releasing political prisoners from captivity. Benefits of the latter type are more likely than those of the former to weigh against harms inflicted as a side effect. (Similarly, a “harm” may have greater weight if it involves causing people to be in an intrinsically bad state, such as a state of suffering, than if it involves only a loss that leaves the victims in a good state overall, such as a modest financial loss suffered by the highly affluent.) Some philosophers have argued that even when a harm and a benefit go to the same person, the ability of the benefit to outweigh the harm depends in part on whether it takes the form of a pure enhancement or involves the prevention of a harm.⁴⁶

There are also various ways in which the weight that a benefit or harm has in the assessment of proportionality may depend on the way in which it is brought about. It seems to make a difference, for example, whether a harm to a person who is not liable to suffer it is inflicted as an intended means of achieving a goal in war or as an unintended but foreseen side effect of military

46. See, e.g., Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117 (1999).

action. Traditional just war theorists generally claim that intentionally harming or killing civilians as a means is ruled out by the requirement of discrimination, so that the issue of whether such harms can be rendered proportionate by outweighing benefits does not arise. But very few people, and very few moral philosophers or just war theorists, are genuine absolutists about discrimination. Most of us accept that it can be permissible to harm or kill a wholly innocent or non-liable person as a necessary means of preventing a much greater harm to other innocent people. That is, we accept that there can, in rare conditions, be what I call a lesser-evil justification for the harming or killing of a person who retains her right not to be harmed or killed. But the proportionality constraint governing such acts is significantly more demanding than that which governs the harming or killing of a non-liable person as an unintended side effect. It may help to elucidate this claim to offer an illustration that presupposes an admittedly artificial and unrealistic degree of precision. Suppose that it would be proportionate to kill five innocent people as a side effect of action necessary to save 100 innocent people but that it would be disproportionate to kill six innocent people as a side effect of saving 100. It would then be clearly disproportionate to kill five innocent people as a means of saving 100 and might be disproportionate to kill five even as a means of saving 300. But it would be permissible to kill five as a means of saving 10,000.

It is particularly wide proportionality that is sensitive to the mode of agency by which harms and benefits are produced. It is sensitive not only to the distinction between means and side effects but also to the distinction between doing harm and allowing harm to occur. Thus, an act of war that causes a certain amount of harm to innocent people as a side effect is not rendered proportionate in the wide sense just because it also prevents an equivalent, or even somewhat greater amount of harm to other innocent people. Suppose, for example, that by destroying a certain military target, just combatants can prevent 20 innocent civilians from being killed. But the strike on the target will unavoidably kill 10 different innocent civilians as a side effect. This attack would be disproportionate even though it would save twice as many civilians as it would kill. This is because of the moral asymmetry between killing people and allowing them to die, or allowing them to be killed.

Next consider a variant of this example. Suppose that the strike on the military facility that would prevent 20 innocent civilians from being killed would not kill any civilians as a side effect. But it would kill 10 enemy combatants (who are on the

unjust side). Suppose that these combatants have two roles: they alternate between fighting and serving as medics. Today they are fighting but tomorrow each of them is scheduled to perform a life-saving surgery on a civilian. If these 10 combatant-medics are killed today, the 10 civilians whom they would have saved will die in the ensuing days. It seems that in this case, in contrast to the previous one, it is proportionate to strike the military target, even though in both cases the strike will result in the deaths of 10 civilians as a side effect. The explanation of why the strike is disproportionate in the first case but proportionate in the second is that in the first case, it kills 10 innocent people, whereas in the second it prevents 10 innocent people from being saved. And the constraint against killing people is stronger than the constraint against preventing people from being saved.⁴⁷ (These constraints can, of course, interact with others. It might be, for example, that if the number of people who could be saved were high enough, it would be proportionate to kill 10 innocent civilians as a side effect of saving them but disproportionate to intentionally prevent 10 people from being saved as a means of saving them.)

I will conclude by noting one further way in which considerations of agency seem to affect the assessment of proportionality. Suppose that Aggressia, a state that is fighting an unjust war, sincerely threatens that if its adversary, Justitia, continues to fight, it will destroy the capital of its adversary's closest ally with a nuclear weapon. Suppose that in the absence of this threat, it would be clearly proportionate for Justitia to continue to fight. The question is whether the fact that Aggressia will kill millions of innocent people if Justitia continues to fight can make it disproportionate in the wide sense, and therefore impermissible, for Justitia to continue. What is distinctive about this issue is that what might make the action of one agent disproportionate is the action of another. In the moral philosophy literature, this is referred to as the *problem of intervening agency*.

There are three broad responses to this problem. One is that whether an agent's action is proportionate in either the wide or the narrow sense cannot be affected by the consequences of the acts of other agents. Agents cannot be responsible for what other free agents choose to do. It is, however, hard to believe that this could be right. Decision makers in Justitia know that if they decide to continue to fight, their ally's capital city will be destroyed, whereas if they cease to fight, it will not be. These facts *must* be relevant to

47. See Matthew Hanser, *Killing, Letting Die and Preventing People from Being Saved*, 11 UTILITAS 277 (1999).

the permissibility of continuing to fight, and the way they are relevant is through their effect on proportionality.

The second response is to treat the acts of others as if they were natural forces. To the extent that it is predictable that another agent will inflict a harm if one does a certain act but not if one refrains from doing the act, that harm should count in the assessment of proportionality in just the way as an equivalent harm one's act might cause through purely physical processes, with no intervening agency. Yet this too is hard to believe. If whether an agent causes or allows a harm to occur can affect that weight that the harm has in the assessment of wide proportionality, then whether the agent causes a harm or another agent causes it must also make a difference.

The third response is that harms that an agent's action provokes through the intervening agency of others must count in the assessment of wide proportionality but must have a somewhat discounted weight in relation to equivalent harms of which the agent's action would be the proximate cause. This seems more plausible than either of the other more extreme positions.

There are various other complexities in the proportionality restrictions on defensive action that I cannot discuss here. I hope, however, to have revealed some of the intricacies in the notion of proportionality. Until these hitherto unappreciated dimensions of proportionality are taken into account, discussions of proportionality in self-defense and war will continue to be inadequate and misleading.⁴⁸

48. I presented earlier versions of this paper at Oxford University, the University of Miami, Middlebury College, Edinburgh University, Stirling University, Osgoode Law School at York University, Colgate College, Syracuse University, the University of California at Berkeley, Boston University, and Stanford University. I have benefited from written comments by Roger Crisp, Shelly Kagan, and Ken Simons, and from discussion with Ruth Chang, Nicolas Frank, Frances Kamm, and Larry Temkin.

THE UN CHARTER, HUMAN RIGHTS LAW, AND CONTINGENT PACIFISM

LARRY MAY*

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In this paper, I will argue that new developments in both the *jus ad bellum* law of the use of force, and the *jus in bello* law of armed conflict, have moved international law quite close to the position of contingent pacifism. The UN Charter was meant to eliminate recourse of war as we had known it.¹ And this continues to be the way the Charter is viewed today as a source of *jus ad bellum* law. In addition, there is a movement that sees that war cannot be conducted *jus in bello*, as we have, and still have respect for human rights. International humanitarian law has in the past largely followed the Just War tradition in regarding some wars as just even though war involves the intentional killing of humans. But that is changing with the human rights revolution that is sweeping across international law.

I will proceed by first discussing the general framework of *lex ferenda* international law that is beginning to influence *lex lata* international law. Second, I shall briefly discuss a new version of pacifism today, contingent pacifism, which seems especially close to where international law is moving today. I then spend several chapters first on the *jus ad bellum* and then several chapters on the *jus in bello*. In the third section, I will set out an argument that the UN Charter, as a source of *jus ad bellum* law, is nearly a contingent pacifist document. In the fourth section, I discuss

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1. See U.N. Charter art. 1, para. 1-4.

various court cases that interpret the UN Charter as holding something close to a contingent pacifist position. In the fifth section, I discuss how some scholarly commentators have come to understand the UN Charter's position on the justifiability of a State initiating war or armed conflict.

In the sixth section, I will describe a very recent controversy about the *jus in bello*, the way war or armed conflict is conducted, namely the conflict between human rights law and international humanitarian law. In the seventh section, I will discuss various ways that theorists and courts have sought to reconcile the two regimes of international law, especially concerning the doctrine of *lex specialis*, explaining why this attempted reconciliation moves international law closer to contingent pacifism than it had been. In the eighth section, I will describe the way that 18th Century texts on the laws of war provide a background for today's debates, where there were very serious restraints on killing during war. In the ninth and final section, I offer some concluding thoughts about how *jus ad bellum* and *jus in bello* are understood, or should be understood, in international law today. While somewhat controversial, my interpretation of the role of the UN Charter in *jus ad bellum* law, and the place of human rights law in the *jus in bello* law of armed conflict, at least at the level of *lex ferenda*, shows that international law is moving toward a position that is close enough to contingent pacifism to be worth noting and investigating.

I. AN EMERGING FRAMEWORK IN INTERNATIONAL LAW

In this first section I will set out the framework of emerging international law that seems to me to be close to pacifism. Then after a brief section on pacifism I will develop the arguments of the current section throughout the rest of the paper. The overarching idea behind the paper is that there is a strong current in *lex ferenda* (what law should be) international law, that is creating a new framework that is beginning to affect *lex lata* (what law is) international law.

The Oxford Encyclopaedic Dictionary of International Law states as a matter of fact that recourse to war is outlawed in international law.

In the attempts by the international community to prevent war, two instruments stand out. The General Treaty for the Renunciation of War (the Kellogg-Briand Pact) of 27 August 1928 (94 L.N.T.S. 57) condemned 'recourse to war

for the solution of international controversies and renounc[ed] it as an instrument of national policy ...' (art. I); and the Parties undertook to settle all disputes or conflicts by peaceful means (art. II). The U.N. Charter, in art. 2(4), requires all members to refrain from the threat or use of force; and art. 2(3) requires all members to settle disputes by peaceful means 'in such a manner that international peace and security, and justice, are not endangered'. The fact that war is, under contemporary international law, outlawed and therefore illegal does not mean that the conduct of any war is outwith the accepted rules on warfare[.]²

This is a statement about *jus ad bellum* as we see at the end, not *jus in bello*. But what is perhaps jarring is that the idea of war being illegal is presented as an uncontroversial fact of international law.

Since the end of World War I, many documents and scholars have confirmed the idea that war or armed conflict is illegal in international law. I will spend time in Sections III-V of this paper setting out some of the most important of these legal documents and arguments. But I should note that international law scholars are by no means in agreement that war is outlawed, primarily because of a controversy about how to understand the relationship between Article 2, discussed by the Oxford Dictionary authors, and Article 51 of the Charter, which seems to provide an exception for wars of self-defense, to the general prohibition of States to initiate war. Nonetheless, I will argue that the UN Charter, as one of the main sources of international law concerning *jus ad bellum*, is nearly a contingent pacifist document.

Jus in bello matters are quite different. The main body of law here is international humanitarian law which does not regard all strategies and tactics of war to be outlawed. Indeed, international humanitarian law seems to follow the Just War tradition in seeing only those tactics that target civilians or cause unnecessary or superfluous suffering to be illegal. Many, if not most, strategies and tactics of war are seemingly legal. In terms of international humanitarian law, there is no support for *lex lata* outlawry of war.

Yet, it will be my argument, advanced in Sections VI-VIII, that the *lex ferenda* law of war is changing. The main reason for such a change is that various court opinions, advisory statements, and scholarly pronouncements are urging that human rights law be

2. Outlawry (of war), in *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* (John P. Grant & J. Craig Barker eds., 3rd ed. 2009).

seen as having wide overlap with international humanitarian law. And here what is important is that human rights law does not seem to allow the intentional killing of one person by another—a practice that has been characteristic of war for millennia. Human rights law's very strong support for the right to life is not easily reconciled with strategies and tactics of war. So, there is an argument to be made in support of the claim that strategies and tactics, and other matters subject to the laws of war, should be seen as illegal, as a matter of *lex ferenda*, and this is likely to affect future *lex lata* understandings of the law of war.

The central claim of the paper is that international law, as a matter of *lex ferenda* if not *lex lata*, is close to pacifism, at least to what I will call contingent pacifism. The paper is an attempt to sketch the broad contours of the argument for this claim. Given the contemporary debates in international law, my claim may seem quite radical. Many of my arguments draw on very recent, and often controversial, sources such as the International Committee of the Red Cross's *Interpretive Guidance on Direct Participation in Hostilities*.³ But I will also draw on the text of the UN Charter, arguably the most important source of international law on the use of force by States (*jus ad bellum*).⁴ And I will also draw on the St. Petersburg Declaration, one of the first statements of the law of war (*jus in bello*).⁵ I will also draw on several important decisions of the International Court of Justice. So, while my primary argument is normative, I also advance arguments about an alternative way to understand significant sources of *lex lata* international law. In the next section I will explain what I mean by pacifism.

II. CONTINGENT PACIFISM

The main idea behind most traditional pacifist accounts is quite simple, namely that it is morally unacceptable for practices or institutions to be designed that countenance the intentional killing of those who are innocent, of which war is the prime example. In many of these views, it is also wrong to kill anyone, whether innocent or not. But the highly intuitive argument that many have found appealing is that all wars involve the intentional killing of innocent people and hence that all wars are morally wrong. In

3. INT'L. COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79 (Nils Mezler ed., 2009) [hereinafter ICRC's Guidance].

4. UN Charter, *supra* note 1.

5. Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration] available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C>.

addition, some early pacifists argued that we should not allow ourselves to become tainted, especially by our association with killing, with the blood of others on our hands. Moral purity calls for no one to kill anyone else. And a third strain in pacifist thinking is closely tied to the Just War tradition, where it is argued that no current, or even past, wars can meet the standards for a just war. These three ideas, either separately or in combination, are the main ideas associated with traditional pacifist positions.

Traditional pacifism has generally not advanced the type of arguments that are capable of persuasively showing that all wars are morally wrong. This is primarily because there may be wars in the future that are so different from wars in the past that the innocent will not be killed or even that killing will not be done by human hands. But traditional pacifists offered significant, and highly plausible, arguments given for why we should be highly suspicious of whether any given war can indeed be justified. The probability that any especially contemporary war will be unjust is very high and that this seems clear is a testament to the insights of traditional pacifists who provided many arguments against war over the years. But the scope and extent of those arguments needs to be refined in a way that will provide support for a different kind of pacifism than that embraced explicitly by earlier pacifists.

In contrast to traditional pacifism is contingent pacifism. As I use the term, “contingent pacifism” admits the possibility of a just war, such as World War II, but not at the current time or into the foreseeable future due to the nature of contemporary war and geopolitics.⁶ The contemporary doctrine of contingent pacifism admits that in principle some wars can be just; it is simply that very few if any are just, and today nearly all wars are problematic morally. Contingent pacifists do not have absolute principled reasons to oppose violence, or even to oppose all wars. Rather they are opposed to war because of a concern that war will *likely* involve killing the innocent or on grounds of other moral risks of participation in contemporary wars. Contingent pacifism calls for a case-by-case assessment of whether a given war involves the moral risks that make participation in that war morally problematic. As with other theorists who have argued for this position, sometimes called “just war pacifism,” the Just War tradition’s criteria for

6. See Larry May, *Contingent Pacifism and the Moral Risks of Participating in War*, 25 PUB. AFF. Q. 95 (2011); Larry May, *Contingent Pacifism and Selective Refusal*, 43 J. OF SOC. PHIL. 1 (2012); Larry May, *Contingent Pacifism: Human Rights, International Law, and Conscience*, (unpublished book length manuscript) (on file with author). See also Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69 (2010).

jus ad bellum and *jus in bello* are central criteria by which war is to be judged morally problematic.⁷

Contingent pacifism is hard to define as a simple doctrine because it has so many aspects that cannot easily be assimilated into one simple statement. Nonetheless, I will here provide a first approximation. Contingent pacifism is the doctrine that armed conflict is in principle justifiable but that it is unjustified now and into the foreseeable future due to a concern for the risk of civilian casualties and suffering and also for the risk of combatant casualties and suffering. Here we can see several elements: (a) the admission that war or armed conflict is in principle justifiable, (b) the condemnation of war or armed conflict today, and (c) the condemnation of war or armed conflict into the foreseeable future. The conditions that make for opposition to war today are contingent on such factors as: (a) the increasing percentage of civilians killed in armed conflicts; (b) the increasing likelihood that armed conflicts will be fought in cities rather than on traditional battlefields; and (c) the increasing amount of effort and money spent on armaments, as opposed to diplomacy.

In the rest of this paper I will address current developments in *jus ad bellum* and *jus in bello* international law. I will argue that such developments are close to supporting a version of contingent pacifism. War as it is often understood today cannot be initiated as it had in previous times and war cannot be conducted in a legal way according to the new human rights approach, which has its roots in the 19th Century understanding of the rules of war. So, from both a *jus ad bellum* and *jus in bello* perspective, war must be reconceived and what arises is the *lex ferenda* idea that war is unjustified at least as war has been understood for millennia.

III. THE UNITED NATIONS CHARTER

The Charter of the United Nations had as one of its most important goals to eliminate war. It is often commented that realizing this goal is no closer now than it was in 1945 when the Charter was drafted.⁸ But it is also true that the Charter sets very severe restrictions on war, which if realized would indeed look like something close to contingent pacifism. In the next three sections I will argue that there is a highly plausible case today for seeing the United Nations Charter, and even the United Nations itself, as

7. See JENNY TEICHMAN, PACIFISM AND THE JUST WAR 63-68 (1986); ROBERT L. HOLMES, ON WAR AND MORALITY, 183-213 (1989); James P. Sterba, *Reconciling Pacifists and Just War Theorists*, 18 SOC. THEORY & PRAC., 21 (1992).

8. See, e.g., MARK JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 419 (1997).

embracing principles close to those of contingent pacifism.

The Preamble to the 1945 Charter of the United Nations begins in the following broad and evocative manner:

We the Peoples of the United Nations [are] Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small....⁹

Notice that the first thing mentioned is “to save succeeding generations from the scourge of war. . . .”¹⁰ And notice also that war is associated with the term “scourge” already giving the reader the idea that war is not a favored institution. Of course, the point to emphasize in general is that the United Nations is established to save people from the scourge of war, seemingly implying that war as it had been known should end with the founding of the United Nations.

Article 1 of the United Nations Charter lists as the first purpose and principle of the United Nations:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustments or settlement of international disputes or situations which might lead to a breach of peace;¹¹

The first purpose and principle of the United Nations is to maintain the peace and by implication to avert war. Of course it is also true that maintaining the peace could involve the suppression of acts of aggression that could lead to the use of war to stop an aggressing State from attacking one of its neighbor States. I will pursue this issue in what follows.

Article 2, Section 4 of the United Nations Charter is a bold statement seemingly prohibiting States from initiating war:

9. U.N. Charter, pmb1.

10. *Id.*

11. U.N. Charter art. 1, para. 1.

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹²

This article only seemingly outlaws all initiation of war because of the effect on Article 2(4) of Article 51, which reads in its first half as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.¹³

There has been much debate about how Article 2(4) and Article 51 are supposed to fit together. Some suggest that the use of the word “inherent” is the key to Article 51 as establishing its priority over Article 2(4), and hence of the acceptance of wars fought in self-defense. Others have argued that “until” is the key to Article 51 and this seems to give only a very limited right of unilateral action on the part of even those States that have been attacked.

I believe it is important also to examine the second part of Article 51 for help in interpreting its meaning:

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁴

This is by no means clear-cut, but it seems to say that even the inherent right of self-defense does not impede the right of the United Nations to act to maintain or reestablish the peace. It thus appears that the key to the whole of Article 51 is not to give States a blanket self-defense exception to Article 2(4)'s prohibition on waging war, but to reaffirm that if war is to take place it is only under the auspices of the United Nations.

12. U.N. Charter art. 2, para. 4.

13. U.N. Charter art. 51.

14. U.N. Charter art. 51.

In this context it is important to my interpretation of the United Nations Charter as something close to a contingent pacifist document that we examine the beginning of Chapter VII concerning threats to the peace and acts of aggression. Article 24(1) of the Charter asserts that the Security Council has “primary responsibility for the maintenance of international peace and security. . . .”¹⁵ Any use of force that is legitimate under the UN Charter has to be recognized and authorized by the UN’s Security Council.

Article 39 is one of the most important linchpins in my argument since it takes out of the hands of States the decision about whether to go to war. This article asserts:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.¹⁶

The United Nations here arrogates to itself the determination of whether the acts of one State are a threat to the peace that would require action by the United Nations through its member nations. The United Nations also again reaffirms that it is the body that decides what measures should be taken and by whom, even in cases of self-defense.

Article 41 lists the actions short of the use of armed force that the United Nations can employ, including “interruption of economic relations.”¹⁷ Article 42 specifies that the United Nations will use “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”¹⁸ if Article 41 measures have failed.¹⁹ The effect of these two articles, in combination with Article 39, is greatly to restrict what States can do in terms of initiating acts of war. It thus seems that one clear way to interpret Article 51 is merely as an emergency provision, where a State can act in self-defense only if the United Nations is not acting and only until the United Nations can react. On this interpretation, war as the world had known it, where States decided unilaterally when and whether to initiate war, was thus virtually prohibited.

15. *Id.* at art. 24, para. 1.

16. *Id.* at art. 39.

17. *Id.* at art. 41.

18. *Id.* at art. 42.

19. *Id.*

There is, though, an exception for joint action by States under the auspices of the Security Council. Indeed some have argued that there is a requirement that States band together to address systematic human rights abuses. The use of force in such cases could be labeled a "just war." But I would argue that the kind of force envisioned in Articles 55 and 56 of the Charter, for instance, are not recognizably instances of "war" as this term has been employed over the centuries. Note that Articles 55 and 56 are grouped under Chapter IX, which has the title: "International Economic and Social Co-operation" not under a title concerning the use of force.²⁰ The kind of cooperation that is required is not primarily that of military force.

And so, even humanitarian intervention initiated by a single State seems not to be countenanced. And for this reason the Charter can be read to prohibit all use of force not sanctioned by the Security Council, even as there is a section of the Charter that seems to allow for armed conflict. Indeed, Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.²¹

This reference to armed force is to a collective use of force by States authorized by the Security Council.

The United Nations Charter is close to a contingent pacifist document insofar as war and armed conflict as the world had known them, where States made unilateral decisions to attack one another, are proscribed. And the reason that the Charter is not fully a contingent pacifist document is because of the ambiguous way that wars conducted for State self-defense are treated. As we will see, there is a reasonable dispute about whether this form of war is allowed. If there is this exception recognized currently or at least into the foreseeable future, then the UN Charter would not necessarily oppose all contemporary wars. And hence for this and the rest of the reasons offered in this section, I regard the Charter as close to a contingent pacifist document, but not fully one.

20. U.N. Charter art. 55-56.

21. *Id.* at art. 42.

IV. THE INTERNATIONAL COURT OF JUSTICE AND THE UN CHARTER

For further evidence of how the United Nations and its related institutions view recourse to war we can consult the International Court of Justice's (ICJ) cases interpreting Articles 2(4) and 51 of the UN Charter. This is an especially rich source of how to understand the Charter since the ICJ is itself an organ of the United Nations. In what follows I will look at three of the most important cases from the ICJ: the *Nicaragua Case* from 1986, the *Nuclear Weapons Case* from 1996, and the *Palestinian Wall Case* from 2004.

In a preliminary decision about the mining of Nicaragua's harbor by the United States from 1984, the ICJ favorably cited Nicaragua's claim "that there is no generalized right of self-defence."²² There is here undoubtedly contemplated a difference between a generalized and a particularized right of self-defense. And then in the 1986 main case concerning the merits of Nicaragua's case against the United States, the ICJ made several important points that set the stage for my view that the United Nations Charter is close to a contingent pacifist document.

In the ICJ's 1986 *Nicaragua* (merits) case, the Court says that the principles concerning the use of force articulated in Article 2(4) of the UN Charter have a "binding character."²³ Hence, States are required to abstain "from the threat or use of force against the territorial integrity or political independence of any State."²⁴ The Court goes on to discuss Article 51's exception to the prohibition on the use of force due to considerations of self-defense. The clearest case of justified use of force in self-defense is "in the case of an armed attack which has already occurred."²⁵ For self-defense to justify the use of force by State A against State B, there has to have been an armed attack against State A by State B. In addition, the attack must also meet requirements of being of sufficient "scale and effects" to be more than a mere "frontier incident."²⁶

The category of armed attack is severely delimited by the Court in the *Nicaragua* merits case. And before self-defensive use of force can be justified the State must have "immediately" notified the United Nations that it has been subject to an armed attack.²⁷

22. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 45, ¶ 92 (Nov. 26).

23. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 89, ¶ 188 (June 27).

24. *Id.*

25. *Id.* at 93, ¶ 194.

26. *Id.* at 93, ¶ 195.

27. *Id.* at 95, ¶ 200.

There is controversy about why the ICJ spends so much time in the Nicaragua case on this notification requirement. At least one plausible explanation is that even in cases of self-defense, a State must not act solely on its own. Notification of the United Nations is not the same as seeking approval, but the requirement of notification signals that justified use of force is not to be unilateral.

Of perhaps even more importance is that the ICJ for the first time clearly differentiated acts that are armed attacks and acts that fall short of being armed attacks. And the ICJ stipulated that when such latter acts have occurred the victim State does not have an inherent right to use force against the attacking State. States have a right of non-intervention, which does not rise to the level of the right of self-defense, and for which there is no inherent right to use force against the State that violates the right of non-intervention. There is a worry here that if there is an inherent right to use force against another State such a rule would admit of “serious abuses.”²⁸ Similarly, respect for sovereignty will also not justify the use of force that would otherwise constitute an abridgement of Article 2(4).

Even in cases of self-defense, the ICJ is clear that the “inherent right” of self-defense is not unlimited. Principles of humanitarian law that require that acts be both necessary and proportionate to the attack are clear restrictions on even what is called an “inherent right” (in French the term used is *droit naturel*—natural right). But when such an inherent right is not applicable, “the criteria of necessity and proportionality take on a different significance.”²⁹ The Court is clear that if the strict requirements of an armed attack are not met then it will be much harder to satisfy necessity and proportionality requirements in justifying the use of retaliatory force. Here is the Court’s summary:

On the legal level, the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force.³⁰

The ICJ’s interpretation of the UN Charter makes it very difficult, although not impossible, to justify recourse to war, just as is true of the contingent pacifist position.

28. *Id.* at 96, ¶ 202.

29. *Id.* at 112, ¶ 237.

30. *Id.* at 117, ¶ 249.

In the ICJ's *Nuclear Weapons Case* from 1996 the Court at one point seemed to go back on its earlier idea that there is no generalized right of self-defense when it said:

[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus to its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as a “policy of deterrence,” to which an appreciable section of the international community adhered for many years.³¹

Yet, earlier in this advisory opinion the Court said: “The entitlement to resort to self-defense under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence . . . [such as] the conditions of necessity and proportionality.”³²

It thus seems that there is a particularized right of self-defense that States have but not one that is generalized and unlimited. The Article 51 right is not a right that allows any measures when self-defense is at issue. Indeed the Court said that “[s]tates do not have unlimited freedom of choice of means in the weapons they use.”³³

The highly controversial penultimate decision of the ICJ *Nuclear Weapons Case* shows how tentative the Court is about its view of the justifiability of initiating war even in self-defense, and also how the Court nonetheless refuses to rule out the possibility of justification of such a war in the future. Here is the decision and reasoning for Question E:

By seven votes to seven, by the President’s casting vote,
It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme

31. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8) 41, ¶ 96.

32. *Id.* at 22-23, ¶¶ 40-41.

33. *Id.* at 35, ¶ 78.

circumstance of self-defence, in which the very survival of the State would be at stake.³⁴

As I will argue in more detail later, this certainly seems to be consistent with seeing the United Nations Charter as close to a contingent pacifist document.

One last case to consider is the ICJ's 2004 *Palestinian Wall Case*. The Court gives the same nuanced reading of Article 2(4) as the two previous ICJ cases we have examined. The court also reaffirmed the idea that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal."³⁵ The Court then responds to Israel's contention that the Wall was important for "military exigencies," largely related to stopping Palestinian insurgents from mounting attacks on Israeli citizens. The Court argues that the restrictions on the movement of Palestinians must meet a high threshold consideration:

[I]t is not sufficient that such restrictions be directed at the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result."³⁶

It should be noted that Article 51 was said not to be relevant to the case because Israel was not responding to a threat from another State.³⁷

The Court thus endorses a substantial limitation on self-defense claims, or a state of necessity, which might allow for the justified use of force or recourse to war. Even though the Court recognizes that Israel has various legitimate security demands to respond to, including "numerous indiscriminate and deadly acts of violence against its population," the construction of the wall is not justified because the Court is "not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."³⁸ Notice that the ICJ here sets a very high threshold for satisfying necessity, even in a case where self-defense of Israel's citizens is at stake.

34. *Id.* at 43-44, ¶ 105.

35. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 39, ¶ 87 (July 9).

36. *Id.* at 60, ¶ 136.

37. *Id.* at 62, ¶ 139.

38. *Id.* at 62-63, ¶¶ 140-141.

V. THE DEBATE ABOUT INTERPRETING THE CHARTER

Nearly all commentators agree that the original intent of the UN Charter was to outlaw war as the world had known it. But there is a serious disagreement about how States have chosen to regard the Charter, especially in light of the inability of the Security Council to play the active role envisioned by the Charter in mediating disputes between States and issuing sanctions to those States that did not follow the dictates of the Charter. In this section I will rehearse some of this debate and indicate why these views all by and large support the interpretation of the Charter, at least given its original intent, that I have indicated above, namely that the Charter is normatively close to a contingent pacifist document.

In a very influential article, Louis Henkin defended the view that the Charter should be read as outlawing nearly all forms of war.³⁹ Early in the article, Henkin contends that:

The Charter reflected universal agreement that the status quo prevailing at the end of World War II was not to be changed by force. Even justified grievances and a sincere concern for “national security” or other “vital interests” would not warrant any nation’s initiating war. Peace was the paramount value. . . . War was inherently unjust. In the future the only “just war” would be war against an aggressor—in self-defense by the victim, in collective defense of the victim by others, or by all. . . . Change—other than internal change through internal forces—would have to be achieved peacefully by international agreement. Henceforth there would be order so that the international society could concentrate on meeting better the needs of justice and human welfare.⁴⁰

Henkin indicates that there were a host of ambiguities and unclaritys that needed to be resolved, but that the original idea behind the UN Charter was clear.

Henkin then discusses how the Charter has been received especially by States around the world:

39. Louis Henkin, *The Use of Force: Law and U.S. Policy, in Right v. Might: International Law and the Use of Force* (Council on Foreign Relations 1989), as reprinted in Mark W. Janis & John E. Noyes, *International Law: Cases and Commentary* 420 (1st ed. 1997).

40. *Id.*

Governments generally have insisted on the interpretations most restrictive of the use of force: the Charter outlaws war for any reason; it prohibits the use of armed force by one state on the territory of another or against the forces, vessels, or other public property of another state located anywhere, for any purpose, in any circumstances. Virtually every use of force in the years since the Charter was signed has been clearly condemned by virtually all states. Virtually every putative justification of a use of force has been rejected. Over the years since the Charter's adoption, even states that have perpetrated acts of force, when seeking to justify their acts, have not commonly urged a relaxed interpretation of the prohibition. . . . Indeed, the community of states has acted formally to tighten the Charter's restrictions.⁴¹

Henkin acknowledges that exceptions have been recognized, such as wars fought for humanitarian reasons or in support of self-determination of peoples. He points out that "[i]t has not been accepted, however, that a state has a right to intervene by force to topple a government or occupy its territory even if that were necessary to terminate atrocities or to liberate detainees."⁴²

Yet, Article 51 has also been interpreted to allow a State to defend itself, despite the prohibitions on the unilateral use of force. And here there has been quite a variety of opinions. Nonetheless, everyone agrees, says Henkin, that "the right of self-defense, individual or collective, is subject to limitations of 'necessity' and 'proportionality.'"⁴³ And as we saw in a previous section, courts have given fairly strict readings of these requirements. Henkin makes a good case for the proposition that the UN Charter can be read as close to a pacifist document.

In another very influential article, Michael Reisman argued for a somewhat different interpretation of the Charter from that of Henkin. He begins his essay by stating his view in opposition to those like Henkin:

Its [Article 2(4)] sweeping prohibition of the threat or use of force in international politics was not an autonomous ethical affirmation of nonviolence Article 2(4) was embedded in and made initially plausible by a complex security scheme, established and spelled out in the United

41. *Id.* at 421.

42. *Id.* at 422.

43. *Id.* at 424.

Nations Charter. If the scheme had operated, it would have obviated the need for the unilateral use of force.⁴⁴

For Reisman, that security scheme has faltered due to the weakness and stalemate at the Security Council resulting in the effective abrogation of the lofty ideals of the UN Charter's Article 2(4).

Since the security scheme has not worked, the UN has basically left it to the strongest States to impose their will on the rest of the States. Indeed, Reisman argues that given the actual political situation on the ground, "a mechanical interpretation of Article 2(4) may be to superimpose on an unwilling polity an elite, an ideology, and an external alignment alien to its wishes" including "grave deprivation of human rights for substantial numbers and strata of the population."⁴⁵ But Reisman seems to recognize that such a mechanical interpretation of Article 2(4) of the Charter sets rather stringent limits on what States can initiate unilaterally concerning the use of force.

Another highly influential scholar who entered the debate about how to understand the UN Charter's Article 2(4) is Thomas Franck. Franck argued that there is a pronounced two-tiered structure to the UN Charter's attempt to regulate the use of force by States.⁴⁶ What he called the "upper tier" set out "a normative structure for an ideal world."⁴⁷ The intent of the Charter at the upper tier envisioned the ideal that:

Collective security is to be achieved by use of international military police forces and lesser but forceful measures such as diplomatic and economic sanctions. Recourse to such measures is to be the exclusive prerogative of the United Nations, acting in concert.⁴⁸

Wars, as they had been known, where States initiated the use of force unilaterally, were to be replaced by a world-wide police force that operated very differently from normal armies.

Franck also postulated that there was a lower tier that came into operation when it was clear that the ideal was not working. In this more realistic tier States may operate on their own when

44. W. Michael Reisman, *The Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985), reprinted in MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 426 (1st ed. 1997).

45. *Id.* at 429.

46. THOMAS FRANCK, *RECOURSE TO FORCE* 3 (2002).

47. *Id.*

48. *Id.* at 2.

self-defense requires it, "subject to certain conditions."⁴⁹ But even this more realistic realm was soon seen to fail because of the advent of the Cold War and the ingenuity of States to design indirect means of aggression, often through the use of insurgents.⁵⁰ So, on this analysis, whatever the promise of the UN Charter, States found ways not to limit their initiating of war. The question to ask is whether the restrictions that States are subject to even when they initiate war for self-defense are so significant as basically to rule out war.

As we saw in Section IV, a string of decisions by the International Court of Justice seemingly favors the view that the use of force characteristic of war is indeed outlawed by the Charter. Even the exception for self-defense is so circumscribed that it makes the use of force very different from what it had been. Indeed, Franck worries that the way the Charter has been interpreted has made it impossible for a State to respond effectively to self-defense concerns because the State must wait until it has been the subject of an armed attack before it can act to defend itself, and this is often too late.⁵¹ Notice that Franck's complaint actually supports the view that the Charter is close to a contingent pacifist document.

Nearly all commentators agree that the original idea behind the UN Charter was to abolish war, at least as the world had known war. The commentators do not even disagree about how the international courts have interpreted the Charter. The disagreements we have just rehearsed are primarily about how policy makers have interpreted the Charter. And here it is clear that the Charter has not managed to eliminate war as we have known it. But again, this does not mean that the Charter is not normatively close to a contingent pacifist document. Contingent pacifism is a normative doctrine, not a doctrine that describes or even explains what States actually do in the world today. As a normative matter, very few commentators disagree that the UN Charter was meant to condemn war and to urge that war should be abolished.

VI. HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

I next turn to *jus in bello* matters, spending the next three sections developing an argument for seeing a trend toward granting

49. *Id.* at 3.

50. *Id.* at 3-4.

51. *Id.*

human rights greater significance during war and this means that international law is moving close to a contingent pacifist position. The law is still not settled but today nearly everyone agrees that human rights law is applicable in at least some wartime situations. In this section, I shall first examine this issue as it arose in several international court cases.

In the 1996 case on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ summarized the arguments of certain States: “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.”⁵² The ICJ rejected this position arguing as follows:

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.⁵³

The ICJ thus rejects the traditional separation of humanitarian and human rights law, allowing that human rights law has application in all contexts, but that then sets up a possible conflict with humanitarian law in armed conflict cases.

In the 2004 case on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the International Court of Justice portrays the arguments of the State of Israel as follows:

Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended

52. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 17, ¶ 24 (July 8).

53. *Id.* at 18, ¶ 25.

for the protection of citizens from their own Government in times of peace.⁵⁴

The position of Israel summarizes the traditional separation of humanitarian and human rights law. But the ICJ declares that that understanding has been rejected since at least the 1996 *Nuclear Weapons Case*.⁵⁵

In the *Palestinian Wall Case*, the ICJ said that “the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”⁵⁶ Thus the ICJ rejected Israel’s claim that there is a clear separation of humanitarian and human rights law, and allowed that human rights law can be applicable to times of war or armed conflict especially concerning the right to life. Human rights are characterized as having universal scope, both in terms of who is subject to the rights and in terms of the addressee of these rights who must protect them.

If the most basic of the human rights, the right to life, is applicable in times of war it seems, on first sight, that war itself would never be justified given that all wars involve massive deprivations of the right to life of civilians and soldiers. And this would mean that human rights law directly conflicts with humanitarian law, which has traditionally recognized that the killing of soldiers can be justified as long as the soldiers are not made to suffer unnecessarily. And it is a longstanding part of humanitarian law that civilians can be justifiably killed during war as long as they are not directly targeted and their killing is necessary and also proportionate to legitimate military objectives.

So, international law is faced with conflicting norms concerning violations of the right to life during times of war. The right to life is a core right of the Covenant on Civil and Political Rights and cannot be abrogated even during times of national emergency. Yet, in such emergencies, mounting an armed defense or counter-attack may be the only way for a State to survive the hostile aggression of a neighbor State. In such a case, recourse may be made to the doctrine of *lex specialis* referred to by the ICJ to allow for humanitarian law concerns still to trump those of human rights law. I discuss this issue later in this chapter.

Some notable interpreters of this controversy have recently seen the insertion of human rights law into war and armed conflict

54. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9).

55. *Id.*

56. *Id.* at 47, ¶ 109.

situations as a pacifist challenge. The International Committee of the Red Cross issued an Interpretive Guidance on Direct Participation in Hostilities that employs human rights law greatly to restrict justifiable killing during armed conflict. The applicable part of Section IX of the ICRC's Guidance states:

In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL [International Humanitarian Law] does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.⁵⁷

Seemingly, each decision of a commander to be legal must meet the necessity test—it must be the only way that a legitimate military objective can be accomplished.

One significant implication of the ICRC's view of human rights law is that during armed conflict “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”⁵⁸ Such a restriction makes most tactical decisions during time of war very difficult for commanders to justify, seemingly supporting something like a contingent pacifist position. Of course, the ICRC Guidance concerns civilians who are taking an active part in hostilities, not combatants proper. But I would argue that the line between these two categories is getting less and less clear.

Various scholars have debated whether the ICRC has a correct understanding of what *is* the current state of *jus in bello* international law, *lex lata*. From my perspective, what matters more is whether or not they have a defensible view of what the current state of international law *should be*. Jann Kleffner has been somewhat skeptical but has recognized that if the ICRC guidance is accepted as *lex lata* and not just *lex ferenda* it would indeed change the way we think of the legality of war.⁵⁹ I would concur in his assessment, and add that this would be a welcome result, moving us closer to the United Nations' founding idea that war, as we have known it, is to be outlawed.

Another source to consider is a decision by the High Court of Israel in 2005. Here the Israeli Court held that “a civilian taking

57. ICRC's Guidance, *supra* note 3.

58. *Id.* at ¶ 82.

59. Jann F. Kleffner, *Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello as we Know It?*, *ISR. L. REV.*, Mar. 2012, at 35, 35-52.

part in direct hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.”⁶⁰ The Israel Court came to its decision that its security forces could not confront terrorists in any manner they deemed appropriate. In the conclusion of the opinion, the Court tackles the central jurisprudential problem in this area.

The saying “when the cannons roar, the muses are silent” is well known. A similar idea was expressed by Cicero, who said: during war, the laws are silent” (*silent enim legis inter arma*). Those sayings are regrettable. They reflect neither the existing law nor the desirable law . . . Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law.⁶¹

The Court goes on to say that there is not a conflict but a close fit between the pursuit of national objectives and the protection of human rights.⁶²

Those in Israel would have more reason than others to disregard human rights in favor of self-defense given that Israel is surrounded by its enemies, and attacked often by them. But the High Court of Israel recognized that the battle against terrorism and its other enemies is also a battle of values.⁶³ In that latter battle, restraint is crucial—even restraint that would rule out many standard tactics of war. The international legal scholars, Theodor Meron⁶⁴ and William Schabas,⁶⁵ have also concluded that taking human rights seriously in war or armed conflict today will move us close to pacifism. In my view, this is indeed the direction that international law should be moving toward as well.

VII. RECONCILING HUMAN RIGHTS AND HUMANITARIAN LAW

There is a debate about how to reconcile international humanitarian law and human rights law in armed conflict situations. As we saw earlier, the ICJ referred to the doctrine of *lex*

60. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel [Dec. 13, 2006] (Isr.), slip op. ¶ 40, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

61. *Id.* at ¶ 61.

62. *Id.* at ¶ 62.

63. *Id.* at ¶ 45.

64. THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 9 (2006).

65. William Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISR. L. REV. 592 (2007).

specialis as the way to resolve the difficulty.⁶⁶ In the *Nuclear Weapons* Advisory Opinion, the ICJ said:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁶⁷

This is the ICJ's attempt to reconcile the conflict and save humanitarian law from being completely swamped by human rights law.

This statement of the *lex specialis* doctrine seems to give priority to humanitarian law over human rights law when it says conflicts must "be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself," where the Covenant refers to the articulation of human rights law.⁶⁸ But another way to understand the final part of the test is that human rights law alone does not determine what the applicable law is—but it must be decided also by reference to international humanitarian law.

Notice that the test is to be employed anew for every "particular loss of life."⁶⁹ What is needed is a determination of whether this particular loss of life falls under an applicable humanitarian law. The laws of war articulated in the Hague and Geneva Conventions, for instance, mention highly specific kinds of weapons and tactics that are proscribed. If the weapon or tactic about to be employed is in those lists, then that is the applicable restraint. Yet it is unclear what to do if the particular loss of life does not fall under one of these provisions of humanitarian law.

66. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 45-46, ¶ 105 (July 9) (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 18, ¶ 24 (July 8)).

67. *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 18, ¶ 25 (July 8). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 46, ¶ 106 (July 9); *Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 78-79, ¶ 216 (Dec. 19).

68. *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 18, ¶ 25 (July 8).

69. *Id.*

Two possibilities are reasonable interpretations of the *lex specialis* doctrine: (a) all acts and weapons not specified as proscribed in humanitarian law are allowed; or (b) all acts and weapons not specified in humanitarian law as proscribed are then regulated by human rights law.

The ICJ's *Palestinian Wall Case* can be cited to confirm the reasonableness of both of these positions.

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both of these branches of international law. . . namely, human rights law and, as *lex specialis*, international humanitarian law.⁷⁰

The ICJ prefaced these remarks by noting that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.”⁷¹ Yet, as noted above the right to life is not one of the rights that can be derogated.⁷²

So, it seems to me that there is a serious interpretive problem that calls for resolution. The problem arises at least in part because in human rights law, the right to life is not derogable. And yet, in humanitarian law certain deprivations of the right to life are not considered arbitrary and are hence open to be allowed, or in other terms open to be derogated. On a straightforward reading of these two provisions there does not seem to be a way to reconcile human rights and humanitarian law concerning deprivations of the right to life that seem inevitably to occur in times of war and armed conflict. *Lex specialis* seems to be a doctrine that conflicts with the human rights law of the Covenant on Civil and Political Rights.

Yet, as we have seen the *lex specialis* doctrine is referred to for a resolution of the conflict between regimes of law in several ICJ opinions.⁷³ One way to understand the doctrine is that unless there

70. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 46, ¶ 106 (July 9).

71. *Id.*

72. *Id.* at 45-46, ¶ 105.

73. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 45-46, ¶ 105 (July 9) (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 18, ¶ 24 (July 8)).

are specific rules of humanitarian law which apply to a given situation, that situation is governed by human rights law. This liberal understanding of *lex specialis* also needs to be qualified by the requirement that certain rules of humanitarian law that would otherwise allow for non-arbitrary killing during war are to be overruled by human rights law.

According to the Covenant, the right to life only protects against the *arbitrary* deprivation of the right to life, so *lex specialis* can be seen as not in tension with the Covenant insofar as it merely indicates that humanitarian law can be appealed to in some cases to show that the deprivation of the right to life was not arbitrary.⁷⁴ So, the question becomes: which are the deprivations of the right to life during wartime that are arbitrary and which are not.

Soldiers' lives are not to be taken in a way that violates the requirement that lives should not be taken arbitrarily. If this is indeed the right way to understand the *lex specialis* doctrine then we can understand why the ICRC Guidance says that if there is some other way to accomplish a given military objective other than killing an enemy soldier that action must be taken instead of killing the enemy soldier.⁷⁵ The ICRC Guidance does not say that all killing in war is outlawed, but makes it very difficult for commanders to wage war.⁷⁶ In every instance the commander must not authorize the killing of enemy troops if they can be disabled or captured instead.⁷⁷ And even in emergency situations, this must be the rule since the right to life is not to be derogated in times of emergency, as the Covenant has specified.⁷⁸

In my view, such an understanding of the doctrine of *lex specialis* in effect moves *jus in bello* international law close to a contingent pacifist position. The strategies and weaponry that are allowable during war or armed conflict become greatly restricted by the new orientation toward human rights. And the *jus in bello* conditions will be very hard to satisfy in any given war. In the previous sections of this paper we have also seen that the *jus ad bellum* is also very hard to reconcile with a certain understanding of international law as well. In both cases, war as we have known

74. International Covenant on Civil and Political Rights, art. VI, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171.

75. ICRC's Guidance, *supra* note 3.

76. *See id.* at 9-85.

77. *Id.* at 82.

78. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 45, ¶ 102 (July 9).

it cannot be conducted without violating international legal requirements. At some point in the distant future it may be possible to satisfy the *jus in bello* and *jus ad bellum* requirements understood through the lens of human rights law, but it is hard to see that this will happen now or in the foreseeable future, just as is held by contingent pacifists.

VIII. THE ST. PETERSBURG DECLARATION AND THE LIEBER CODE

The seeming change in the burden of proof for commanders concerning whether they can use lethal force, as understood by the human rights approach, is not completely new. Indeed, in the first major statement of the law of war in modern times, the St. Petersburg Declaration stated:

[T]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is *sufficient to disable* the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.⁷⁹

Notice that the proper aim of military operations is said to be to “disable the greatest possible number of men,”⁸⁰ not to kill as many of the enemy as one can. And such a declaration was said to be necessary “in order . . . to conciliate the necessities of war with the laws of humanity.”⁸¹

Here already in 1868 is the core of the human rights approach to killing during war. As a conceptual matter this makes perfect sense. The *jus in bello* principle of necessity should be seen to stipulate that military tactics are illegal unless there is no other way of achieving a legitimate military objective. The principle of necessity would be violated by a tactic that called for killing enemy soldiers when disabling them will accomplish the same objective. So the human rights approach to *jus in bello* requirements that was sketched above is actually not very radical at all since it is

79. St. Petersburg Declaration, *supra* note 5.

80. *Id.*

81. *Id.*

supported in historical documents that are canonical and also supported by good reasons.

If commanders are mainly to be justified in disabling enemy soldiers, then only in certain very limited cases are they justified in killing enemy soldiers. If enemy soldiers can be disabled by being wounded, or captured, then these strategies must be clearly contemplated before it is justified to kill enemy soldiers. Yet, for commanders in the field, attempting to ascertain what tactics satisfy *jus in bello*, most killing will then be outlawed. But, commanders are not currently trained as much in tactics that non-lethally disable rather than kill the enemy. So, war as we know it would change radically. And we are moved close to contingent pacifism—to a position where war and armed conflict is possible in principle but not at the current time or into the foreseeable future.

In addition, we should consider another seminal Nineteenth Century document that also could be seen to take a similar stance, namely the Lieber Code.⁸² Unlike the St. Petersburg Declaration, the Lieber Code does seem to countenance a broad array of killing during war:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.⁸³

Notice two things here. First, killing must be necessary for it to be legal. Second, the rules of war are thought to be intimately connected to what it means to be a moral soldier.

The Lieber Code was drafted by Francis Lieber for the Union Army during the US Civil War. Lieber set out to diminish the carnage of war and to provide rules that would be supported by legal practice and also by morality. Military necessity was the key component of the rules of war as Lieber understood them.⁸⁴ At

82. U.S. Dep't of War, Gen. Order No. 100, art. 15, Instructions for the Government of Armies of the United States in the Field (1863), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=A25AA5871A04919BC12563CD002D65C5&action=openDocument>.

83. *Id.*

84. *Id.*

least one *lex ferenda* understanding of military necessity refers to what it is indispensable to do in order to achieve legitimate military objectives. Limiting military activities on the battlefield to those that are militarily necessary was the key to humanizing war. So, while killing could be justified by military necessity there had to be a deliberative act, where all other options are considered and found lacking, which preceded the commander's order to kill enemy soldiers.

In addition, we should also consider other limits posed by military necessity on tactics and weaponry in the Lieber Code.

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.⁸⁵

Again notice how extensive the rules are in terms of what acts of war are ruled out. The chief case here is where the killing of these soldiers is not necessary in the sense that disabling the soldiers would have achieved the same military objective. In this sense, as well as several others, the Lieber Code sets similar limits on killing during war to that of the St. Petersburg Declaration, despite their superficial dissimilarity.

IX. CONCLUDING THOUGHTS

In the previous sections I have argued that international law embodies something close to contingent pacifism. The U.N. Charter, as a source of the *jus ad bellum*, embodies the idea, in Articles 2(4) and 51, that wars should not be fought by States except when the U.N. has sanctioned them or in emergencies involving individual or collective State self-defense, and even then only until the U.N. can respond. This is at least similar to a contingent pacifist position since States are nearly outlawed from engaging in war. It is only nearly a contingent position because there is one class of exceptions, where a State's self-defense is involved and the U.N. has not yet acted. And while this is thought to be a rare instance it could occur in the foreseeable future.

85. *Id.* art. 16.

It is true that contingent pacifists hold that there are no instances of justified war in the foreseeable future. The U.N. is thus only “close to” a contingent pacifist institution, in that war is ruled out for States only in nearly all cases—and this becomes the default position. Contingent pacifism, nearly so, is on the continuum between a robust Just War position and a traditional pacifism. Both this view and regular contingent pacifism are middle positions that are contingent on the current conditions of political leaders and military tactics, with the conclusion that very few if any wars are justified today.

In addition to the above discussed *jus ad bellum* issues, from a *jus in bello* perspective, a few additional things need to be said. First, the risk of civilian casualties is very high in today’s armed conflicts. While some weapons have achieved a greater level of accuracy, thereby potentially reducing the likelihood of collateral damage, it is also true that war and armed conflict is increasingly fought in cities where civilian casualties remain very high indeed. And civil wars are the most common type of war at the moment and also into the foreseeable future. In civil wars, civilian casualties are very difficult to minimize since combat operations often proceed by means of terrorizing tactics aimed at civilian centers, as I have also argued elsewhere.⁸⁶ And the use of human shields also exacerbates *jus in bello* concerns.⁸⁷

Second, contemporary wars are increasingly not being fought by States but by non-State actors. The American Society of International Law has recently focused its annual conventions on the fact that the old rules of engagement do not seem to be relevant to the kind of asymmetrical armed conflict today. Insurgent combatants from non-State actors are not being trained in the law of war, and are often ignorant of this law. Legal rules such as those found in the Geneva Conventions are designed to make wars less likely to violate *jus in bello* considerations. But when combatants do not know of such rules, as is increasingly true today, wars will not be likely to be legal or just wars from the perspective of tactics and weaponry.

It is a fact that war today is not often of the interstate variety. More commonly war is conducted between a State and a non-State actor, or between two groups struggling for control of a State, as in a civil war. The tactics that are used in these “new” wars are virtually the same as those used in the older interstate wars, but the application of the UN Charter’s Article 2(4) has been called

86. See generally LARRY MAY, WAR CRIMES AND JUST WAR 93-117 (2007).

87. See MICHAEL NEWTON AND LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW Ch. 9 (2014).

into question by many commentators. If for no other reason, the UN Charter envisioned the use of force as being something employed by one State against another State and yet this is not at all what is the normal use of force today.

There is ample evidence for thinking that the UN Charter does not rule out wars of liberation or wars of secession that are aimed at ending oppression. Thomas Franck cites many of these sources as does Louis Henkin. So, in this respect if not in others, there are “wars” that the UN Charter would countenance. This means that the UN Charter is only close to a contingent pacifist document. Yet, it is also not completely clear what contingent pacifists would say about wars of liberation. Those traditional pacifists who opposed all war as well as all violence would of course not support wars of liberation. But the contingent pacifists today, as well as those in the past such as Erasmus, might very well support such “wars,” perhaps not being willing to call them wars at all or perhaps seeing that it is in principle possible to support wars such as these, while still thinking they will be very rare indeed.

Christine Gray has emphasized a different aspect of the Nicaragua decision of the ICJ than I did earlier.⁸⁸ She thinks that the Court “seems to have accepted the possibility of a dynamic interpretation of Articles 51 and 2(4) based on the development of state practice.”⁸⁹ I am in large-scale agreement with Gray’s analysis on this issue. But I do not think that the strategy of using force for humanitarian purposes in so-called “humanitarian intervention” is consistent with the spirit of the development of international law. And this seems even more to be the case when considering the original intent, and even the subsequent interpretations, of the Charter by the International Court of Justice and other courts. The possibility of a justified war of humanitarian intervention must indeed be conceded, but the UN Charter’s guiding ideals could not be reconciled with more than the rarest of such interventions today.

In this paper I have defended the controversial thesis that international law today is close to a form of pacifism that I have called contingent pacifism. The UN Charter seems to embrace something close to contingent pacifism concerning *jus ad bellum*. And human rights law seems to embrace something close to contingent pacifism concerning *jus in bello*. It seems to me time for more scholars to start focusing on the pacifist implications of

88. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 8 (2d ed. 2004).

89. *Id.*

contemporary developments in international law concerning both the law of the use of force and the law of war.⁹⁰

90. The author thanks Shannon Fyfe for assistance on this article.

THE PRICE OF PUBLIC DISENGAGEMENT

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I. INTRODUCTION

I come to this essay from different perspectives but with one primary theme: I am engaged presently in a major research and writing project addressing the role of the bystander in the Holocaust, primarily focusing on the “death marches” in late 1944-Spring 1945 and lynching of African-Americans in the 1930s and 1940s. Regarding the Holocaust, the project will examine, in particular:

In late 1944, the tide of war had turned and Allied forces moved across Europe in a series of offensives on Germany. The Nazis decided to evacuate outlying concentration camps. In the final months of the war, SS guards forced inmates on death marches in an attempt to prevent the Allied liberation of large numbers of prisoners.

Those death marches passed directly through many towns, and many died literally at the front doors of townspeople. Many died from starvation, disease, exhaustion, and cold, and thousands more were shot along the way. It is estimated that 250,000 concentration camp prisoners were murdered or died in the forced death marches that were conducted during the last 10 months of World War II.¹

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1. *The Holocaust*, UNITED STATES HISTORY, <http://www.u-s-history.com/pages/h1677.html> (last visited Apr. 18, 2014).

What is the connection between the two? The Bystander project focuses on complicity in two distinct historical paradigms, while this essay examines the danger to society posed by those who disengage from the public domain in the face of extremism. The similarities between the two projects, bystanders and disengagement, have a common philosophical underpinning: a stepping back from constructive contribution to mainstream society and facilitating, to varying degrees, harm to otherwise innocent individuals. The bystander clearly saw and chose to ignore; the disengaged clearly removed himself or saw harm yet sought an alternative means to express his disenchantment from mainstream society. In both instances, the potential for substantial harm clearly exists. In this essay, we will focus on those that ignored clear danger signs and did so knowingly. As discussed below, I am one of them.

These lines are penned as Tahrir Square is, once again, the site of clashes between government forces and demonstrators; unlike those who, in 2011, sought to bring down President Hosni Mubarak, those taking to the street are supporters of deposed President Mohamed Morsi. Though too soon to answer the Egypt “to where” question, the demonstrations reflect deep unrest amongst Egyptians regarding the nation’s future. While much uncertainty exists regarding the true impact of the Arab Spring and its results, undeniable is that the Arab street spoke loudly and resoundingly against decades-old dictatorial regimes.

From Tunis to Cairo, from Tripoli to Damascus, entrenched leaders were overthrown, killed or severely threatened. The cost is high: approximately 100,000 Syrians have been killed in the on-going and brutal civil war.² Though many commentators were quick to comment, if not wax poetically, regarding burgeoning democracy in the Middle East, the final outcome of the Arab Spring remains to be seen. Nevertheless, what cannot be ignored is the clear desire for a government distinct from oppressive and brutal regimes. Loud and courageous voices have made that clear.

These voices, then, reflect public engagement. That is in direct contrast to public disengagement reflecting apathy and disinterest endangering individuals in particular, society in general. Re-articulated: in an age characterized by religious and secular extremism that challenges, if not undermines, democracy disengagement, is not “cost-free.” A bit of an exaggeration? Perhaps, perhaps not. The danger is assuming extremism does not exist and

2. See *Syria Death Toll Tops 100,000, Activist Group Says*, CBS NEWS (June 26, 2013, 9:35 AM), <http://www.cbsnews.com/news/syria-death-toll-tops-100000-activist-group-says>.

that risks to society and individuals are easily ignorable. That said, there is need to address this issue with great care and caution, for the danger of over-estimating threats is similarly dangerous.

II. WHAT WE SHALL DISCUSS: RABIN, LEIPZIG, AND KING

This essay will focus on three distinct historical paradigms: the U.S. Civil Rights Movement, the end of the Cold War, and the assassination of Israeli Prime Minister Rabin. The first two represent extraordinary public engagement by those subjected to unremitting hostility, violence, and hatred; the latter depicts the price when mainstream society willingly, knowingly, and deliberately turns a “blind eye” to a danger visible to all, should they have only chosen to look.

In other words, what is referred to in Israel as the “sane majority” (ha’rov ha’sha’fo’i) chose to ignore the vitriolic hatred spewed by right-wing rabbis. In the name of full disclosure, I belong to that category and take no pride in assigning myself that designation. Whether we convinced ourselves that the incitement against Rabin will never be *actually* acted upon is a matter of historical conjecture; perhaps we *assumed* that the security services have the matter fully under control.

Perhaps we convinced ourselves that an Israeli Jew would never assassinate an Israeli Prime Minister. Most damning of all, we—philosophically and practically—left Prime Minister Rabin unprotected. While he paid the ultimate price for our disengagement, we also paid a price, socially, culturally, politically, and most importantly, the Oslo Peace Process came to a grinding halt in the years following the assassination.³ That the security services failed to protect Rabin is clear; that the intelligence community failed to recognize the danger posed by right wing religious extremists is unforgivable. The forced resignation of the then Head of the Israel Security Services (SHABAK), Carmi Gillon, in the wake of the Shamgar Commission was a “dollar short, day late.” Gillon’s remarkable and stunning incompetence⁴ is a matter of historical record;⁵ what is similarly noteworthy is our individual and

3. As these lines are written, Israeli and Palestinian negotiators are meeting in Washington, D.C.

4. Gillon was appointed by Rabin at the recommendation of out-going Israel Security Agency Head, Ya’akov Peri, who favored Gillon over Gideon Ezra, considered to be “rough around the edges” and therefore unsuited for the position by Peri.

5. See THE GATEKEEPERS (Mac Guff Ligne 2012).

collective failure to demand that the security services and legal and judicial establishment act preemptively and proactively to protect Rabin and punish the inciters.

Historical analogy can enhance discussion; Winston Churchill's "Munich Speech" captures appeasement brilliantly:

Many people, no doubt, honestly believe that they are only giving away the interests of Czechoslovakia, whereas I fear we shall find that we have deeply compromised, and perhaps fatally endangered, the safety and even the independence of Great Britain and France. This is not merely a question of giving up the German colonies, as I am sure we shall be asked to do. Nor is it a question only of losing influence in Europe. It goes far deeper than that. You have to consider the character of the Nazi movement and the rule which it implies.

The Prime Minister desires to see cordial relations between this country and Germany. There is no difficulty at all in having cordial relations between the peoples. Our hearts go out to them. But they have no power. But never will you have friendship with the present German Government. You must have diplomatic and correct relations, but there can never be friendship between the British democracy and the Nazi power, that power which spurns Christian ethics, which cheers its onward course by a barbarous paganism, which vaunts the spirit of aggression and conquest, which derives strength and perverted pleasure from persecution, and uses, as we have seen, with pitiless brutality the threat of murderous force. That power cannot ever be the trusted friend of the British democracy.

What I find unendurable is the sense of our country falling into the power, into the orbit and influence of Nazi Germany, and of our existence becoming dependent upon their good will or pleasure. It is to prevent that that I have tried my best to urge the maintenance of every bulwark of defence—first, the timely creation of an Air Force superior to anything within striking distance of our shores; secondly, the gathering together of the collective strength of many nations; and thirdly, the making of alliances and military conventions, all within the Covenant, in order to gather together forces at any rate to restrain the onward movement of this power. It has all been in vain. Every

position has been successively undermined and abandoned on specious and plausible excuses.⁶

Churchill's warnings are particularly disturbing because it reflects an unwillingness to learn from history. Public protest, the essence of engagement, is both legitimate and important; the question is *how* opinions, concerns, and desires are expressed. Five hundred thousand East Germans who demonstrated peacefully on November 4, 1989 calling for "fundamental civil rights such as freedom of opinion, freedom of the press, and freedom of assembly, as well as free elections"⁷ represented the essence of public engagement, particularly given the nature of the regime they were protesting against. However, that extraordinary demonstration was not born in one evening, for it reflected a continuum that had previously begun.

Whether there is a specific date that can be identified is a matter of historians to debate; what is clear is that the weekly gatherings in Leipzig on Monday evenings in the Saint Nicholas Church were instrumental in the burgeoning call for rights, including the freedom to travel and elect a democratic government.⁸ The leaderless movement, which expressed the will of the people, took on a life of its own, resulting in the fall of the Berlin Wall and reunification of East and West Germany. While reunification is not without its challenges, the extraordinary rise of ordinary East Germans directly contributed to the Cold War's end. Because no one individual can claim credit for this remarkable development, the fall of the Berlin Wall must be viewed as public engagement in its most extraordinary and powerful manifestation.

While the Rev. Dr. Martin Luther King, Jr. was the readily identifiable leader of the U.S. Civil Rights Movement, the level of public engagement amongst African-Americans in the Deep South was nothing short of remarkable. Facing brutal law enforcement, a hostile public, and indifferent public officials, Dr. King and his followers directly contributed to a stunning paradigm shift in the

6. Winston Churchill, The Munich Agreement, Address at the House of Commons (Oct. 05, 1938), *available at* <http://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/101-the-munich-agreement> (last visited Apr. 18, 2014).

7. *Mass Demonstration in East Berlin*, GERMAN HISTORY IN DOCUMENTS AND IMAGES, http://www.germanhistorydocs.ghi-dc.org/sub_image.cfm?image_id=3048 (last visited Apr. 18, 2014).

8. Francine S. Kiefer, *Why People in Leipzig Protest*, THE CHRISTIAN SCIENCE MONITOR, Nov. 27, 1989, *available at* [http://www.csmonitor.com/1989/1127/odres__1.html/\(page\)/2](http://www.csmonitor.com/1989/1127/odres__1.html/(page)/2) (last visited Apr. 18 2014); ROLAND BLEIKER, NONVIOLENT STRUGGLE AND THE REVOLUTION IN EAST GERMANY, 14-15 (1993), *available at* <http://www.aeinstein.org/wp-content/uploads/2013/10/NonviolentStruggleandtheRevolutioninEastGermany-Eng.pdf> (last visited Apr. 18, 2014).

U.S. The willingness of African-Americans to risk injury to limb and loss of life under the most painful of circumstances reflects remarkable tenacity and commitment to undo decades of institutionalized discrimination and segregation. Dr. King's "Letter from a Birmingham Jail" brilliantly captures the resolve, struggle, and pain; to fully understand and appreciate its power and historical importance, it is essential to quote a large excerpt:

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

We have waited for more than 340 years for our constitutional and God given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse and buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five year old son who is asking: "Daddy, why do white people treat colored people so mean?"; when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable

corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of "nobodiness"—then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair. I hope, sirs, you can understand our legitimate and unavoidable impatience. You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I it" relationship for an "I thou" relationship and ends up relegating persons to the status of things.

Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.⁹

Dr. King's words are majestic, his thoughts compelling, and his message to White America clear as his phrases: no more, we have had enough. Similarly, the unspoken message to African-Americans is of equal importance and strength: we must continue our struggle. While the Letter was directed to America's establishment, explaining the basis for the Civil Rights Movement and its resolve to gain the rights guaranteed by the Founding Fathers, the text speaks powerfully to those who will bear the burden of this effort. King's Letter is a call to engagement, regardless of the price which, as he made clear, would continue to be exacting, painfully so. Demonstrator and non-demonstrator felt that pain; the White southern establishment—politicians, Billy-club wielding law enforcement, and genteel society—perceived African-Americans as second-class citizens, at best. King's message was clear: we cannot and must not accept our collective and individual fate any longer.

III. U.S. CIVIL RIGHTS MOVEMENT: ENGAGEMENT NOTWITHSTANDING BRUTALITY

The U.S. Civil Rights Movement is of particular importance to the disengagement discussion: societal and institutionalized racism against African-Americans arguably left civil rights leaders no alternative but to organize, demonstrate, and protest. The extremism which they confronted on a daily basis, based on deep-seated racism enabling systemic, callous, institutionalized disregard of their constitutionally guaranteed rights, was a primary motivation in King's efforts to seek justice and redress for African-Americans.

9. Martin Luther King, Jr., *Letter from Birmingham Jail*, (Apr. 16, 1963) in THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE 1854-66 (Henry Louis Gates, Jr. & Nellie Y. McKay eds., 1996), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (last visited Apr. 18, 2014).

While King was a profound believer in non-violence, he was incarcerated on a number of occasions by local law enforcement and convicted for his actions.¹⁰ All of his convictions were for non-violent crimes such as preventing the operation of a business without “just or legal cause,” trespassing, loitering, and obstructing the sidewalk.¹¹ These stemmed from organizing and participating in sit-ins, boycotts, marches, and simply standing in a public place.¹² King’s political philosophy was distinct from the Black Panthers who were, in response to the racism that gave birth to the Civil Rights Movement, violent extremists in their own right. While King largely, but not exclusively, sought change legally, the Black Panthers conduct was overtly violent, illegal, and openly disdainful of government, White society, and King. Broadly speaking, albeit with caveats and cautionary flags raised, King’s Civil Rights Movement was inclusionary whereas the Black Panthers excluded Whites and moderate Blacks alike.¹³

The King-Black Panthers discussion is important not only with respect to the Civil Rights Movement, but also in the context of the larger extremist discussion, for it requires addressing the question “how to respond to extremism.” Re-articulated: should extremism be fought with extremism or are moderate measures more effective and ultimately more successful? While local circumstances and conditions significantly impact the course chosen, larger principles must not be discounted. If those whose rights are violated reach the conclusion that ‘working within the system’ and calculated/deliberate tolerance of intolerance is no longer effective, then more violent measures may be understandably adopted.

The larger question is: what is the goal of the relevant group? If the group is dedicated to long-term change, then moderate measures, predicated on compromise, are legitimate and perhaps effective. However, if the group’s focus is on immediate impact rather than far-reaching strategic considerations, then moderate action is, largely, irrelevant. Determining which tact to adopt is essential; after all, seeking to affect change is inherent to democracy and the democratic process. If society/law enforcement over-reacts to extremism—real or perceived—then not only is

10. See Mitchell Brown, *Timeline of Events in Martin Luther King, Jr.’s Life*, LSU LIBR., <http://www.lib.lsu.edu/hum/mlk/srs216.html> (last visited Apr. 18, 2014) (listing dates and locations where Martin Luther King, Jr. was arrested by local law enforcement).

11. See *Dr. Martin Luther King, Jr. Chronography*, U.HAW., <http://www.hawaii.edu/mauispeech/html/mlk.html> (last visited Apr. 18, 2014) (listing dates, arrests, and convictions of Martin Luther King, Jr.).

12. *Id.*

13. Pictures from Civil Rights marches consistently show significant white participation; that is in direct contradiction to the Black Panthers.

government legitimacy in question, but the ranks of the extremists may, inadvertently from the perspective of government, increase.

How society reacts to the moderate-extreme paradigm is of the utmost importance; however, as the Civil Rights Movement demonstrated, even moderate groups (though engaged in illegal activity as defined by the criminal code) may be subjected to extremist responses by society and law enforcement alike. Government's extreme response to real or perceived extremism is, generally, justified as necessary to protect society; in accordance with the social contract, which ironically, is violated when government denies otherwise guaranteed rights. In addressing rights guaranteed either by a national constitution or specific laws, it is necessary to inquire whose rights are at stake and what protections can be demanded.

History is important: the Civil Rights Movement to which Dr. King dedicated his life challenged basic norms and mores of American society in the 1950's and 1960's; in innumerable ways, it changed America. Obviously, for millions of Americans, that was extraordinarily unsettling, if not threatening; one only has to listen to the speeches of George Wallace and Lester Maddox and to see pictures from Birmingham, Alabama, to viscerally feel the pure hate and unadulterated racism that defined how much of White America (in both the North and South) reacted to Dr. King's message. Governor Wallace's inauguration speech in 1963 is a striking and clear example:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.

The Washington, D.C. school riot report is disgusting and revealing. We will not sacrifice our children to any such type school system—and you can write that down. The federal troops in Mississippi could be better used guarding the safety of the citizens of Washington, D.C., where it is

even unsafe to walk or go to a ballgame—and that is the nation's capital. I was safer in a B-29 bomber over Japan during the war in an air raid, than the people of Washington are walking to the White House neighborhood. A closer example is Atlanta. The city officials fawn for political reasons over school integration and THEN build barricades to stop residential integration—what hypocrisy!

Let us send this message back to Washington by our representatives who are with us today—that from this day we are standing up, and the heel of tyranny does not fit the neck of an upright man . . . that we intend to take the offensive and carry our fight for freedom across the nation, wielding the balance of power we know we possess in the Southland that WE, not the insipid bloc of voters of some sections . . . will determine in the next election who shall sit in the White House of these United States . . . That from this day, from this hour . . . from this minute . . . we give the word of a race of honor that we will tolerate their boot in our face no longer and let those certain judges put that in their opium pipes of power and smoke it for what it is worth.

Hear me, Southerners! You sons and daughters who have moved north and west throughout this nation we call on you from your native soil to join with us in national support and vote . . . and we know . . . wherever you are . . . away from the hearths of the Southland . . . that you will respond, for though you may live in the farthest reaches of this vast country your heart has never left Dixieland.

And you native sons and daughters of old New England's rock-ribbed patriotism . . . and you sturdy natives of the great Mid-West . . . and you descendants of the far West flaming spirit of pioneer freedom . . . we invite you to come and be with us . . . for you are of the Southern spirit . . . and the Southern philosophy . . . you are Southerners too and brothers with us in our fight.

What I have said about segregation goes double this day and what I have said to or about some federal judges goes TRIPLE this day.¹⁴

14. Governor George Wallace, Inaugural Address (Jan. 14, 1963), *available at* http://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf (last visited Apr. 18, 2014)(use of ellipses in original).

IV. RABIN'S ASSASSINATION: IN OTHER WORDS,
THE PRICE OF DISENGAGEMENT

While I do not ascribe significance to the relationship between similar events and the date that they occurred, the date November 4 is of particular significance for the subject at hand. In 1989, 500,000 East Berliners said "enough," and in 1995 a religious right-wing Jewish extremist assassinated Israeli Prime Minister Rabin after months of hate-filled incitement against Rabin by rabbis.¹⁵ Moments before Yigal Amir assassinated Rabin, a rally attended by 100,000 Israelis had ended. Those attending came both to express their support for the Oslo Peace Process and to denounce the virulent hatred against Rabin. Ironically, the rally ended with the crowd, and Rabin, singing "Song of Peace."¹⁶

Those Israelis who attended, largely but not exclusively secular Jews, were sending three powerful messages: support for the peace process, outrage at the incitement, and solidarity with Rabin. The last two points are of particular importance regarding the engagement/disengagement discussion: it was the first time, in the face of relentless and unmitigated incitement, that the so-called "silent majority" left the comfort of their homes and individually and collectively said "enough."

However, the "silent majority"—of which I am a part—stayed silent for an extended period of time before the assassination thereby enabling the rabbis and their supporters to act with impunity. In other words, we individually and collectively ignored the impossible to ignore incitement; simply put, we turned a blind eye. Rabin had previously warned that the Hebrew expression "it will be okay" (*ye'he'e be'se'der*) are the most dangerous words in Hebrew because they enable ignoring clear danger signals.¹⁷ Needless to say, he was, tragically, correct.

In the aftermath of the assassination many Israelis asked themselves: "What happened, where was I?" "Where we were" was going about our daily lives, choosing not to see what we knew we should not ignore, and assuming that, while the hatred was vile and consistent, it was only "talk." We miserably failed to understand the power of rabbinical incitement and thoroughly underestimated the extent to which the religious extremist right-wing was deeply opposed to the Oslo Peace Process. The

15. Yoram Peri, *THE ASSASSINATION OF YITZHAK RABIN* (Yoram Peri ed., 2000).

16. *Id.*

17. Yitzhak Rabin, Prime Minister, Israel, Remarks to the IDF Staff and Command School (Aug. 1992).

Rabin assassination brought to light the existence of what Ami Ayalon termed “deep schisms in Israeli society.”¹⁸

Rabin’s assassination, in retrospect, should have come as no surprise. What was shocking was the utter failure of state agents to take seriously the unmitigated incitement and the incompetence of the State Attorney General to prosecute those responsible for inciting Rabin’s assassin. I lived in Israel during those terrible days; like many others, I was aghast at the unrelenting hatred but did not entertain the thought that a Jew would kill the Prime Minister. Perhaps like many others, I was skeptical that the incitement would actually lead to violence thereby underestimating rabbinical influence. Whether that reflects skepticism regarding the sway of religion or ignorance regarding the relationship between rabbi and parishioner is an open question; regardless of the answer, the silent majority—to which I belong—abandoned Rabin to an opponent whom we did not understand in a game played without rules and morality. That is the price of disengagement.

V. DISENGAGEMENT CAUSES HARM: THE LARGER DISCUSSION

The ignoring of clear danger signs manifests violation of the social contract; there is little doubt that extremism benefits from this willful blindness, which, depending on the circumstance is either a criminal act or an extraordinary moral failure. In either paradigm—criminal or moral—the results are arguably similar: harm is caused to the vulnerable because mainstream society and those in official positions failed to sufficiently protect those most in need of that very protection. It seems, then, that there is something about extremist behavior that fosters reticence on the part of larger society; that very weakness emboldens extremists who are committed to a worldview intolerant of compromise that brooks no dissent.

That reality defines an internal society which poses extraordinary dangers to those deemed apostates or insufficiently devout; in other words, those declared by the group’s leaders to not be “true believers” are at risk. As history demonstrates, vulnerable members of an internal society are subject to unrelenting abuse with little hope of external mitigation of their distress. In other

18. THE GATEKEEPERS, *supra* note 5.

words, the price of tolerating intolerance is neither abstract nor ephemeral; it is very real with tragic consequences.

Society's turning a blind eye to extremism is a pattern that tragically repeats itself. It is, in many ways, insignificant whether the deliberate ignoring of the threat posed by extremists is a crime or "only" a moral failure. In both cases, the victims of extremism are unprotected; whether Penn State officials in positions of power—who may have had the opportunity to ensure that child abuse desist and Sandusky be prosecuted—committed a crime (i.e. child endangerment) or failed morally (brand/institution protection rather than child protection) will be determined by prosecutors and courts. An investigative report written by former FBI director Louis Freeh finds Penn State officials guilty, not of simple negligence, but rather of willfulness in covering up Sandusky's abuses.¹⁹ Currently, the Penn State officials responsible for the cover up are awaiting trial.²⁰ What is clear, similar to the response of the Catholic Church to horrific and unceasing reports of child abuse by priests, is that Penn State officials had a deliberate policy intended to protect the institution rather than the victim. In both cases, Penn State and the Church, the damage to the institution would be extraordinary; in both cases, institution leaders made egregious errors reflecting willful blindness at its most unconscionable extreme.²¹

While neither Penn State nor the Catholic Church is the focus of this essay, each is instructive in examining dangers extremism poses to society; the failure to act in the face of a clear wrong largely defines society's response to extremist behavior. Perhaps, by analogy, it is akin to the schoolyard bully whose actions fellow students and authorities know, yet whose response time, traditionally, has been painfully delayed. Whether that hesitation, recently the subject of extensive media attention,²² will change is

19. FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), available at <http://progress.psu.edu/the-freeh-report> (last visited Apr. 18, 2014).

20. Tim Rohan, *Three Penn State Officials Are Ordered to Stand Trial*, N.Y. TIMES (July 30, 2013), <http://www.nytimes.com/2013/07/31/sports/ncaafootball/three-penn-state-officials-are-ordered-to-stand-trial.html>.

21. See *Roman Catholic Church Sex Abuse Cases*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/r/roman_catholic_church_sex_abuse_cases/index.html; see also Erik Kain, *How Penn State and the Catholic Church Covered Up Sexual Abuse and What We Can Do to Stop It*, FORBES (Nov. 7, 2011, 2:19 PM), <http://www.forbes.com/sites/erikkain/2011/11/07/how-penn-state-and-the-catholic-church-covered-up-sexual-abuse-and-what-we-can-do-to-stop-it/>.

22. See Kirk Semple, *Army Charges 8 in Wake of Death of a Fellow G.I.*, N.Y. TIMES (Dec. 21, 2011), <http://www.nytimes.com/2011/12/22/us/8-charged-in-death-of-fellow-soldier-us-army-says.html>.

an open question; the historical pattern reflects a policy best described as “fear of confronting.” The extremist not only poses a danger to victims (specific or random) but also benefits from society’s reticence to confront a clear and present danger.

The idiom “there cannot be a policeman on every corner” brilliantly conveys the reality of living in a democracy. Protecting civilians is the primary responsibility of government, but protection is neither absolute nor guaranteed. It is not absolute because, literally and figuratively, there cannot be a policeman at every corner; not guaranteed because the freedoms of speech, religion, information and association are similarly protected. Freedoms cannot be considered in a vacuum; the question is what circumstances justify their limits and subject them to what criteria, standards and guidelines. The notion of limits is essential to balancing state power, ensuring that the unfettered executive is kept at bay. Achieving this critical goal poses great challenges, politically and philosophically alike.

In addressing this tension, the core assumption is that guaranteed rights must be protected; that is, after all, inherent to the social contracts between the individual and society and between the individual and the state. The question is whether threats to national security and public order justify minimizing free speech. In some ways, American history has demonstrated a ready willingness to answer in the affirmative. The costs, as repeatedly demonstrated, are significant with respect both to First Amendment principles and on a human, practical, individual basis.

Disregarding legitimate threats to national security is *also* dangerous. The dilemma, then, is determining the seriousness of the threat to public order and ascertaining whether limiting free speech will mitigate that threat and at what cost to individual liberty. The risk in finger pointing is extraordinary; there is always a danger in identifying the ‘other’ as posing a threat to society.

In many ways the “tolerating intolerance” paradigm espoused by Professor Martha Minow is directly “on point” with respect to the limits of free speech.²³ That is, do religious and secular extremists pose a sufficient enough threat to society that *their* freedom of speech protections need be re-defined? There is, clearly, danger in raising this question; it suggests deliberate identification of a specific group as worthy of special attention in the context of

23. See generally, Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453 (2007).

establishing a rights minimization paradigm. The risk in this proposal is significant; similarly, the possible risk to public safety and individuals alike in failing to recognize the possible harm posed by religious and secular extremists is also fraught with danger.

The most obvious harm extremism poses is physical injury to members of society; in that vein, it is the primary responsibility of the nation state to ensure physical safety of the populace, from internal and external threats alike. To dismiss the possibility that extremists have the capability, and under certain conditions the willingness, to cause harm is to undermine the social compact that Rousseau brilliantly outlined in *The Social Contract*.²⁴ After all, in exchange for entering into a social compact with the state, the individual expects protection and safety. That is, by willfully entering into an association with other individuals under the 'umbrella' provided by the state, the person rightfully demands protection and safety.²⁵ In addition, the individual agreeing to the social compact expects laws that reflect the majority will. Nevertheless, the individual has the right to oppose particular laws the majority has viewed favorably.²⁶

That is, after all, the essence of democracy; while the individual may oppose particular laws, he is guaranteed protection from the majority provided the laws do not minimize otherwise guaranteed individual rights or facilitate violence to person or property. The social compact, in establishing an association, articulates a paradigm whereby the individual sacrifices liberty for protection; that, however, does not mean the individual agrees to be subjected to violence and harm. After all, the motivation in forming an association and joining society is to be free from harm and danger. In examining the harm posed by extremism, the question is not only one of existential harm to society, but also of physical harm to individual members of society who are, potentially, at risk.

It is important to recall that "risk" may come both from society at large and from a particular group the individual belongs to. In many ways, the social contract theme is essential to the extremism discussion; the willingness of the individual to voluntarily join society is based on the understanding that loss of some freedom

24. See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Ernest Rhys ed., G.D.H. Cole trans., J.M. Dent & Sons 1923) (1762), available at <http://www.archive.org/stream/therepublicofpla00roussoft#page/n3/mode/2up>.

25. *Id.*

26. It is important to note that Rousseau rejected the individual's right to resist a general will. See *id.* at 15, 23-33.

and liberty is voluntarily relinquished in exchange for protection and safety. In other words, the individual has made a “deal” with society whereby protection is proffered in exchange for minimization of personal rights.

Failure to protect the individual violates the contract; more importantly, it enhances the vulnerability of the individual by exposing him to harm from which he is unprotected. In the context of examining extremism one of the most important—and troubling—realities is that the nation state tolerates conduct that, as history has consistently demonstrated, harms individuals, whether randomly or specifically. The social contract model articulated by Rousseau sought to create a model whereby harm to individuals is minimized; yet, the pages of history are replete with examples where the contract has been violated by the nation state that turns a blind eye to extremism.²⁷ In that vein, the social contract is at the epicenter of that confluence, for it articulates state responsibility to the individual. When the nation state chooses not to confront extremism or extremists, the social contract has been violated.

The social contract is predicated on an understanding that neither national security nor individual rights are absolute and that respect for both is essential to a thriving civil, democratic society. After all, the voluntary joining of society necessarily implies rights minimization in exchange for protection. One of the great dilemmas from the perspective of the individual is what alternatives exist if the contract is violated; *prima facie*, three options seem viable: submissiveness; peaceful, civil disobedience;²⁸ and violent protest. Circumstances and conditions of particular environments are significant determinants in analyzing how an affected group or specific individual responds to societal tolerance of extremist behavior that directly impacts their security and safety.

When the social contract is violated the “at harm” individuals or groups are vulnerable; they are forced to either accept their fate or to engage in “self-help.” However, on innumerable occasions decision makers have failed to decisively act in the face of internal harm to an individual. The reasons for this failure are varied ranging from “political correctness” to unjustified deference to religion/race/ethnicity to ignorance regarding the influence of internal group leaders.

27. *Id.*; For historical examples, see anti-Semitism in Europe, institutionalized racism in the Deep South, and Japanese treatment of Korean sub slaves.

28. See generally PETER SINGER, DEMOCRACY AND DISOBEDIENCE (1973).

As an Israeli journalist ruefully commented, the failure of the Israeli media (including this journalist) to soberly assess *clear* danger posed by extremist right-wing rabbis inciting against former Prime Minister Rabin was based on a belief (secular) that religious-based incitement is not a sufficient motivator for action. In other words, to paraphrase the journalist, “no one really takes religious extremists seriously.” Needless to say, the media’s failure to sufficiently appreciate the power of religious extremist speech was a malady that permeated throughout Israeli society prior to Rabin’s assassination. It was only after Yigal Amir assassinated Rabin, acting in the spirit of unrestrained and unmitigated religious extremist incitement, that mainstream society asked “where were we?” The question, posed in anguish and deep remorse by many, was the wrong question; the correct query is ‘why did we consistently fail to underestimate the power of religious extremist speech?’ In many ways, the answer is arrogance; a secular arrogance that religious leaders must not be taken ‘seriously’ by their congregants who should understand that religious speech is just that, religious speech and is therefore inapplicable to modern society.

This arrogance born of inability to understand the power of religious extremist speech is not restricted to a powerful disconnect between religious extremists and secular members of society for it extends to secular extremist speech. That, too, is minimized by a mainstream society largely convinced that extremist speech represents mere “venting” by a disaffected few and does not pose a threat to society or individuals. As McCarthyism made clear, ignorance is not bliss, and the price to be paid for willfully disregarding extremist speech is high, indeed. The sheer numbers of careers ruined, lives destroyed, and irreversible harm caused to innumerable innocent victims highlight the dangers of speech “dismissed” by society as the ranting of a lone individual.²⁹

Three ingredients—powerful leader, concise message, and unifying symbols—facilitate “rallying” around a particular idea whose consequences, if unchecked, may destroy society. Message framing, verbal or symbolic, requires intimate knowledge of the audience and its core needs and beliefs. The ability of extremists, religious or secular, to concisely frame an idea, devoid of nuance, is essential to shaping public opinion. The message is critical to the dissemination of extremism; the more concise and direct, the more powerful and compelling. The concise message is essential to

29. See generally ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* (2d ed. 2001).

extremist movements; the “simpler” the message, the more powerful the “punch.” Nuance is perceived as weakness whereas focused themes have a much greater ability to move people to action, particularly when a target group has been identified.

The relationship between the individual and the state is the essence of the social contract; the danger is when the individual feels significantly disconnected from the state. The danger is, at least, two-fold: disengagement politically, socially, and economically and affiliation and subsequent association with problematic non-state groups. That is, disengagement from mainstream society may well extend beyond “checking out” for it may well involve identification, for example, with groups that pose threats to society and individuals alike.

VI. WHAT DOES ALL THIS MEAN?

Larry Graham, former Member of the Australian Parliament notes:

This public disengagement is an extremely disturbing and dangerous trend that was confirmed in research conducted by the Lowy Institute. Their 2011 poll showed that nearly a quarter of young Australians think that “it doesn't matter what kind of government we have.”

The disengagement is further highlighted by the voting figures in this state where there are 606,951 people aged 18 and over who are either, not on the electoral role or who posted an invalid vote. At 26 per cent of the population, the percentage not voting is similar to the Lowy poll national numbers and is dangerously high.

Another way of looking at this is that the people not participating in our democracy dwarf the vote of any political party (2008 election: Liberals received 418,000 votes, Labor 390,000). This must rob government of its legitimacy. What party can claim any sort of mandate when the vast majority of the state did not vote for them?³⁰

30. Larry Graham, ‘None of the Above’: *The Disengaged Public's Vote*, WA TODAY (Feb. 28, 2013), <http://www.watoday.com.au/comment/none-of-the-above--the-disengaged-publics-vote-20130228-2f7h1.html#ixzz2YMaxBvbW>.

According to Victoria Barnett:

The bystander is not the protagonist, the person propelling the action; nor is the bystander the object of the action. In a criminal case, the bystander is neither victim nor perpetrator; his or her legally relevant role is that of witness—someone who happened to be present and could shed light on what actually occurred.³¹

Barnett's definition clearly does not describe Dr. King or those who stood with him, shoulder to shoulder in the face of brutal violence and studied indifference alike. It does, however, describe the "sane majority" that stood silent as Rabin was subjected to unmitigated hatred, looking in askance but failing to act. When leaders of the opposition—Benjamin Netanyahu, Ariel Sharon, Tzahi Hanegbi, Moshe Katsav, and Yitzhak Shamir—stood on the balcony overlooking Jerusalem's Zion Square and saw Rabin's likeness in a SS uniform, they individually and collectively turned their gaze in another direction.

While Messrs.' Netanyahu, Sharon, Hanegbi, Katsav, and Shamir did not commit a crime in accordance with the Israeli Penal Code, their moral compass, if it existed, went astray. In the engagement/disengagement paradigm, the Israeli "street" was solidly engaged and aligned, tragically so, with the forces of hatred and violence. The moral culpability—not legal—culpability—of Netanyahu et al. was to facilitate the voices of unmitigated incitement. To that end, standing on the balcony is not akin to being a bystander. While not equating to the level of involvement of direct participants, it is important to ask what would have been the outcome had the opposition politicians called on their supporters to refrain from inciting against one of Israel's greatest military leaders who defined himself, when Prime Minister, as a "soldier for peace." Tragically that is a rhetorical question for Netanyahu et al. focused solely on their narrow and immediate political interests rather than understanding the true significance of the hatred articulated (yelled) by their supporters at the urging of rabbis. Their shameful and unforgiveable conduct was met, largely, with silence by the disengaged "sane majority."

In July 2013, I spent five days in Berlin and Dresden; conversations with academics, security officials, and politicians focused on the National Socialist Underground (NSU) and the National

31. VICTORIA J. BARNETT, *BYSTANDERS: CONSCIENCE AND COMPLICITY DURING THE HOLOCAUST* 9 (1999).

Democratic Party (NDP). The former is responsible for ten murders over ten years, killing nine immigrants (eight Turks, one Greek) and one German policewoman.³²

The NDP [is a right-wing political party] which holds seats in two state parliaments [Saxony and Mecklenburg-Vorpommern ANG] vehemently opposes immigration and rejects the German constitution, claiming it was imposed on the country by the victorious Allies after World War II. Germany's domestic intelligence agency has called it a "racist, anti-Semitic, revisionist" organization determined to abolish democracy and create a Fourth Reich³³

Efforts to ban the NDP have been initiated by the German states before the Constitutional Court.³⁴

With respect to right-wing extremism, described by some as "pissed off white man," Professor Hans-Gerd Jaschke has written the following:

Non-acceptance of immigration and prejudice toward immigrants are common values of right-wing voters in Europe. This electorate mainly consists of younger males on a low skill and education level. Most of them are laborers or unemployed

Recent public discourse in Germany highlights right-wing extremism as a social movement This is a new development, because until now the political operations of the far right had been considered to be part of a subculture, neglected more or less by the general public. It is being argued now that the intensity of networking, demonstration and provocation turned the far right into a modern working-class movement, based on stable milieux.³⁵

The danger, then, is of ignoring the threat or of, at the least, the possible threat to society and individuals alike. To cut to the chase:

32. Kate Connolly, *Neo-Nazi Gang Trial to Get Under Way in Germany After Chaotic Start*, THE GUARDIAN (May 3, 2013, 10:29 AM), <http://www.guardian.co.uk/world/2013/may/03/beate-zschape-trial-germany-neo-nazis>.

33. Andrew Bowen, *World from Berlin: 'You Can't Outlaw Stupidity' of the Far-Right*, SPIEGEL ONLINE (Mar. 19, 2013, 2:14 PM), <http://www.spiegel.de/international/germany/press-review-german-cabinet-backs-off-attempt-to-ban-far-right-ndp-a-889671.html>.

34. *Id.*

35. Hans-Gerd Jaschke, *Right-Wing Extremism and Populism in Contemporary Germany and Western Europe*, in RIGHT-WING RADICALISM TODAY: PERSPECTIVES FROM EUROPE AND THE US, 22, 34 (Sabine von Mering and Timothy Wyman McCarty, eds., 2013).

those members of white society who chose to ignore the horrors of lynching in the Deep South adopted the same attitude that secular Jews in Israel did in the face of unremitting incitement by extremist Jewish rabbis prior to Prime Minister Rabin's election. The attitude is best described as tolerating intolerance. The failure of the mainstream Israeli public, as well as the stunning failure of law enforcement and Justice Ministry officials to fully appreciate the power of religious extremist incitement prior to the Rabin assassination, is a collective tragedy. More disturbing, or at least no less disturbing, is the *continued* failure to recognize the danger extremist rabbis pose to civil democratic society.

Recent examples of this danger are found in remarks made by right-wing extremists towards former Defense Minister Ehud Barak when West Bank settlements were put on a ten month freeze: "If you think of destroying the settlements, you are mistaken, and I will kill you . . . I will harm you or your children, be careful . . . If not now, then when you are no longer a minister and have no security around you."³⁶ An additional example is a warning given by the former Head of the Israeli Security Agency, Yuval Diskin, to Prime Minister Benjamin Netanyahu and Defense Minister Ehud Barak: "The Rabin assassination can repeat itself. There are extremist Jews within the Green Line as well, not only in the territories. It's an optical illusion that they're all in the territories. . . . There are dozens willing to use firearms against their Jewish brothers"³⁷

It is, admittedly, difficult to be courageous in the face of a mob; similarly, it requires either extraordinary individual leadership as manifested by Dr. King or nameless and faceless individuals reaching the conclusion that "enough is enough." That is the remarkable and distinguishing quality of the East Germans in Leipzig; the end of the Cold War began when individuals took to the streets with the understanding that harm may befall them. In doing so, they cast aside their justified personal fears in a remarkable demonstration of courage, fortitude, and determination. The individual and group decision to demand rights was extraordinary, for neither East Germany nor the Soviet Union had distinguished themselves as tolerating dissent or alternative voices.

36. Amos Harel, *Barak Gets Death Threat Over West Bank Settlement Freeze*, HAARETZ (Jan. 5, 2010, 8:23 PM), <http://www.haaretz.com/news/barak-gets-death-threat-over-west-bank-settlement-freeze-1.260859>.

37. Chaim Levison, *Yuval Diskin: West Bank Evacuation Could Lead to Another Political Assassination*, HAARETZ (Apr. 28, 2012, 7:08 PM), <http://www.haaretz.com/news/diplomacy-defense/yuval-diskin-west-bank-evacuations-could-lead-to-another-political-assassination-1.426979>.

Re-articulated: the communist regime brooked no dissidents, as its authoritarian nature demanded absolute obedience to the party and the state. And yet, in 1989 the regime was confronted with individuals not cowed by state force or power. Undoubtedly, the regime's stuttering response encouraged, if not emboldened, the demonstrators and their supporters who, perhaps, understood they had wrestled initiative and momentum from state leaders.

Dr. King, as clearly articulated in his Letter,³⁸ fully understood the forces he was facing: an entrenched political and cultural system intended to ensure the permanent subordinate position of African-Americans and national political leaders hesitant to fully embrace King and his movement. President John F. Kennedy's failure to demonstratively and publicly support King powerfully reinforced the complexity and enormous risks associated with King's efforts; while historians correctly credit President Lyndon B. Johnson with determination and efforts regarding the Civil Rights Movement, it is important to recall the loneliness of King's road and its travails.

That, however, is the essence of leadership. A note of caution: the lack of a strong leader does not necessarily lead to disengagement from the public sphere as dramatically demonstrated in Leipzig, and the presence of a strong leader cannot be offered as an excuse for the incitement-based engagement that resulted in Rabin's assassination. The three examples touched upon in this essay present distinct paradigms; two reflect courage, and one manifests the danger of turning a blind eye. Needless to say, this is not a new phenomenon: in 1943 U.S. Supreme Court Justice Felix Frankfurter met with Jan Karski, a Polish emissary who managed to escape Nazi Europe, and reported to Allied countries regarding the Holocaust. Justice Frankfurter could not believe what he heard, stating, "I am not saying that he is lying. I only said that I cannot believe him, and there is a difference."³⁹

Similar to the turning blind eye of the Israeli majority, what I suggest reflects disengagement. Barnett writes:

Such responses [like those of Justice Frankfurter] are typical of bystanders In a sense, they were a form of denial—not the denial of those people today who claim that the Holocaust never happened, but a form of denial that came to characterize bystanders everywhere: *the denial that it was possible to do anything to stop what was*

38. See King, *supra* note 9.

39. BARNETT, *supra* note 31, at 51.

happening. Paralyzed by the sense of helplessness and powerlessness, people became convinced that what was happening was inevitable. . . . [T]his phenomenon suggests that we are looking at something other than simple indifference or even prejudice.⁴⁰

Martin Luther King, Jr. was not a bystander, neither were those demonstrating in Leipzig; the results of their determination and engagement changed America and the world respectively. King was able to harness the energy, anger, and pain of African-Americans whose lives were a mockery of the U.S. Constitution; the hundreds of thousands of demonstrators looked the proverbial tiger in the eye, and he blinked. King and his supporters, some who paid the ultimate price for their engagement, stand proud; the same holds true for those who brought the East German regime to its knees. Both stand in direct contrast to the disengaged Israeli majority whose response to rabbinical incitement was akin to Justice Frankfurter's reaction to Karski: disbelief and denial. That is, the "sane majority" assumed that harm would not befall Rabin, and therefore passivity ruled the day.

Needless to say, the disengaged rued the day they failed to understand that religious extremists act in accordance with rabbinical interpretation of religious text. The social contract was violated by both the inciters/incited and the disengaged; however, blame should not be appropriated equally. While Yigal Amir pulled the trigger and extremists noted with satisfaction the demise of the peace process, the core failing—morally not legally—rests with those like this author who let the extremists control the tone and tenor of Israeli political discussion and society. Rabin's assassination is the unequivocal result of disengagement.

As a rejuvenated peace process is seemingly in the offing, both the security services and mainstream society must draw their own conclusions; the former must take threats to Prime Minister Netanyahu seriously, the latter—even if Netanyahu is not "their" candidate—must not sit passively when the voices of hate enter the fray. To that end, the "sane majority" can learn from the U.S. Civil Rights Movement and the East German demonstrations. The lessons are clear; failure to learn and apply is, tragically, deadly. That is the price of disengagement.

40. *Id.*

INTERNATIONAL HUMANITARIAN LAW TRANSPARENCY

LESLEY WEXLER*

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I. INTRODUCTION

This article identifies the demand for public transparency as a new frontier in International Humanitarian Law (IHL). When new conflicts occur, they expose the limitations of the IHL regime and often spur major reform efforts. I suggest that the growing movement for greater public access to information is just as significant as proposals for substantive IHL changes, calls for enhanced accountability, and suggestions for better training. Its advocates contend that information is a necessary precondition to intelligent public debate over IHL reform and assessments of IHL compliance.

Armed conflicts have long required governments to balance secrecy and transparency. To take a few examples, they must decide whether and how to acknowledge the existence of an armed conflict, the applicable legal rules, the evidence of possible violations, and the number of combatant and civilian casualties. But the long war on terror has heightened global civil society's concerns about expansive government secrecy. Demands for enhanced public transparency span the range of IHL activities:

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the classification of conflicts, the sorting of combatants and civilians, the numbers of civilian casualties, the deployment of unlawful weapons, the conditions of detention, the use of coercive interrogation, its facilitation via extraordinary rendition, and the punishment for unlawful activities.

Assessing the costs and benefits of public transparency is notoriously difficult as the government closely guards much of the information needed to make such a determination. In the context of armed conflicts, states may have a laundry list of justifications not to disclose information to the public: enhancing safety for civilian populations and their own troops, maintaining diplomatic relationships and protecting allies, discouraging strategic behavior by their opponents, and allowing policy and negotiation flexibility. Yet government actors may have less laudatory motives such as: precluding public debate, discouraging accountability,¹ avoiding reform to unlawful practices, and accruing power vis-à-vis members of other government branches.

Of course, numerous justifications for greater public access to information during armed conflicts exist as well. These include bolstering government accountability, shoring up government legitimacy,² building a historical record, reducing uncertainty for families of potential victims, enhancing decision-making,³ and revealing strength or compliant behavior. Again, actors may also have less praise-worthy motives in revealing information such as forwarding a particular policy agenda,⁴ embarrassing other government actors or branches, and undermining political relationships.

While revelations about drone strikes and national surveillance programs have spurred a domestic transparency debate, more attention needs to be paid to the role of international transparency. Many other countries also engage in the war on terror, and several face their own internal armed conflicts. They too must decide how to manage information disclosure in light of their participation in armed conflicts. Moreover, revelations during armed conflicts often implicate multiple countries and, in so doing,

1. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM*, 557 (2004) (arguing that secrecy under the Bush administration was motivated by its desire “to insulate executive action from public scrutiny.”).

2. *Richmond Newspapers v. Virginia, Inc.*, 448 U.S. 555, 572 (1980) (quoting 6 J. WIGMORE, *EVIDENCE* § 1834, 438 (J. Chadbourn rev. 1976)) (noting in the context of the public’s right to attend criminal trials that openness increases “respect for the law” and knowledge of the “methods of government”).

3. Alisdair Roberts, *National Security and Open Government*, 9 *GEO.PUB. POL’Y REV.* 69, 73-75 (2004).

4. Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 *HARV. L. REV.* 906, 910-11 (1990).

can affect cooperation and interoperability. Thus, this article looks abroad to map out various mechanisms for IHL-related transparency and discusses the role of IHL itself in mandating public transparency.

Part I begins by broadly contextualizing some of the most frequently deployed mechanisms of public transparency. First, democratic governments sometimes acknowledge voluntary disclosure of information regarding armed conflicts or authorize the unacknowledged release of information. In addition, unauthorized leakers or other third parties actors may reveal information regarding IHL that the government prefers to keep secret or differs from official government accounts. Domestic law itself may compel public disclosure of some information. While each state has its own variants, this section describes some relevant sources such as open access laws and judicial rulings during litigation. Relatedly, international law may also contain public transparency provisions that remain applicable during armed conflicts. While all of these mechanisms may enhance public access to information, the increasing demands for information outstrip their current application.

Part II uses a 2010 German-ordered air strike in Kunduz, Afghanistan to investigate the role of various transparency mechanisms in the current IHL climate. As this operation ignited a political firestorm in Germany, it provides a nice case study of transparency in action. The strike raised such questions as whether an armed conflict existed, what rules of IHL applied, what the facts on the ground were concerning civilian casualties, and whether government actors had lied or engaged in a cover up. This section concludes by briefly describing the ecosystem in which existing transparency mechanisms dynamically interacted and noting why civil society might find them inadequate.

Part III turns to the substantive content of IHL itself to survey existing and possible future transparency requirements. While legal scholars have exhaustively discussed domestic information forcing statutes, they have written much less about how IHL itself can be used as a tool to compel disclosure.⁵ While such requirements would still require domestic implementation, they affect transparency on a global scale. This section identifies the limited public transparency requirements and notes reform efforts calling for new interpretations or new rules to facilitate public access to information.

5. Cf. Eliav Liebllich, *Show Us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law*, 45 ISR. L. REV. 459, 460 (2012).

This paper concludes by noting the contours of this new IHL frontier. What normative priors inform this frontier? What questions demand further research? What sort of reforms need to be assessed? This paper opens this conversation in hopes that as other IHL reforms are proposed and debated, the need for quality IHL information is recognized as an essential part of any of those other frontiers.

II. EXISTING MECHANISMS OF IHL TRANSPARENCY

This section briefly reviews some of the most important mechanisms of government transparency. First, a government may always choose to voluntarily release information about an armed conflict. For instance, a country may announce the existence of an armed conflict and the application of a particular body of law as did Austria-Hungary when it declared war on Serbia in July 1914. Or a head of state may have his officials explain the governing interpretations of IHL like the Obama administration did with a series of speeches articulating its legal positions on the war on terror.⁶ Similarly, a military could choose to release data relating to civilian casualties as the United Kingdom did for recent conflicts in Iraq and Afghanistan.⁷ But as mentioned in the introduction, executives often have strong incentives not to provide and acknowledge information to the public.

In addition to publicly acknowledged disclosures, plants and leaks provide another mechanism of government transparency. With plants, someone in the government authorizes the revelation of information to the media.⁸ Because such information is not publicly linked to a named individual, governments may communicate data and messages without absorbing all of the “diplomatic, legal, or political risks.”⁹ Take, for example, an unnamed French official condemning Georgia’s behavior as “mad”

6. KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION ADDRESSES ON NATIONAL SECURITY LAW* (forthcoming 2014).

7. COUNTING CIVILIAN CASUALTIES 39 (Taylor B. Seybolt et al. eds., 2013).

8. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 11, 37 (forthcoming 2013).

9. *Id.* at 38-40 (elucidating reasons for plants: They allow executives to “circumvent or cajole the career bureaucracy, to communicate more efficiently with foreign governments, to send signals and warnings to adversaries without formally engaging them, to float trial balloons, to respond rapidly to breaking developments, to preserve plausible deniability if an initiative is poorly received or an assertion turns out to be false and generally to impart information about executive branch policies without officially acknowledging those policies and thereby inviting unwanted forms of accountability or constraint.”).

and a bad gamble during the recent conflict over South Ossetia.¹⁰ The comments convey a message without the full costs of an official statement. In contrast, with leaks, someone in the government discloses confidential information to the media without the authority to do so.¹¹ Both Daniel Ellsberg's public dissemination of the Pentagon papers detailing the Department of Defense's assessment of the U.S. role in Vietnam¹² and Bradley Manning's provision of confidential war logs and embassy cables to WikiLeaks are leaks directly related to activity governed by IHL. With the increasing digitization of information, such IHL-related leaks are likely to continue.¹³

Independent actors may also provide information about government activity. For instance, witnesses may observe and disclose government activity. When Israel denied using white phosphorus in Lebanon, civilian reports suggested differently.¹⁴ Sometimes, parties make contemporaneous revelations as when local occupants and news agents captured incendiary bombs on school playgrounds in Syria,¹⁵ while others take place years or even decades later as with Iris Cheng's painstaking interviews of Chinese survivors of the Rape of Nanking.¹⁶ Yet non-government actors may often be unaware of much of the detail surrounding IHL-related activity, or the government may act to bar the dissemination of such information. Take, for example, the limited media access to Guantanamo or China's new secret detention law¹⁷ or the absolute secrecy of suspected CIA black sites in Thailand, Romania, Poland, and Lithuania.

10. Doug Bandow, *United in Powerlessness*, THE NAT'L INTEREST (Aug. 18, 2008), <http://nationalinterest.org/article/united-in-powerlessness-2824>.

11. Pozen, *supra* note 8, at 17. Individuals may possess a variety of reasons to leak: to satisfy their "sense of self-importance, to curry favor with a reporter," to help make policy, to settle a grudge, "to test the response of key constituencies" and to reveal a perceived abuse, "to neutralize prior disclosures" or by accident. *Id.* at 15 discussing STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES* 77-78 (1984).

12. United States-Vietnam Relations, 1945-1967: A Study Prepared by the Department of Defense.

13. Alisdair Roberts, *Open Secrets and Dirty Hands*, in *LAW & SECRETS* 25 (Austin Sarat et al. eds., 2012).

14. Jeremy R. Hammond, *Israel's Illegal Use of White Phosphorus During 'Operation Cast Lead' And How the U.S. Media Tries to Cover Up Israeli War Crimes*, FOREIGN POLICY JOURNAL (May 2, 2013), <http://www.foreignpolicyjournal.com/2013/05/03/israels-illegal-use-of-white-phosphorus-during-operation-cast-lead/>.

15. *BBC News World*, *Syria Crisis: Incendiary Victims Like the Walking Dead* (Aug. 23, 2013), <http://www.bbc.co.uk/news/world-23892594>.

16. See generally IRIS CHENG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997).

17. Sui-Lee Wee, *China Holds Man in Secret under New Law Despite Reform Talk*, REUTERS (Jan. 8, 2013), <http://www.reuters.com/article/2013/01/08/us-china-dissident-idUSBRE90707U20130108>.

While the International Committee of the Red Cross (ICRC) is the independent actor with the greatest access to on the ground IHL-related information, it is institutionally committed not to enhance transparency about government activity during armed conflicts.¹⁸ As the custodian of the Geneva Conventions, the ICRC is tasked with the humanitarian mission of protecting victims of armed conflict. In so doing, it maintains a code of confidentiality¹⁹—typically not disclosing communications with states or other armed actors.²⁰ When the ICRC makes field visits, it does not publicly reveal IHL violations or violators in order to maintain its neutrality and continued access.²¹ Similarly, it generally does not disseminate its opinion about whether particular factual situations violate IHL.²² That said, the ICRC does occasionally leak information to other organizations. For instance, while it has only provided Guantanamo detainee reports to the United States,²³ the ICRC did make public its legal analysis of the appropriate legal rules for detainee treatment.²⁴ In addition it may provide information to other governments or organizations to influence state behavior.²⁵ Yet only in rare instances will the ICRC publicly condemn specific IHL violations.²⁶

Sometimes a government discloses information because its own law requires it do so. Such domestic mechanisms include open access laws and judicial litigation. The United States' Freedom of Information Act is an important model as over seventy countries have adopted similar open access laws with various success

18. Steven R. Ratner, *Beyond the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*, in *TRANSPARENCY IN INTERNATIONAL LAW*, at 2, 16, 23 (A. Bianchi & A. Peters eds., forthcoming 2013) available at <http://ssrn.com/abstract=2047788> (noting "secrecy is part of the personality and the identity of the ICRC").

19. *Id.* at 23.

20. *Id.* at 65.

21. Kenneth Anderson, *First in the Field: The Unique Mission and Legitimacy of the Red Cross in a Culture of Legality*, *TIMES LITERARY SUPPLEMENT BOOK REV.*, at 4 (July 31, 1998). Such a stance has proven controversial, as when it was later learned that the ICRC chose not to speak out in 1942 of what it knew of the Holocaust. *Id.* at 5.

22. CAROLINE MOOREHEAD, *DUNANT'S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS*, at xxx (1998) (noting the ICRC refused to take a stand despite their knowledge of Germany's mass murders of various groups civilians during World War II).

23. Yves Daccord, *ICRC Communication: Generating Support*, 87 *INT'L REV. RED CROSS* 694, 696 (2005).

24. *Id.* at 697.

25. Ratner, *supra* note 18, at 5; Leah M. Nicholls, Note, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 *DUKE J. COMP. & INT'L L.* 223, 227, 230-31 (2006) (discussing possible ICRC leakage of US detention conditions).

26. Ratner, *supra* note 18, at 5.

including China, India, and New Zealand.²⁷ Yet such acts still allow governments to keep classified documents private and contain other exclusions which often limit their application during armed conflicts.²⁸ In addition, courts can act both as a generator and disseminator of IHL information. For instance, in order to resolve legal questions, the judicial branch may declare its interpretation of IHL or its applicability to a particular factual situation. For example, when ascertaining the legality of targeted killings, the Israeli high court declared the existence of an international armed conflict and explained its legal reasoning.²⁹

International law may also create state obligations for public disclosure. The push for greater IHL transparency requirements might be seen as part and parcel of the civil society movement for international law transparency generally. The new United Nations International Convention for the Protection of All Persons from Enforced Disappearance is a particularly salient example as it is clearly applicable even during times of armed conflict. The treaty requires states to acknowledge all persons they hold in custody and to acknowledge custodial deaths to their family members.³⁰ While the viewing of official registers of those detained is limited,³¹ article eighteen provides some information about detainees to “any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel.”³² Other human rights treaties also contain provisions requiring varying forms of public transparency for government actions, but their applicability during armed conflicts is often limited.

Despite the existence of these mechanisms and others, many in civil society lament the lack of quality government information regarding IHL and believe that governments are still far too opaque.³³ They may distrust their governments³⁴ or simply feel

27. Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, 70 PUB ADMIN. REV. no. 6 925, 926-27 (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527858.

28. Mark Fenster, *The Implausibility of Secrecy*, 11 (forthcoming 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220376.

29. HCJ 769/02 *The Public Committee Against Torture in Israel v. Government of Israel* n. 60-61 [2006] (Isr.).

30. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, art. 10, 24, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/177 (Feb. 6, 2007) available at <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.

31. *Id.* at art. 17 (mandating “up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose”).

32. *Id.*

33. Roberts, *supra* note 13, at 4.

34. *Id.*

ill-informed. While many have written about the push for greater access to information by reforming various domestic laws, this paper suggests reformers may also wish to look directly at IHL itself. While many have documented the shortcomings of U.S. domestic transparency schemes, this next section looks at the limitations in another setting.

III. CASE STUDY: THE KUNDUZ INCIDENT IN GERMANY

The Kunduz incident in Germany provides an interesting case study in IHL public transparency. In 2009, the German-ordered bombing of two fuel tankers sparked a national debate over the lawfulness of targeted killings and the government's public transparency in making such assessments. This section opens with a factual background regarding Germany's role in Afghanistan and the 2009 bombing. It then investigates the mechanisms fostering greater public IHL transparency including voluntary government disclosures, forced government disclosures through litigation, and involuntary government disclosures via leaks. It concludes with some observations about the dynamic system in which actors revealed information about the Kunduz affair and the notable absence of claims about IHL transparency requirements.

A. Background

In the aftermath of World War II, Germany has been reluctant to engage in military activities. Although Germany participated in multilateral missions in Kosovo and Somalia,³⁵ it chose the safest aspects of those actions and consequently, German troops engaged in very little combat during those operations.³⁶ Similarly, although Germany contributed a significant number of troops to NATO's International Security Assistance Force in Afghanistan,³⁷ it chose to direct actions in a relatively quiet area to avoid combat activities.³⁸ In addition, Germany publicly construed its

35. *The End of Innocence in Afghanistan: The German Air Strike Has Changed Everything*, SPIEGEL ONLINE INT'L (Sept. 14, 2009), <http://www.spiegel.de/international/world/the-end-of-innocence-in-afghanistan-the-german-air-strike-has-changed-everything-a-648925.html>.

36. *Id.*

37. Siobhan Dowling, *Letter from Berlin: Rising Star Guttenberg Embraces Difficult Defense Job*, SPIEGEL ONLINE INT'L (Nov. 13, 2009), <http://www.spiegel.de/international/germany/letter-from-berlin-rising-star-guttenberg-embraces-difficult-defense-job-a-661124.html> (sending over 4,300 troops)

38. Dirk Kurbjuweit, *Afghanistan and the West: The Difficult Relationship between Democracy and War*, SPIEGEL ONLINE INT'L (July 7, 2010), <http://www.spiegel.de/international/world/afghanistan-and-the-west-the-difficult-relationship-between-democracy>

Afghanistan mission to domestic audiences as a reconstruction effort.³⁹

For several years, the government avoided directly answering the question of whether Germany was engaged in an armed conflict in Afghanistan or elsewhere. Many of Germany's practices suggested it was not engaged in an armed conflict vis-à-vis the Taliban or terrorists more generally.⁴⁰ Both the public and many members of the government were unsure of the limits of Germany's role. For instance, after several years in Afghanistan, a high-ranking German Defense Ministry lawyer lamented the absence of "a clear directive on whether and to what extent Germany can take part in the targeting process."⁴¹

A high profile incident on September 4, 2009 created the conditions for a national conversation over the legality of targeted killings and other subsidiary IHL questions. It began when Taliban fighters in Afghanistan hijacked two fuel tankers. Once U.S. reconnaissance missions located the tankers,⁴² German Army Colonel Georg Klein directed U.S. fighter jets to strike. After denying repeated requests from U.S. pilots to engage in a fly-by to disperse persons located near the tankers⁴³ and suggestions to consult with ISAF headquarters prior to the use of force,⁴⁴ Klein

-and-war-a-704884.html (noting that after a brief time in Kabul, the Germans moved to the stable Northern part of the country).

39. Charles Hawley, *Letter from Berlin: Germany Confronts the Meaning of War*, SPIEGEL ONLINE INT'L (Feb. 4, 2010), <http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html>.

40. For instance, early German military directives restricted German use of force to self-defense. Ulrike Demmer et al., *'Capture or Kill': Germany Gave Names to Secret Taliban Hit List*, SPIEGEL ONLINE INT'L (Aug. 2, 2010), <http://www.spiegel.de/international/germany/capture-or-kill-germany-gave-names-to-secret-taliban-hit-list-a-709625.html>. Evidence shows that German troops received little training in NATO procedures, perhaps because they did not anticipate the frequent need to engage in the use of force. Matthias Gebauer, *Aftermath of a Deadly Airstrike: Misguided Esprit de Corps Lets Officer Off the Hook*, SPIEGEL ONLINE INT'L (Aug. 20, 2010), <http://www.spiegel.de/international/germany/aftermath-of-a-deadly-airstrike-misguided-esprit-de-corps-lets-officer-off-the-hook-a-712843.html>.

41. Demmer, *supra* note 40; Matthias Gebauer & Shoib Najafzada, *Another Hit Against the Taliban: Pakistan Arrests Germany's Enemy Number One*, SPIEGEL ONLINE INT'L (Feb. 18, 2010), <http://www.spiegel.de/international/world/another-hit-against-the-taliban-pakistan-arrests-germany-s-enemy-number-one-a-678723.html> (noting that as late as 2010, German newspapers were reporting that German troops refused to take part in such missions in Afghanistan).

42. The tankers were stuck for several hours on a sandbank in the Kunduz River. Matthias Gebauer, *Inquiry into Kunduz Bombing: German Defense Minister Blasted for 'Slanderous' Statements*, SPIEGEL ONLINE INT'L (Mar. 19, 2010), <http://www.spiegel.de/international/germany/inquiry-into-kunduz-bombing-german-defense-minister-blasted-for-slanderous-statements-a-684541.html>.

43. Matthias Gebauer & John Goetz, *Testimony to Parliamentary Inquiry: German Officer Defends Controversial Afghanistan Air Strike*, SPIEGEL ONLINE INT'L (Feb. 10, 2010), <http://www.spiegel.de/international/germany/a-677109.html>.

44. He also acted without advice from his legal advisor or supervisors. *The End of Innocence in Afghanistan: The German Air Strike Has Changed Everything*, *supra* note 35.

falsely reported enemy contact and again ordered a strike.⁴⁵ American pilots then dropped two bombs killing a significant number of people.⁴⁶

The ordering of this air strike proved politically controversial in Germany.⁴⁷ Several politicians decried the strike as illegitimate,⁴⁸ and the public, already reluctant to send troops, used this opportunity to question the lawfulness of their involvement in Afghanistan.⁴⁹ In order to assess the legitimacy of the strike, the Germans needed to know what body of law to apply. Did IHL rules apply to a targeted killing or did the rules of self-defense govern?⁵⁰ As a next set of questions, the Germans would need to know how did the government distinguish civilian deaths from combatant deaths? How many of the deaths were civilians? Given those answers, should the strike be viewed as disproportionate and thus unlawful under IHL?

B. Deploying Existing Transparency Mechanisms

Thus, the Kunduz strike raised legal questions regarding the applicability of IHL⁵¹ and the application of the proportionality

45. Hawley, *supra* note 39.

46. Matthias Gebauer & John Goetz, *Kunduz Bombing in Afghanistan: German Defense Ministry Sought to Obscure the Truth*, SPIEGEL ONLINE INT'L (Mar. 18, 2010), <http://www.spiegel.de/international/germany/kunduz-bombing-in-afghanistan-german-defense-ministry-sought-to-obscure-the-truth-a-684411.html>.

47. The lower house in parliament characterized the strike as "one of the most serious incidents involving the German military since the Second World War." *German Court Hears Suit by Afghan Raid Victims*, AGENCE FRANCE PRESSE (Mar. 20, 2013), <http://www.globalpost.com/dispatch/news/afp/130318/court-hear-suit-against-germany-afghan-raid-victims>.

48. *Debate on Germany's status in Afghanistan Heats Up*, DEUTSCHE WELLE (Nov. 7, 2009), <http://www.dw.de/debate-on-germanys-status-in-afghanistan-opens-up/a-4868657-1>.

49. The lower house in parliament characterized the strike as "one of the most serious incidents involving the German military since the Second World War." *German Court Hears Suit by Afghan Raid Victims*, *supra* note 47.

50. Relatedly, even if the strike satisfied the formal rules of IHL, did it violate U.S. General McChrystal's recent 2009 Rules of Engagement, limiting airpower to avoid risks to civilian lives? *The End of Innocence in Afghanistan: The German Air Strike Has Changed Everything*, *supra* note 35 (dictating that "if there is a risk of civilian casualties, ISAF commanders should call off air support at the last minute and allow the enemy to escape."); see also *Investigation in Afghanistan: New Allegations against German Officer who Ordered Kunduz Air Strike*, SPIEGEL ONLINE INT'L (Sept. 21, 2009), <http://www.spiegel.de/international/world/investigation-in-afghanistan-new-allegations-against-german-officer-who-ordered-kunduz-air-strike-a-650200.html> (discussing ISAF regulations requiring consultation with ISAF headquarters in the absence of an imminent threat or the necessary authorization of NATO's joint force command if civilians are at risk).

51. The press viewed this incident as raising the question "Are or should Germans be permitted to conduct targeted killings in Afghanistan?" Holger Stark, *Kunduz Bombing Affair: German Colonel Wanted to 'Destroy' Insurgents*, SPIEGEL INT'L ONLINE (Dec. 29, 2009), <http://www.spiegel.de/international/germany/kunduz-bombing-affair-german-colonel-wanted-to-destroy-insurgents-a-669444.html>.

principle under IHL.⁵² Numerous bodies addressed the application of IHL to the specific facts on the ground. For instance, NATO investigators⁵³ went to the Kunduz base, questioned personnel, reviewed radio communications,⁵⁴ and interviewed the American pilots.⁵⁵ The German Defense Ministry also conducted its own investigation,⁵⁶ concluding that although the attack was “militarily inappropriate,”⁵⁷ neither Klein nor others committed a breach of discipline warranting further action. Yet these actors conducted these investigations privately and as an official matter, intended to keep their reports and legal analysis largely confidential.⁵⁸

The government’s opacity as to its basic legal positions regarding rules governing Afghanistan and the factual details regarding the specific Kunduz bombing raised fundamental questions about whether Parliament and the public possessed sufficient information to assess the executive branch’s positions. After inconsistent answers and unsatisfying accounts, the Parliament eventually conducted an inquiry into the government’s behavior regarding the Kunduz affair. In turn, that inquiry led to a parliamentary debate over the nature of the actions.⁵⁹ But even

52. German political officials viewed it as forcing them to address “whether the fundamental principal of proportionality when applying military force, and thereby the conditional national ban on targeted killing, still holds true.” Spencer Kimball, *German Opposition Condemns Kunduz Airstrike as Mistake*, DEUTSCHE WELLE (Aug. 11, 2011), <http://www.dw.de/german-opposition-condemns-kunduz-airstrike-as-mistake/a-15311961>.

53. *Dozens Dead in Afghanistan: UN Calls for Investigation into Air Strikes*, SPIEGEL ONLINE INT’L (Sept. 4, 2009), <http://www.spiegel.de/international/world/dozens-dead-in-afghanistan-un-calls-for-investigation-into-air-strikes-a-647084.html>.

54. *Investigation in Afghanistan: New Allegations against German Officer who Ordered Kunduz Air Strike*, SPIEGEL ONLINE INT’L (Sept. 21, 2009), <http://www.spiegel.de/international/world/investigation-in-afghanistan-new-allegations-against-german-officer-who-ordered-kunduz-air-strike-a-650200.html>.

55. Matthias Gebauer & John Goetz, *Deadly Bombing in Kunduz: German Army Withheld Information from US Pilots*, SPIEGEL ONLINE INT’L (Feb. 1, 2010), <http://www.spiegel.de/international/germany/deadly-bombing-in-kunduz-german-army-withheld-information-from-us-pilots-a-675229.html>.

56. *Germany Drops Probe into Afghan Air Raid*, UNITED PRESS INT’L (Aug. 20, 2010), http://www.upi.com/Top_News/Special/2010/08/20/Germany-drops-probe-into-Afghan-air-raid/UPI-94981282322935/.

57. John Goetz, *NATO’s Secret Findings: Kunduz Affair Report Puts German Defense Minister Under Pressure*, SPIEGEL ONLINE INT’L (Jan. 19, 2010), <http://www.spiegel.de/international/germany/nato-s-secret-findings-kunduz-affair-report-puts-german-defense-minister-under-pressure-a-672468.html>. By December 2009, Guttenberg claimed “[a]lthough Colonel Klein undoubtedly acted to the best of his knowledge and belief as well as to protect his soldiers, it was, from today’s objective viewpoint, and in light of all of the documents that were withheld from me at the time, militarily inappropriate.” *Id.*

58. See, e.g., Volker Wieker, *Declassification of Kunduz Report*, Headquarters ISAF (Nov. 4, 2009), <http://dipbt.bundestag.de/dip21/btd/17/CD07400/Dokumente/Dokument%20073.pdf>.

59. Chuck Penfold, *German Opposition Slams Berlin’s Stance on Kunduz Inquiry*, DEUTSCHE WELLE (Jul. 3, 2011), <http://www.dw.de/german-opposition-slams-berlins-stance-on-kunduz-inquiry/a-15207372>.

so, the German public has been left with many unknowns and the suggestion that no reform to German practices have occurred.⁶⁰

I use the Kunduz affair as a case study to highlight the workings of the transparency ecosystem in the IHL context. Kunduz provides an opportunity to explore both the potential and the limitations of some existing mechanisms in encouraging public transparency. I look at highly charged IHL questions such as whether Germany was participating in an armed conflict, how it assessed civilian casualties, and whether Germany engaged in targeted killings. The following subsections illustrate the role of voluntary disclosures, leaks, and litigation in revealing and generating information for public consumption on these IHL questions.

1. Armed Conflict Determinations

As mentioned above, the threshold question of whether a state is engaged in an armed conflict must be answered to determine the applicability of IHL. For many years, the German government dodged this question. Though it originally classified the deployment of German troops as a “stabilization mission,”⁶¹ this does not directly address the question of IHL application. Immediately after the Kunduz attack, a defense ministry spokesperson voluntarily acknowledged that stabilization could include fighting but remained coy about the legal classification of troop activity.⁶²

Nor did Klein prove to be a reliable source of information as to the nature of his activities. Klein failed to contemporaneously declare the applicable rules of engagement for the strike.⁶³ During an early investigation, Klein initially defended the strike as immediately necessary to protect soldiers at a nearby base from a Taliban suicide attack suggesting the application of self-defense rules.⁶⁴ Subsequent investigations made public however, suggested

60. Joerg Brunsmann, *Kunduz Bombing Taught Germany Nothing*, War Crime Expert Says, DEUTSCHE WELLE (Aug. 4, 2010), <http://www.dw.de/kunduz-bombing-taught-germany-nothing-war-crimes-expert-says/a-5970832>.

61. Siobhan Dowling, *The World from Berlin: New Evaluation on Afghanistan Long Overdue*, SPIEGEL ONLINE INT'L (Feb. 11, 2010), <http://www.spiegel.de/international/germany/the-world-from-berlin-new-evaluation-on-afghanistan-long-overdue-a-677289.html>.

62. *Dozens Dead in Afghanistan: UN Calls for Investigation into Air Strikes*, *supra* note 53 (“In reply to a question put to him during the press conference, as to whether the Bundeswehr would continue to maintain that there was no war in Afghanistan, the spokesperson said ‘this is about a stabilization effort. It is a robust stabilization effort, and as such, necessarily involves some fighting.’”).

63. Gebauer & Goetz, *supra* note 55.

64. *Top Prosecutor to Investigate Controversial Airstrike*, DEUTSCHE WELLE (Nov. 6, 2009), <http://www.dw.de/top-prosecutor-to-investigate-controversial-airstrike/a-4866396>.

Klein, in consultation with Germany's Special Forces Unit,⁶⁵ ordered the strike to "liquidate" Taliban fighters, which could fall under IHL rules.⁶⁶

Once local prosecutors opened a criminal investigation to consider the legality of Klein's actions,⁶⁷ the government found it difficult to maintain its opaque stance on such a key question.⁶⁸ Jurisdictional considerations for the pursuit of criminal charges forced the question of IHL's application. Local prosecutors had to decide whether to move the prosecution to a federal office for consideration of international law issues.⁶⁹ When prosecutors decided that they would in fact have to look into international law,⁷⁰ the government chose to clarify its position. For instance, in November 2009, Defense Minister Guttenberg referred to the war-like conditions in Afghanistan⁷¹ and soon thereafter, labeled the situation in Afghanistan theater as a non-international armed conflict.⁷² Similarly, German Foreign Minister Guido Westerwelle classified the military deployment in Afghanistan as an "armed conflict within the parameters of international law" and explained the classification as important to allow German soldiers to act without fear of prosecution.⁷³ Westerwelle also said, "[w]e have to know that rebel fighters in a non-international armed conflict covered by the framework of humanitarian international law can and must be deliberately fought."⁷⁴

65. Johannes Stern, *German Foreign Minister Defends Targeted Killings in Afghanistan*, WORLD SOCIALIST WEB SITE (Aug. 7, 2010), www.wsws.org/en/articles/2010/08/target-a07.html (noting that Klein "had consulted with the German KSK elite unit that had been tracking the movements of Taliban leaders.").

66. Kimball, *supra* note 52.

67. The criminal case began as a local prosecution but was moved to "Germany's highest prosecution office to ascertain if the incident is covered by international law." *Top Prosecutor to Investigate Controversial Airstrike*, DEUTSCHE WELLE (Nov. 6, 2009), <http://www.dw.de/top-prosecutor-to-investigate-controversial-airstrike/a-4866396-1>.

68. *Id.*

69. *Legal Issues Snarl German Inquiry into Airstrike Colonel*, DEUTSCHE PRESSE-AGENTUR (Nov. 6, 2009), <http://www.lakelandlegal.com/content/headline/embed/headline/2009/11/06/legal-issues-snarl-german-inquiry-into-airstrike-colonel>.

70. *Germany Drops Probe into Afghan Air Raid*, *supra* note 56. In Germany, civilian courts adjudicate actions concerning the military as Germany abolished courts martials after World War II. Edward F. Sherman, *Military Justice without Military Control*, 82 YALE L. J. 1398, 1398 (1973).

71. Siobhan Dowling, *Letter from Berlin: Rising Star Guttenberg Embraces Difficult Defense Job*, SPIEGEL ONLINE INT'L (Nov. 13, 2009), <http://www.spiegel.de/international/germany/letter-from-berlin-rising-star-guttenberg-embraces-difficult-defense-job-a-661124.html>.

72. Ulrike Demmer, *The Afghan War Logs: Germany Gave Taliban Names to Secret U.S. 'Capture or Kill' Unit*, SAN FRANCISCO SENTINEL (Aug. 2, 2010), <http://www.sanfranciscosentinel.com/?p=83030>.

73. Siobhan Dowling, *The World from Berlin: New Evaluation on Afghanistan Long Overdue*, SPIEGEL ONLINE INT'L (Feb. 11, 2010), <http://www.spiegel.de/international/germany/the-world-from-berlin-new-evaluation-on-afghanistan-long-overdue-a-677289.html>.

74. Stern, *supra* note 65.

This clarification guided both this prosecution and created the information necessary to assess other actions going forward. For instance, the prosecutors decided to apply IHL to assess the lawfulness of Klein's actions.⁷⁵ The classification may also prove relevant to an ongoing civil suit seeking compensation for the incident.⁷⁶ And the official indication allows the public to debate whether it wishes to be involved in such a conflict and whether IHL rules are being properly applied and interpreted. It no longer has to focus on the question of whether it is engaged in an armed conflict at all.

2. Civilian Casualties and Proportionality

One related set of IHL questions raised by the Kunduz strike relates to civilian casualties. In order for the public to assess the lawfulness of the specific incident and the quality of government accountability measures in this instance, it needs a sense of the number of civilian casualties.⁷⁷ In debating the lawfulness of the strike, governments and non-governmental organizations have hotly contested the number of civilian casualties. German Defense Minister Franz Jung initially maintained the strike only killed Taliban fighters.⁷⁸ Similarly, Afghan Governor Omar's interview with German journalists suggested there were few or no civilian casualties.⁷⁹ The WikiLeaks embassy cables similarly suggested that the Afghanistan government either believed, or wanted the U.S. and Germany to believe, few if any civilians were involved.⁸⁰

Yet the availability of other information gatherers challenged the government's original casualty assessments. An early report to Afghan President Hamid Karzai and leaked to the public noted 30 civilian deaths and 69 Taliban deaths.⁸¹ Others determined the

75. Matthias Gebauer, *Aftermath of a Deadly Airstrike: Misguided Esprit de Corps Lets Officer Off the Hook*, SPIEGEL ONLINE INT'L (Aug. 20, 2010), <http://www.spiegel.de/international/germany/aftermath-of-a-deadly-airstrike-misguided-esprit-de-corps-lets-officer-off-the-hook-a-712843.html>.

76. Carla Bleiker, *German Court to Rule on Kunduz Air Strike*, DEUTSCHE WELLE (Mar. 20, 2013), <http://www.dw.de/german-court-to-rule-on-kunduz-airstrike/a-16680014>.

77. Of course, the number of civilian deaths is only part of the proportionality analysis, but without it, the conversation cannot progress.

78. *Germany Drops Probe into Afghan Air Raid*, *supra* note 56.

79. According to Kunduz ANP Chief Gen. Abdul Rizzaq, those killed in the airstrike came from fourteen villages, some from outside the province, which he said suggested strongly they were anti-government elements rather than innocent victims. *Id.* In addition, the Governor suggested that as no one had come forward to demand compensation, unlike in previous incidents where innocent civilians were killed or injured, one should infer no civilians were involved. *Id.*

80. Embassy Kabul, *Response to Coalition Strike in Kunduz: We Need More of This*, WikiLeaks Embassy Cable Ref id 224402, 09KABUL2760 (Sep. 9, 2009) available at <http://wikileaks.org/cable/2009/09/09KABUL2760.html>.

81. *Legal Issues Snarl German Inquiry into Airstrike*, *supra* note 69.

civilian counts to be much higher with the International Red Cross at 74, Amnesty International at 83, and the International Organization for Migration at 95.⁸² WikiLeaks also provided full access to the classified NATO report and the Military Police “for service only” report that suggested there should have been a strong expectation of civilians killed.⁸³

The availability of other sources of information caused the German government to revise its estimates. For instance, German Defense Minister Franz Jung subsequently walked back his earlier comment that there were no civilian casualties.⁸⁴ By December 2009, Defense Minister Guttenberg called the attack “military disproportionate” to the German parliament.⁸⁵ A later German report indicated that the “airstrike killed 91 people, at least 83 of whom were civilians, including 22 children.”⁸⁶ Yet in revising its estimates and changing its assessment of the attack, the government did not disclose its legal analysis distinguishing combatants from civilians or who counts as civilians directly participating in hostilities.

3. Transparency Ecology

The Kunduz incident reveals a government refusing to take a stance on the nature of operations and the application of the laws of war. When faced with a use of force resulting in a large number of deaths, the government initially maintained limited or no civilian casualties. Yet the combination of small data leakage to traditional news outlets as well as full text, full database leakage via WikiLeaks⁸⁷ provided information that was incorporated into the public debate over Germany’s IHL application and compliance.⁸⁸

82. Jochen-Martin Gutsch, *Compensation for Bombing Victims: The Price of an Afghan Life*, SPIEGEL ONLINE INT’L (Aug. 10, 2010), <http://www.spiegel.de/international/world/compensation-for-bombing-victims-the-price-of-an-afghan-life-a-710963.html>.

83. Lieutenant Colonel Brenner, *Untersuchungsbericht zum ‘Close Air Support KUNDUZ’ vom 04.09.2009* (Sept. 9, 2009) available at <http://wlstorage.net/file/de-isaf-cas-kunduz-sep09.pdf>.

84. *Aftermath of Afghan Air Strike: Germany Pledges Full Probe as Pressure Mounts on Defense Minister*, SPIEGEL INT’L ONLINE (Sept. 7, 2009), <http://www.spiegel.de/international/world/aftermath-of-afghan-air-strike-germany-pledges-full-probe-as-pressure-mounts-on-defense-minister-a-647398.html>.

85. Gutsch, *supra* note 82.

86. Kimball, *supra* note 52.

87. *Legal Issues Snarl German Inquiry into Airstrike*, *supra* note 69.

88. The leaks to traditional media outlets tended to be more filtered in the information provided to the public. For instance, the newspaper Der Spiegel received access to a secret NATO report, but did not publish it in its entirety. The newspaper did reveal several of NATO’s factual determinations such as: Klein’s reliance on a single intelligence source, Klein’s failure to identify the applicable Rules of Engagement, the American pilots’ repeated efforts to delay or avoid the strike, and Klein’s statement to the pilots that the people on the

In turn, the inconsistencies between the government accounts and the other sources of information along with a failed early promise from Prime Minister Merkel for a full investigation and questions about potential governmental irregularities,⁸⁹ led the Bundestag to create a parliamentary inquiry.⁹⁰ This inquiry was to both look at the events precipitating the attack⁹¹ and to “review[] the German government’s response to events in Kunduz and whether politicians sought to cover up possible mistakes made by German officers.”⁹² This inquiry called high level officials to account for Germany’s earliest official position maintaining both the lawfulness of Klein’s decision to strike and the absence of civilian deaths.⁹³ The inquiry reviewed multiple reports submitted by various parties containing conflicting facts and assessments of Klein’s actions.⁹⁴ This inquiry revealed the government’s efforts to mislead the public on the Kunduz affair. For instance, the inquiry uncovered a Defense Ministry working group formed to influence NATO investigators to draft a favorable report of Klein’s actions.⁹⁵ It lasted 14 months and included over 40 witnesses including Prime Minister Merkel and Defense Minister Guttenberg.⁹⁶

ground were an imminent threat and that enemy contact had been made. Goetz, *supra* note 57.

89. Matthias Gebauer & Holger Stark, *One Year After the Kunduz Air Strike: No Sign of a Full Investigation*, SPIEGEL ONLINE INT’L (Aug. 30, 2010), <http://www.spiegel.de/international/world/one-year-after-the-kunduz-air-strike-no-sign-of-a-full-investigation-a-714532.html>.

90. Many governments possess the legislative capacity to publicly investigate the deceptive behavior of political actors. Germany’s capacity is embodied in the parliamentary inquiry. Under Article 44 of the Basic Law, the Bundestag can establish a committee of inquiry to investigate “possible misgovernment, maladministration and possible misconduct on the part of politicians.” *Committees of inquiry established in accordance with Article 44 of the Basic Law*, DEUTSCHER BUNDESTAG, available at http://www.bundestag.de/htdocs_el/bundestag/committees/bodies/inquiry/index.html. The committee functions as a quasi-judicial body with the authority to “question witnesses and experts and request that further investigations be carried out by courts and administrative authorities.” *Id.*

91. Charles Hawley, *Letter from Berlin: Germany Confronts the Meaning of War*, SPIEGEL ONLINE INT’L (Feb. 4, 2010), <http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html>.

92. Cathrin Schaer, *The World from Berlin: Truth is Often the First Casualty of War*, SPIEGEL ONLINE INT’L (Apr. 21, 2010), <http://www.spiegel.de/international/germany/letter-from-berlin-germany-confronts-the-meaning-of-war-a-675890.html>.

93. A week into office, German Defense Minister Guttenberg briefed parliamentary groups about the NATO report and concluded to the press that “the military strikes and the airstrikes given the overall threat environment, must be viewed as militarily appropriate.” Goetz, *supra* note 57.

94. Kimball, *supra* note 52.

95. Gebauer & Goetz, *supra* note 46. Some evidence suggests they had a “spy” in the NATO team working on the report, and he was instructed to get the report “to say that Klein did not go beyond his ‘discretionary authority’ in his decision to order the bombings.” The group also undercut a German military police report critical of Klein. See Gebauer, *supra* note 42.

96. Judy Dempsey, *Merkel Gives Testimony on 2009 Airstrike in Afghanistan*, NYTIMES (Feb. 10, 2011), http://www.nytimes.com/2011/02/11/world/europe/11iht-germany11.html?_r=0; Siobhan Dowling, *The World from Berlin: German Soldiers Don’t*

The Kunduz incident provides a nice example of how the demands for transparency can be self-reinforcing. As sources revealed more information via one mechanism, it often triggered another process and more information revelations. Litigation and legal inquiries served an information-forcing role by creating conditions under which government actors felt the need to formally endorse a legal position. Even for those classified legal proceedings and quasi-judicial inquiries, journalists and leakers may sometimes have opportunities for information dissemination.

Yet these mechanisms may be unsatisfying. Looking at Kunduz, even with a scandal of this magnitude, the public's frustration continues with its lack of access to information.⁹⁷ Many key documents remain classified.⁹⁸ Despite promises of transparency, the parliament conducted a closed-door session with Colonel Klein.⁹⁹ The inquiry's report was viewed as inconclusive and did not answer many of the questions the public had.¹⁰⁰ Moreover, some legal experts contend that no reform to German military practices has occurred.¹⁰¹

To speak more broadly, the frequency and coverage of leaks is uncertain. Litigation and public inquiries are slow and not always public. Many publics, including the German, do not view open access laws as an important avenue for information.¹⁰² One might leave this incident with the hypothesis that if civil society wants better access to information for public debate or greater accountability on IHL issues, one might look to the substance of IHL itself. Thus, this next session maps out existing requirements and efforts to generate more access.

Believe in a Happy Outcome, SPIEGEL ONLINE INT'L (Apr. 23, 2010, 2:57 PM), <http://www.spiegel.de/international/germany/the-world-from-berlin-german-soldiers-don-t-believe-in-a-happy-outcome-a-690826.html>.

97. Gebauer & Goetz, *supra* note 43.

98. Gebauer & Stark, *supra* note 89.

99. Gebauer & Goetz, *supra* note 97.

100. Nicole Goebel, *Report on Deadly German Ordered Air Raid in Kunduz is Inconclusive*, DEUTSCHE WELLE (Oct. 28, 2011), <http://www.dw.de/report-on-deadly-german-ordered-air-raid-in-kunduz-is-inconclusive/a-15493225>.

101. Joerg Brunsmann, *Kunduz Bombing Taught Germany Nothing, War Crime Expert Says*, DEUTSCHE WELLE (Sept. 4, 2009), <http://www.dw.de/kunduz-bombing-taught-germany-nothing-war-crimes-expert-says/a-5970832>.

102. Tom Hannan, *FOI Requests: Do You Know About Your Right to Know?*, GLOBAL INTEGRITY, (Oct. 17, 2012, 3:35 PM), <http://www.globalintegrity.org/node/1121> (explaining that German freedom of information laws did not appear to play a significant role in this context and German adoption of such a laws is relatively recent and their invocation infrequent).

IV. INTERNATIONAL HUMANITARIAN LAW PUBLIC TRANSPARENCY REQUIREMENTS

Given the groundswell of support for greater public access to information regarding armed conflicts, the IHL governing such conflicts is one natural place to turn. This final section surveys some of the most relevant substantive areas to get a sense of existing public transparency requirements. As such mandates are limited, this section also provides a flavor of the movement for reinterpreting or amending IHL to require greater government openness.

A. Existence of Armed Conflict or Occupation and Application of IHL

Some states understood early IHL to require a public declaration of war in order to trigger its application. For instance, the Hague Convention of 1899 is applicable only “in case of war.”¹⁰³ Some read this requirement to mean a “declared” war was necessary to trigger their IHL obligations.¹⁰⁴ Thus Japan steadfastly maintained that IHL did not apply to its activities in China during World War II because no formal declaration had been made.¹⁰⁵ While international courts rejected this argument,¹⁰⁶ it led the drafters of the Geneva Conventions to make clear public declarations were not necessary for IHL application.

In fact, the Geneva Conventions carry no requirement that either the triggering event or the state’s decision to apply IHL be made public. IHL’s transparency requirements are narrow and generally do not provide for public access to information. While the Geneva Conventions set up the standards for determining whether an armed conflict exists and what rules of IHL apply, the Conventions do not require a formal declaration by a state for their application nor must states publicly identify which rules they choose to apply. Common Article 2, which governs international armed conflicts states.

103. Convention with Respect to the Laws and Customs of War on Land, art. 2, Jul. 29, 1899, 32 Stat. 1803, T.S. 403.

104. LAURIE BLANK & GREGORY NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CHALLENGES IN THE LAW OF WAR 83 (2013).

105. Judgment of Nov. 4, 1948, 1948 Military Tribunal for the Far East, at 490-91 (discussing Japan’s arguments that hostilities in China were only an incident and thus, “the military authorities persistently asserted that the rules of war did not apply in the conduct of the hostilities.”).

106. *Id.*

[T]he present Convention shall apply to all cases of declared war *or other* armed conflict which may arise between two or more High Contracting Parties *even if the state of war is not recognized by one of them*. The convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance.¹⁰⁷

The commentary to this goes on to make clear that “[t]here is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention.”¹⁰⁸

Nor does Common Article 3, which governs non-international armed conflicts, demand public transparency as to the existence or nature of the conflict. It is triggered simply by the existence of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹⁰⁹ The drafters intentionally chose not to define “armed conflict not of an international character” in the text in order to facilitate a wide application of the protections.¹¹⁰ Rather the Commentary simply provides a list of relevant, but non-obligatory conditions, upon which one may determine such a conflict exists. While recognizing insurgents as belligerents or the agreement of the insurgent civil authority to be bound by the Geneva Conventions are relevant,¹¹¹ they are not mandatory and neither side must formally acknowledge the existence of an armed conflict.

While abolishing formal declarations allows for greater application of Geneva Convention protections, this often leaves civil society in the dark as to the nature of government activities. One particularly visible and controversial example of such uncertainty regards the use of drone strikes outside of Afghanistan. The United States deployed drones, often administered by CIA, to strike suspected terrorists in Yemen and Pakistan. Other

107. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

108. INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 22-23 (Oscar M. Uhler & Henri Coursier eds., 1958).

109. *Id.* at 35-36.

110. *Id.*

111. *Id.*

countries such as Germany,¹¹² Australia,¹¹³ Britain,¹¹⁴ Pakistan,¹¹⁵ and Yemen¹¹⁶ aided these missions. Yet many of these states remained coy about their participation and whether their role constituted participation in an armed conflict. As I have written in more detail previously, this lack of clarity generated much domestic pressure for governmental disclosure about participation in and classification of the nature of the potential armed conflict.¹¹⁷

*B. Civilians and Combatants:
Classification & Proportionality*

The acknowledgement of armed conflict and the application of a particular set of IHL rules help states determine who they may target with force and when the unintended deaths from such force are lawful. In other words, IHL authorizes a state engaged in an armed conflict to kill combatants and civilians directly participating in conflicts.¹¹⁸ Relatedly, under IHL, states are not liable for the unintended deaths of civilians if such deaths are proportionate to a military objective.¹¹⁹ Yet even if states disclose the existence of an armed conflict and the applicability of a certain

112. Nathalie Van Raemdonck, *Vested Interest or Moral Indecisiveness? Explaining the EU's Silence on the US Targeted Killing Policy in Pakistan*, 1205 ISTITUTO AFFARI INTERNAZIONALI WORKING PAPERS 15 (2005) (noting that Germany only took a public position opposing the use of German intelligence for US drone strikes after a German citizen was killed in such a strike).

113. Philip Doring, *Pine Gap Drives US Kills*, THE AGE (July 21, 2013), <http://www.smh.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html> (report describing use of Australian Spy base to locate terrorist suspects and provide intelligence to Americans for drone strikes).

114. Steve Swann, *CIA Drone Strikes. Is the UK Involved?* BBC NEWS UK (Dec. 12, 2012, 5:37PM), <http://www.bbc.co.uk/news/uk-20804072> (reporting on dismissing lawsuit attempted to find out nature of UK involvement in drone strikes). Notably, Germans had provided information on the head of the Taliban group that abducted the tanks described below to place him on Joint Prioritized Effects List. This list is also known as a "capture or kill list" *Capture or Kill: Germany Gave Names to Secret Taliban Hit List*, SPIEGEL ONLINE INT'L (Aug. 2, 2010), <http://www.spiegel.de/international/germany/capture-or-kill-germany-gave-names-to-secret-taliban-hit-list-a-709625.html>.

115. John Hudson, *WikiLeaks Cache Reveals Pakistan's Role in Drone Strikes*, THE ATLANTIC WIRE (May 20, 2011), <http://www.theatlanticwire.com/global/2011/05/wikileaks-cache-reveal-pakistans-role-drone-strikes/37966/>.

116. Cheryl Sullivan, *Why Yemen Claims Role in US Drone Strike on Cleric Anwar al-Awlaki*, CHRISTIAN SCIENCE MONITOR (May 7, 2011), <http://www.csmonitor.com/USA/2011/0507/Why-Yemen-claims-role-in-US-drone-strike-on-cleric-Anwar-al-Awlaki>.

117. Lesley Wexler, *The Role of the U.S. Judicial Branch during the Long War: Drone Courts, Damage Suits and Freedom of Information Act (FOIA) Requests*, in *Applying Int'l Humanitarian Law in Judicial and Quasi Judicial Bodies: International and Domestic Aspects* (Derek Jinks, Jackson Nyamuya Maogoto & Solon Solomon eds., forthcoming 2014).

118. For such time as they participate. Whereas if the state is not engaged in armed conflict, it must use other rules to decide when and against whom force is appropriate.

119. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 17512, Art. 51(5); BLANK & NOONE, *supra* note 104.

set of rules, IHL contains no clear textual mandate demanding disclosure of either states' classification standards for differentiating between combatants and civilians or their civilian casualty counts. Nor does the text of any IHL treaty demand that states must reveal their analytic tools or factual predicates for measuring proportionality. One might plausibly argue that such transparency is a necessary precondition for ensuring respect for the convention, but as a matter of *lex lata*, states have not understood IHL this way. States do not commonly report civilian casualties in either international or internal armed conflicts.

Yet an emerging civil society movement is calling for the recording, dissemination, and compensation of civilian deaths during armed conflicts. For instance, the civil society coalition comprising the Every Coalition Counts campaign contends IHL already legally requires data collection and transparency for every casualty of armed conflict. The coalition draws on a broad interpretation of the Geneva Conventions, supplemented by expansive application of human rights protections.¹²⁰ Acknowledging that this approach may not be common practice,¹²¹ they have also suggested a treaty consolidating or creating these protections and making clearer the obligations may be in order.¹²² To facilitate this process, they have drafted a charter calling for states to ensure that every direct "casualty of armed violence" is "promptly recorded[,] correctly identified[,] and] publicly acknowledged."¹²³ In the absence of full government agreement

120. For example, despite the absence of a clear textual hook, the Oxford Research Groups' Recording of Armed Conflict Programme has argued that "a move towards establishing a systematic mechanism of casualty recording in all theatres of armed conflict is necessary and required by law." Susan Breau & Rachel Joyce, *The Legal Obligation to Record Civilian Casualties of Armed Conflict* (June 2011), <http://www.oxfordresearchgroup.org.uk/sites/default/files/1st%20legal%20report%20formatted%20FINAL.pdf>. They urge a broad and comprehensive reading of the Geneva Conventions and human rights laws to demonstrate this requirement. *Id.*

Others, such as the UN Special Rapporteurs on Extrajudicial Killings, have forwarded similar textual arguments on behalf of transparency requirements for casualty statistics. For instance, Christof Heyns, cited numerous Geneva Convention articles, but none references such a duty. Rapporteur on Extrajudicial, Summary or Arbitrary Executions *Addendum 3*. U.N. Doc. A/HRC/20/22/Add.3 13n 68 *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-22-Add3_en.pdf (citing the Geneva Conventions I-IV 1, 50, 51, 130, 147, API I 11.85, 87 (3) and the Economic and Social Council Resolution 1989/65, annex, para. 17.).

121. They have drafted a publication specifically criticizing the U.S. drone practices for failing to make publicly available its data on civilian casualties. Susan Breau et al., *Drone Attacks, International Law and the Recording of Civilian Casualties of Armed Conflict* (June 2011), <http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf>.

122. *Id.* See also EVERY CASUALTY, <http://www.everycasualty.org/> (last visited Apr. 18, 2014).

123. Charter for the recognition of every casualty of armed violence, EVERY CASUALTY, *supra* note 122.

to these goals, the group is also creating a broad coalition of an international practitioner network to facilitate the recording and dissemination of casualty data.¹²⁴

Similarly, the Center for Civilians in Conflict (also known as CIVIC) campaign argues that states must acknowledge civilian casualties as part of their international responsibilities and provide compensation or other amends for victims of armed conflicts.¹²⁵ For about a decade, the campaign has offered ethical, strategic, and legal reasons why militaries must track civilian harms.¹²⁶ While CIVIC allows that IHL currently contains no explicit tracking requirement, it suggests that proportionality analysis necessitates a full understanding of “what civilian harm has occurred as a result of a particular operation. This requires matching post-operation data with estimations of probable civilian harm assessed pre-operation.”¹²⁷ Relatedly, the group is also working on increasing international willingness to make amends to civilian victims of armed conflict. Such amends may include public recognition of the losses.¹²⁸

While transparency regarding civilian deaths is one part of the puzzle, many are also calling for greater public availability of the government’s proportionality analysis.¹²⁹ In order to assess the lawfulness of an attack resulting in civilian casualties, one needs some sense of how the government valued both the anticipated military objective and the anticipated civilian losses. Yet most governments do not disclose either their standards or the specific facts as regards proportionality analysis. As a result of FOIA litigation, the U.S. government has made a significant portion of its analytical reasoning related to proportionality available.¹³⁰ Yet discrete calculations and valuations are still unavailable and few other states provide nearly as much information.

124. International Practitioner Network, OXFORD RESEARCH GROUP, http://www.oxfordresearchgroup.org.uk/rcac/international_practitioner_network (last visited Apr. 18, 2014).

125. CENTER FOR CIVILIANS IN CONFLICT, <http://www.civiliansinconflict.org/who-we-are> (last visited Apr. 18, 2014); Taylor Seybolt, *Significant Numbers: Civilian Casualties and Strategic Peacebuilding*, in COUNTING CIVILIAN CASUALTIES 15, 19 (eds. Taylor B. Seybolt et al. 2013).

126. *Tracking Civilian Harm*, CENTER FOR CIVILIAN CONFLICT, <http://civiliansinconflict.org/our-work/research-documentation/tracking/> (last visited Apr. 18, 2014).

127. *Id.*

128. *Amends & Post Harm Assistance*, CENTER FOR CIVILIANS IN CONFLICT, <http://civiliansinconflict.org/our-work/amends/> (last visited Apr. 18, 2014).

129. Wexler, *supra* note 117.

130. Gregory McNeal, *Guest Post*, LAWFARE BLOG (Nov. 29, 2011, 9:16 PM), <http://www.lawfareblog.com/2011/11/guest-post-gregory-mcneal>; see also Joint Targeting Cycle and Collateral Damage Estimation Methodology (Nov. 10, 2009) available at http://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDE_S_1-47.pdf.

C. Weapons

IHL also contains few public transparency requirements regarding weapons and other means and methods of warfare. States publicly commit to the prohibition on certain weapons or certain uses of weapons by ratifying treaties, but treaty-mandated compliance information is usually only shared among states. Notably, however, the trend may be pushing in the direction of greater openness. While the vast majority of weapon bans contain no public transparency compliance requirements, both the recent landmine and cluster bomb bans dictate that state parties make their annual compliance reports publicly available.

Similarly, while article 36 of the Additional Protocol I to the Geneva Conventions dictates states must conduct a legal review of new weapons and means and methods of warfare, it contains no public transparency requirement.¹³¹ In other words, when states determine whether new weapons are capable of complying with principles of distinction and discrimination, no requirement for public input or oversight exists. Other state parties may ask about internal procedures for the review,¹³² but no such provision is made for civil society. That said, many states' domestic open access laws govern these weapons reviews.¹³³ For instance, most U.S. weapon reviews are unclassified and thus available to the public.¹³⁴

In the last 15 years, various groups have called for significantly enhanced transparency regarding weapons and other means and methods of warfare. The International Conference of the Red Cross has encouraged enhanced article 36 transparency "wherever possible."¹³⁵ A UK NGO, aptly named Article 36, also urges greater transparency on information about weapons. It "operates from

131. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 17512, art. 36. Many consider this requirement to be customary international law and thus apply to even non-ratifying states. ICRC, *A guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, 88 INT'L REV. RED CROSS 931, 933 (Dec. 2006).

132. Commentary of the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, paras. 1470, 1482 (Y. Sandoz et al, eds. 1987). Six states, including the United States, are known to have made the instruments setting up national review mechanisms available to the ICRC. ICRC, *supra* note 131, at n.8.

133. ICRC, *supra* note 131, at 955.

134. W. Hays Parks, Office of the Judge Advocate General of the Army, *Weapons Review Programme of the United States*, presented at the Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, Jongny sur Vevey, Switzerland, 29-31 Jan. 2001 (on file with ICRC).

135. Section 21, Final Goal 1.5 of the Plan of Action for the years 2000-2003 adopted by the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999; ICRC, *supra* note 131, at n.8.

a principle that practical, policy and legal controls over weapons should be founded on publicly transparent and evidence-based analysis.”¹³⁶ Many have called for greater transparency for reviews of particularly feared weapons such as depleted uranium,¹³⁷ and killer robots.¹³⁸ Others call for casualty statistics to be disaggregated by weapon.¹³⁹

V. QUESTIONS FOR THE FRONTIER

This paper maps out the basic landscape as civil society pushes for greater transparency on IHL-related issues and looks to IHL itself as a source for those obligations. As a next step, scholars need to address the normative and pragmatic questions raised by this frontier.

One set of questions involves the appropriate role of civil society in IHL. Should it play a participatory role in forcing state and individual accountability? Should it help determine the range of acceptable weapons and means and methods? Is civil society well-suited or well-positioned to affect such debates? Is IHL an area where deference to experts of government decision-makers is particularly warranted or particularly worrisome? Can civil society adequately appreciate the security concerns embedded in current decisions to remain flexible and disclose only limited information?

For those that think civil society ought to play a role here, another set of questions arises regarding the best way to disseminate information to civil society. How good are plants, leaks, and other disclosures at painting an accurate picture of the existing state of affairs? Will technology enhance the quality and quantity of such information? Is more transparency-forcing law needed? If so, what should that law mandate? Should legal reasoning and conclusions be treated differently than on-the-ground facts? Should investigations and other judicial and quasi-judicial proceedings be more open?

Relatedly, to the extent that more law is needed, is international law an optimal or even suitable hook to facilitate transparency? Should such efforts precede or follow domestic efforts? Would international law requirements effectively trickle down into domestic law and shift transparency norms? A

136. *About*, ARTICLE 36, www.article36.org/about (last visited Apr. 18, 2014).

137. Doug Weir, *Open Letter to Nick Harvey MP Minister of State for the Armed Forces*, UK URANIUM WEAPONS NETWORK, (Feb. 27, 2012), uwnetwork.wordpress.com/letter-to-nick-harvey-mp/.

138. The Solution, CAMPAIGN TO STOP KILLER ROBOTS, <http://www.stopkillerrobots.org/the-solution/>.

139. See generally COUNTING CIVILIAN CASUALTIES, *supra* note 7.

subsidiary set of questions is whether IHL itself is the right hook for transparency requirements or whether they should be embedded into human rights laws more generally or into freestanding law? As countries continue to be embroiled in internal, international, and transnational armed conflicts, academia and policy makers need to start viewing these questions as an important part of the IHL landscape.

**SOME OTHER MEN’S REA?
THE NATURE OF COMMAND RESPONSIBILITY
IN THE ROME STATUTE**

JOSHUA L. ROOT*

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The Rome Statute of the International Criminal Court provides for Command Responsibility. The provision addressing this is ambiguous and raises a number of interpretive issues. Command responsibility can either be understood as a mode of liability—a way of holding commanders vicariously responsible for the acts of their subordinates, or it can be understood as a separate, distinct crime based on the commander’s dereliction of his supervisory duties. The Rome Statute is not clear on the matter and points in both directions. In recent years, the mode of liability approach has come under increasing scrutiny by academics and by judges, particularly at the ICTY. This is rightly so, because the mode of liability approach offends basic notions of justice and accountability for personal responsibility. The separate crime theory conversely, serves to punish commanders for their omissions and comports with modern notions of due process and fundamental fairness. A mode of liability approach is particularly problematic in the context of specific intent crimes, like genocide, because the Rome

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Statute only requires that a military superior be negligent to be punishable under command responsibility. If command responsibility is a distinct crime, there is no conflict here; however, if command responsibility is a mode of liability, it effectively nullifies the element of genocidal intent, the hallmark of the "crime of crimes." This dissertation explores some of the interpretive issues the Court must address in order to construe command responsibility in the Rome Statute as a distinct crime. The conclusion here is that there is sufficient foundation in the Rome Statute to construe command responsibility as a separate, distinct crime, and still maintain the Court's jurisdiction over that crime.

I. INTRODUCTION

In the Biblical story of King Ahab, the king's wife, Jezebel had a man stoned to death to settle a property dispute. King Ahab was not involved and had no knowledge of Jezebel's intentions.¹ He was held responsible, however, because as king he was deemed personally responsible for all acts in his kingdom. Ultimately, Ahab humbled himself and pleaded for mercy. In an early example of shifting responsibility, God commuted Ahab's sentence but transferred the punishment to Ahab's unborn son.² This is perhaps the earliest written example of what has become known as command responsibility ("CR").³ While it has a long pedigree in public international law, as a component of international criminal law, it is relatively nascent.⁴ It is uncontroversial that a commander who orders his subordinates to commit crimes, or tacitly approves of their occurrence can be held responsible for those crimes as acts of commission under a mode of liability.⁵ (The

1. 1 *Kings* 21:1-14.

2. *Id.* at 21:27-29.

3. See *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 60 (James R. Fox ed., 3rd ed. 2003) (defining command responsibility as a military commander's "duty to assure that personnel under their command do not violate HUMAN RIGHTS LAW and the LAWS OF WAR"). It is used here more specifically to discuss the criminal responsibility flowing from breach of that duty.

4. As early as 1899, the general principle of superior responsibility was included in an international document. See *Convention with Respect to the Laws and Customs of War on Land*, annex art. 1, July 29, 1899, 1 U.S.T. 247 (1968) (In order to be accorded the rights and responsibilities of war, armed forces must "be commanded by a person responsible for his subordinates."). However, the first criminal trial for command responsibility under international law was for General Tomoyuki Yamashita, tried by a US Military Commission in Manila following World War II. See *Trial of General Tomoyuki Yamashita*, 4 U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* 1, 35-36 (1948) [hereinafter *Yamashita*].

5. See e.g., *Draft Code of Crimes against the Peace and Security of Mankind*, in *Report of the International Law Commission to the General Assembly*, 48th Sess., 6 May-July 26, 1996, U.N. Doc. A/, reprinted in 2 Y.B. Int'l L. Comm'n 15, at 18,

masculine pronoun is used in this dissertation for convenience only.) During the first years of the ad hoc tribunals, ordering and omission liability were often confused, but the two are distinct.⁶ In the former sense, the commander is directly liable for his own wrongful acts (*actus reus*), guilty mind (*mens rea*), and the consequences that result from them (the underlying crime).⁷ The omission branch of CR is different.

The basis of criminal liability under the international law doctrine of CR for omissions is the failure of a military commander (and some civilian leaders—not dealt with in this dissertation) to prevent or suppress subordinates from committing war crimes, crimes against humanity, and genocide, and the failure to punish subordinates after they have committed those crimes.⁸ Normally, omissions do not trigger criminal responsibility, but because of the superior-subordinate relationship, and the significant authority and responsibilities vested in military commanders, international law confers on these leaders the affirmative duty to act.⁹ When commanders fail to act, CR serves as a means of holding superiors criminally responsible in some manner for the resulting crimes committed by his subordinates.¹⁰ CR is the flip side of command authority. CR is “a hybrid form of liability which is made of

U.N. Doc. A/51/10 (“An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] if that individual: . . . (b) Orders the commission of such a crime which in fact occurs or is attempted.”); *see also* Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L CRIM. JUST. 619, 620 (2007).

6. *See, e.g.*, Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment, ¶¶ 210, 223, 492, 551-571 (May 21, 1999). The problem was first diagnosed in Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 337 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000). *See also* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 448 (Antonio Cassese ed., 2009) [hereinafter OXFORD COMPANION].

7. *See generally* RONALD C. SLYE AND BETH VAN SCHAACK, ESSENTIALS: INTERNATIONAL CRIMINAL LAW 285 (2009) (“Superior responsibility should not be confused with liability for ordering an act, which is a form of direct, not accessorial, liability.”); OXFORD COMPANION, *supra* note 7, at 448. *But see*, Kai Ambos, *Superior Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 853 (Antonio Cassese et al. eds., 2002) (“[O]rdering crimes and failing to prevent them, although conceptually distinct, seem to be different sides of the same coin.”).

8. *See* Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 447 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Bagilishema, Case No. ICTR 95-1A-A, Judgment (Reasons), ¶ 35 (July 3 2002); *see also*, OXFORD COMPANION, *supra* note 6, at 445.

9. In its judgement in the Karadžić case in 1995, the U.S. Court of Appeals for the Second Circuit, recalling the judgement in the Yamashita case, stated: “[I]nternational law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of [war crimes].” *Kadic v. Karadžić*, 70 F.3d 232, 242 (2d Cir. 1995).

10. *See* Ambos, *supra* note 7, at 850 (explaining that the commander “is punished because of the failure to supervise the subordinates This kind of liability—for omission—is unique in international criminal law.”).

composite elements that are traditionally found in different categories of forms of liability. Those are sewn together into what has sometimes been described as a *sui generis* form of liability for omission.”¹¹ This doctrine fits awkwardly with modern notions of penal law. It “surprises, because it partly neglects and reaches beyond the traditional concept of criminal liability and personal guilt, the well accepted and acknowledged, indispensable basis of criminal law and responsibility for centuries in all major legal systems of the world.”¹² Unlike most components of criminal law, for penal liability to attach under CR, the commander need not personally commit the underlying offences; he will have performed a different actus reus and have had a different mens rea than those who committed the predicate crimes, and yet he will be held responsible for their commissions.¹³ This is a powerful prosecutorial tool. When the commander has not physically committed any crime or there is insufficient evidence to prove his direct participation, recourse can be had to CR.¹⁴ While the doctrine has an important role to play in international law, its individual elements and its reach are controversial. There is no doubt, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) pointed out in *Delalić*, that CR is a well-established norm of customary international law.¹⁵ Its component parts and fundamental nature, however, are hotly debated.¹⁶

11. GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 43 (2009) (internal citations removed).

12. Roberta Arnold & Otto Triffterer, *Article 28: Responsibility of Commanders and Other Superiors*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 795, 799 (Otto Triffterer ed., 2d ed. 2008) [hereinafter OBSERVERS' NOTES].

13. See ANTONIO CASSESE ET AL., *CASSESE'S INTERNATIONAL CRIMINAL LAW* 191 (3d ed. 2013).

14. Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUST. 599, 600 (2007).

15. Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶¶ 195, 222 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); see also Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2007).

16. See, e.g., WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 458 (2010) (citing *Delalić*, Case No. IT-96-21-A, ¶¶ 195, 222; *Halilović*, Case No. IT-01-48-A, ¶ 63; Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 11, 27, 29, 31 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003)); see also, Rep. of the Int'l Comm'n of Inquiry on Darfur, established pursuant to Res. 1564 (2004), transmitted by letter of the Secretary General to the President of the Security Council, ¶ 9 & n.1, U.N. Doc. S/2005/60 (Feb. 1, 2005). *But see* Bonafé, *supra* note 14, at 601 (“[A]rguably the nature as well as the elements of command responsibility can be regarded as well established under customary international law.”); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 573-75 (1999); Erkin Gadirov & Roger S. Clark, *Art. 9: Elements of Crimes*, in OBSERVERS' NOTES, *supra* note 12, at 515-21; Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139 (2000); Ambos, *supra* note 7, at 824-25.

Some courts and academics treat criminal responsibility for omissions as a mode of liability, making the commander vicariously responsible for the underlying acts committed by their subordinates. The mode of liability approach holds a military commander directly responsible for the crimes committed by his subordinates as if he had committed the crimes himself. The commander's "criminality is thus 'borrowed' from actual culprits."¹⁷ Others construe CR based on omission liability to be a dereliction of duty.¹⁸ Accordingly, the commander's omission resulting in a failure to properly supervise their troops constitutes a separate offense from the underlying crimes committed by the subordinates. These omissions are substantive offenses in their own right. Command responsibility is provided for in Article 28 of the Rome Statute. For the purposes of this discussion, the relevant parts of Article 28 provide:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁹

17. Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 479 (2001).

18. See SCHABAS, *supra* note 16, at 456 (explaining that the "[t]wo alternatives indicated a conceptual difference, with one approach viewing superior responsibility as a form of participation or liability, and the other as a principle by which superiors were subject to prosecution for the crimes of their subordinates").

19. U.N. Diplomatic Conf. of Plenipotentiaries on the Est. of an Int'l Crim. Ct., June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, art. 28, A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]; see also, Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of Rome

Despite the fact that the article “was the subject of extensive negotiations and represents quite delicate compromises,” or perhaps because of that, it does not explain what theory of liability is embraced under the Rome Statute.²⁰ This is surprising, because during the ten-year drafting process, several proposals with varying approaches to the question of its nature were put forward for inclusion in the Rome Statute.²¹ The drafters, therefore, had reason to know that there was basic disagreement as to the underlying nature of CR. The obtuse provision above leaves many questions unanswered and raises new ones.

Writers, legislatures, and judges, particularly at the ad hoc tribunals—from where the International Criminal Court (ICC) will undoubtedly look for guidance—have often been confused as to the fundamental nature of CR. Its nature and elements shift depending on the jurisdiction and the judge. This dissertation addresses the fundamental nature of CR as it is provided for in the Rome Statute. This dissertation only addresses the branch of CR dealing with omission liability, that is, liability for a commander’s failure to prevent crimes from being committed by his

Statute, ¶ 407 (June 15, 2009) (where the Chamber explained that under article 28(a) “the following elements must be fulfilled: (a) The suspect must be either a military commander or a person effectively acting as such; (b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute; (c) The crimes committed by the forces (subordinates) resulted from the suspect’s failure to exercise control properly over them; (d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and (e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.”). This is somewhat different from the customary international law rule, where three elements must be satisfied for command responsibility to attach: (i) there must exist a superior-subordinate relationship; (ii) the superior must have known “or had reason to know that the criminal act was about to be or had been committed”; and (iii) the commander must have “failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators of those acts.” OXFORD COMPANION, *supra* note 6, at 270 (quoting *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement, ¶ 346 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)). Normally, a predicate crime must have been physically committed by subordinates of the accused. For an exception, see *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, ¶¶ 294-306 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006).

20. U.N. Dipl. Conf. of Plenipotentiaries on the Est. of an Int’l Crim. Ct., June 15-July 17, 1998, Rep. of the Working Grp. On Gen. Principles of Crim L., p. 3 n.8, U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1 (June 29, 1998); see SCHABAS, *supra* note 16, at 457 & n.24. See also Bonafé, *supra* note 14, at 603 (noting that the Rome Statute does not answer the question whether command responsibility is “a means of indirectly holding a superior responsible for the criminal acts carried out by his or her subordinates[.] Or rather, [whether] the superior criminally liable for his or her personal misconduct, that is, for not having prevented such crimes or for not having punished those responsible[.]”).

21. See SCHABAS, *supra* note 16, at 456-57 (discussing the drafting history of Article 28).

subordinates, failure to suppress on-going crimes, and failure to punish past crimes. Part I discusses the confusion surrounding CR, evident at the ad hoc tribunals, in domestic legislation and amongst academics. Part II of this dissertation addresses the application of CR in the context of specific intent crimes to show the significant problems in construing CR as a mode of liability. This is especially so because the Rome Statute requires only a negligent mens rea to convict military leaders via CR. Part III concludes that CR as a mode of liability offends basic notions of justice and fairness. Applying CR as a separate crime, on the other hand, avoids these critical errors. Having examined the arguments for doing so, Part III further shows that Article 28 can be properly construed so as to provide for a separate offense, without forfeiting the Court's jurisdiction over that crime. A brief conclusion then follows.

II. THE CONFUSED NATURE OF COMMAND RESPONSIBILITY

States have promulgated military manuals that provide for CR and have come to very different understandings of its nature. The doctrine was provided for in the statutes of the ICTY, International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone, but none clarified the nature of CR.²²

22. See Statute of the International Tribunal, U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Para. 2 of S.C. Res. 808 (1993)*, ann. art. 7(3), U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTYst.] ("The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.");

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, ann. art. 6(3), U.N. Doc. S/RES/955 (Nov. 8, 1994) ("The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.");

Statute of the Special Court for Sierra Leone, U.N. Secretary-General, *Rep. of the Secretary-General on the Est. of a Special Ct. for Sierra Leone*, encl. art. 6(3), U.N. Doc. S/2000/915 (Oct. 4, 2000) ("The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.");

see also Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29, NS/RKM/1004/006, http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf ("The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does

Among the ad hoc international and hybrid tribunals, the 2007 Statute of the Special Tribunal for Lebanon comes close to explaining the nature of the commander's criminality under CR.²³ There it is a mode of liability though not unequivocally, and the provision's reach is limited to commanders who either have knowledge of their subordinates' criminal activity or were reckless in that regard.²⁴ As will be discussed below, this encompasses a much narrower ambit than the Rome Statute does. When the Court construes Article 28, they will look for guidance from the ad hoc tribunals, and they will consider the way States have approached the matter, but the Court will not find clarity.

A. State Practice

At least thirty-six States have promulgated military manuals providing for CR (a number of States have also provided for CR in their domestic legislation, discussed in Part II).²⁵ Twenty-five of these military manuals provide for or allude to criminal sanctions for commanders based on omission liability.²⁶ But of these twenty-

not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.”).

23. Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, attach. art. 3(2), U.N. Doc. S/RES/1757 (May 30, 2007) (“With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 [acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences] of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”).

24. *Id.*

25. These thirty-six states include Argentina, Australia, Belgium, Benin, Burundi, Cameroon, Canada, Chad, Columbia, Côte d'Ivoire, Croatia, Djibouti, Dominican Republic, El Salvador, France, Germany, Hungary, Italy, Madagascar, Netherlands, New Zealand, Nigeria, Peru, Philippines, Republic of Korea, Russian Federation, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, United Kingdom, United States and Uruguay. The relevant military portions of each military manual has been compiled by the International Committee of the Red Cross in their Customary IHL Database. *Practice Relating to Rule 153. Command Responsibility for Failure to Prevent Punish or Report War Crimes*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule153 (last visited Apr. 18, 2014) [hereinafter ICRC IHL Database].

26. *See id.* These states do not include Colombia, Croatia, Dominican Republic, El Salvador, Germany, Hungary, Italy, Madagascar, Russian Federation, South Africa and Switzerland. But note that criminal responsibility in Germany, for example, is provided for in domestic legislation. *See* discussion *infra* Section II.

five, only the military manuals of Côte d'Ivoire, the Netherlands, the Philippines, the United Kingdom and the United States explain the nature of the resulting criminal liability.²⁷ Côte d'Ivoire's military teaching manual tells the reader: "if you do not report violations [of the laws of war], you make yourself an accomplice to them."²⁸ Accomplice liability is a mode of liability, but this provision is not limited to commanders, rather to all personnel.²⁹ The provision of the manual specifically addressing the commander's responsibility does not mention accomplice liability and simply states that if a commander breaches his duties in this regard, "he can be prosecuted," without specifying what crime the prosecution would be for.³⁰ The military manual of the Netherlands provides that in some circumstances, commanders will be held responsible as if they committed the predicate crime ("as an accomplice"), but requires the military commander to "deliberately permit[] subordinates to commit crimes, or "deliberately omit[] to take such measures as may be necessary" for this form of liability to arise. Otherwise, a separate criminal sanction is provided.³¹ The Philippine's Handbook on Discipline provides for the nature of CR, but does so in a wholly indecisive way: "The immediate [commanding officer] of errant military personnel is held accountable *either* as conduct unbecoming [an officer], *or* as accessory after the fact"³² Only the United States is unambiguous on this point. The U.S. Manual for Military Commissions provides that commanders are "punishable as a principal" when they "had reason to know, or should have known, that a subordinate was about to commit such acts or had done so

27. Nigeria's Manual on the Laws of War might be included in this list. It provides: "In some cases, commanders are responsible for *war-crimes* committed by their subordinates. For example, when soldiers commit acts of massacre against the civilian population of an occupied territory or against prisoners of war the responsibility for such acts may rest not only with the actual perpetrators but also with the commander. Such responsibility arises when the acts in question have been committed in pursuance of an order of the commander, when the act is done with the commander's knowledge or when the commander ought to have known about the act and failed to use all necessary means at his disposal to ensure compliance with the Laws of War." Lt. Col. L. Ode PSC, *The Laws of War*, § 8, undated (Nigeria). This seems to indicate that the commander is directly responsible for war crimes, but the language is not entirely clear on this point. *But see infra* Part III discussing similar language in the Rome Statute and concluding that it provides for a separate crime.

28. Ministère de la Défense, Forces Armées Nationales, *Droit de la guerre, Manuel d'instruction, Livre I: Instruction de base*, pp. 21 and 23, Basic Rule No. 12, Nov. 2007 (Côte d'Ivoire).

29. *Id.*

30. *Id.*, Livre II, 1.2 at Lesson 4.

31. *Humanitair Oorlogsrecht: Handleiding*, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, § 1074, art. 148, 2005 (Neth.).

32. *Handbook on Discipline*, Armed Forces of the Philippines, Part IV, p. 7, 1989 (Phil.).

and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”³³ (As an aside, it is worth noting that the United States and United Kingdom have harsh rules of liability, such as the felony murder rule and CR as a mode of liability, but the harsh applications of these rules are counterbalanced by the ameliorative effect of the jury system.³⁴ Juries have the power of nullification where they can refuse to convict an individual when they feel that the facts prove the elements of a crime, but the application of that law would be too harsh in the case at hand.³⁵ There are no juries in international law, and judges at international courts have no power to acquit an individual when the facts prove the individual is technically guilty. Interpreting CR as a mode of liability in international law would adopt the harshest aspects of the common law without the counter-veiling check of the jury system.)³⁶

The United Kingdom and Canada have ratified the Rome Statute and have incorporated it into their domestic laws.³⁷ The divergence in the practices of these two common law States illustrates the conceptual discord surrounding the issue. When the British parliament adopted the International Criminal Court Act 2001 incorporating the Rome Statute domestically, it copied Article 28 almost verbatim, but added this explanatory clause: “A person responsible under this section for an offence is regarded as aiding,

33. U.S. DEPT. OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS 2010 ED. IV-2 (2012) (codified as amended at 10 U.S.C. Ch. 47A (2014)).

34. See Damaška, *supra* note 17, at 488 (noting that “throughout the history of common law, the jury of defendants’s [sic] peers cushioned the severity of substantive criminal law”).

35. See BLACK’S LAW DICTIONARY 936 (9th ed. 2009) (defining jury nullification as “[a] jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness”).

36. Further, as the American Military Tribunal stated in the *Hostages* case, “[t]he fact that the British and American armies may have adopted [a rule] for the regulation of its [sic] own armies as a matter of policy does not have the effect of enthroneing it as a rule of International Law.” Trial of Wilhelm List and Others (The Hostages Trial) U.N. War Crimes Comm’n, 8 Law Reports of Trials of War Criminals 1, 51 (1949); see also YORAM DINSTEIN, THE DEFENCE OF ‘OBEDIENCE TO SUPERIOR ORDERS’ IN INTERNATIONAL LAW 47, 48 (1965) (noting “it is not enough to direct the limelight at an isolated provision in one or two military manuals”). Dinstein further notes that as the editors of the Law Reports of the United Nations War Crimes Commission pointed out, the US and UK military manuals “are not legislative instruments, formally binding, and their publication is designed for informative purposes only.” *Id.* (internal citation omitted).

37. See Elies van Sliedregt, *Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?*, 12 NEW CRIM. L. REV. 420, 428-429 (2009) [hereinafter Van Sliedregt, *Article 28*].

abetting, counselling or procuring the commission of the offence.”³⁸ The Scottish International Criminal Court Bill incorporating the Rome Statute’s CR provision likewise adds a clarification stating that a commander “shall be regarded as being art and part in the commission of the offence.”³⁹ In other words, the British legislatures understood CR under the Rome Statute to be a mode of liability. Contrarily, when the Canadian legislature incorporated Article 28 into domestic law they too adopted the language almost verbatim, but then clarified that CR is a distinct “indictable” offense deriving from the commander’s “breach of responsibility.”⁴⁰ In other words, it is a distinct crime. The German International Criminal Code, also incorporating the Rome Statute domestically, takes a nuanced approach and refers to reckless conduct of commanders as a mode of liability and negligent conduct as punishable as a distinct crime, the “violation of the duty of supervision.”⁴¹

B. International Jurisprudence

At the international tribunals, the charging practice of prosecutors has been to frame CR as a mode of liability through which the accused is guilty of the underlying crime.⁴² The ad hoc tribunals have largely accepted the mode of liability approach without offering coherent analysis. Only a few cases at the tribunals dealt with the conviction of superiors under CR alone.⁴³ This is so because many cases, particularly at the ICTR, have ended in guilty pleas, and because the tribunals have applied a

38. *Id.* at 428; *see also* International Criminal Court Act, 2001, (U.K.) *available at* <http://www.legislation.gov.uk/ukpga/2001/17/contents>. It is worth noting that the explanatory clause provided in the legislation is not very satisfying. Aiding, abetting, counselling and procuring are acts of commission (with perhaps some very narrow exceptions) and command responsibility in article 28 of the Rome Statute is concerned with omissions. The British legislation merges the two haphazardly.

39. International Criminal Court (Scotland) Bill, Part I, article 5(4) SPBill 27A, as amended at State 2 (2001).

40. *See* Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, § 5, (Can.) *available at* <http://laws-lois.justice.gc.ca/eng/acts/c-45.9/FullText.html> (last modified Jan. 23, 2014); *see also* 2 ICRC, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW pt. 2, case no. 65, at 2 (Sassöli, et al. eds., 3d ed. 2011).

41. Gesetz zur Einführung des Völkerstrafgesetzbuches [Act to Introduce the Code of Crimes against International Law of 26 June 2002], BGBl. I at ch. 3, § 13, June 26, 2002 (Ger.), *available at* <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (The language appears under the heading “Other crimes” and subsection “violation of the duty of supervision.”); *see also* ICRC, *supra* note 40, pt. 2, case no. 64, at 7.

42. *See* CASSESE, *supra* note 13, at 19.

43. *See* OXFORD COMPANION, *supra* note 6, at 272.

rigorous approach to the superior-subordinate element.⁴⁴ Further, when faced with facts proving both direct criminal responsibility (where a commander orders his subordinates to commit crimes, for example) and indirect responsibility the tribunals have preferred to convict on the former basis, suggesting some intuitive unease with omission liability.⁴⁵ As the ICTY Appeals Chamber in *Blaskić* put it, where both direct criminal conduct and CR “are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of [direct responsibility] only”⁴⁶ In fact, the ICTY Trial Chamber in *Stakić* stated that the CR inquiry is “a waste of judicial resources” when direct liability can be established.⁴⁷ This notion was adopted by the Pre-Trial Chamber in *Bemba Gombo*, but it is not universally followed.⁴⁸

The first ICTY case to flesh out CR was the *Delalić* case, also known as *Celebići* after the concentration camp where the crimes were committed.⁴⁹ Although the trial judgment is notable in part

44. See *id.*; see also Michael G. Karnavas, *Forms of Perpetration*, in ELEMENTS OF GENOCIDE 97, 139 (Paul Behrens & Ralph Henham eds., 2013) (stating “[u]nfortunately, the jurisprudence on this subject is often confused: vague indictments and guilty pleas have enabled the ICTR in particular to avoid having to embark on a coherent analysis of command responsibility and genocide”).

45. See OXFORD COMPANION, *supra* note 6, at 751 (the Chamber “after considering the evidence indicating active participation, . . . determined that there were reasonable grounds to believe that they committed the crime of genocide”); Transcript of Hearing at 973-74, Prosecutor v. Karadžić & Mladić, Case No. IT-95-5/18 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 1996). The Chamber went on to state that while the evidence established command responsibility under art. 7(3), art. 7(1) more accurately reflected their culpability under the Statute. *Id.* at 973. The Chamber invited the prosecution to supplement the indictment to emphasise the art. 7(1) aspects of the case. *Id.* at 974. See also Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 841 (Dec. 1 2003); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶¶ 342-43 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006).

46. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 91 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004); see also OXFORD COMPANION, *supra* note 6, at 272 (noting “a number of superiors charged under command responsibility have been convicted only for their direct responsibility in the commission of international crimes, most of the time as either accomplices or participants in a joint criminal enterprise”); Bonafé, *supra* note 14, at 612.

47. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 466 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003); see also SCHABAS, *supra* note 16, at 458.

48. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Confirmation of the Charges, ¶ 402 (June 15, 2009) (“Mr. Jean-Pierre Bemba’s criminal responsibility under article 28 of the Statute shall not be examined, unless there is a determination that there is not sufficient evidence to establish substantial grounds to believe that the suspect is criminally responsible as a ‘co-perpetrator’ within the meaning of article 25(3)(a) of the Statute”). *But see* Guterres, Indonesian Ad Hoc Hum. Rts. Ct. for E. Timor, judgment No. 04/PID (Cent. Jakarta Dist. Ct. Nov. 25, 2002).

49. See Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998). For an overview of the case law on command responsibility at the ICTY, see generally Elies Van Sliedregt, *Command Responsibility at the ICTY—Three Generations of Case-Law and Still*

for its thorough analysis of several important aspects of CR, the judgment did not at all discuss the nature of the doctrine, and applied the mode of liability approach without consideration.⁵⁰ This established the tenor of the debate at the tribunals early on: there was none. It took a full decade of jurisprudence following *Čelebići* for judges at the ICTY to analyse the nature of CR.⁵¹ In his partially dissenting opinion in an interlocutory appeal decision of *Hadžihasanović*, Judge Shahabuddeen focused light on the controversy hiding in plain view, stating:

The position of the appellants seems to be influenced by their belief that [the ICTY statute's CR provision] has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*." No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.⁵²

This thinking was adopted in *Krnjelac*, where the ICTY Appeals Chamber was even clearer in delineating the nature of criminal responsibility, writing "[i]t cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control."⁵³ A vocal

Ambiguity, in THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNE FOR THE FORMER YUGOSLAVIA 377, 377-400 (Bert Swart et al. eds., Oxford University Press 2011); see also ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 186-187 (Oxford, 2012) [hereinafter VAN SLIEDREGT, CRIMINAL RESPONSIBILITY] (discussing *Delalić*).

50. See *Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 330-401.

51. Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003).

52. *Id.* ¶ 32 (Shahabuddeen, J., dissenting in part); see also OXFORD COMPANION, *supra* note 6, at 714; VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 187-89.

53. Prosecutor v. Krnjelac, Case No. IT-97-25-A, Judgment, ¶ 171 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); see also Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, pt. VII (Declaration of J. Shahabuddeen), ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008); METTRAUX, *supra* note 11, at 45 (discussing the case).

minority of ICTY cases followed this reasoning, most notably *Halilović*.⁵⁴ That case involved a Bosnian Muslim commander of military forces involved in the war crime of murder for the killings of 62 Bosnian Croat civilians and a prisoner of war.⁵⁵ Halilović was charged solely under the doctrine of CR, which gave the Trial Chamber the opportunity to more closely scrutinize its nature.⁵⁶ While the Chamber noted that the ICTY had fairly consistently applied CR as a mode of liability up to that point, it had done so without articulating why.⁵⁷ The Trial Chamber in *Halilović* concluded that the nature of CR is in fact a separate crime.⁵⁸ The ICTY statute provides that a commander is responsible for “acts . . . committed by a subordinate.”⁵⁹ (The Rome Statute differs slightly in that a commander is responsible “for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control”)⁶⁰ The *Halilović* Trial Chamber found that the “for the acts of his subordinates” language “does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.”⁶¹ The Trial Chamber further stated that “a commander is responsible not as though he had committed the crime himself”⁶² *Halilović*

54. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 78-80 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); see Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment, ¶¶ 175-80 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2007).

55. OXFORD COMPANION, *supra* note 6, at 714 (for an overview of the case, see *id.* at 713-16).

56. *Id.*

57. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005), referring to holdings in Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) and Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment (June 25, 1999); see also OXFORD COMPANION, *supra* note 6, at 716 (noting that the trial judgment was “the first judgment in the jurisprudence of the ICTY that deals with the nature of superior responsibility, with its *sui generis* character analyzed in greater depth. Such a development of the concept of superior responsibility is important for its accurate and fair application as a form of individual criminal responsibility.”).

58. See Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 372, 746, 747, 750-52 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); see also OXFORD COMPANION, *supra* note 6, at 715 (noting “[w]hile this holding [Halilovic] indicates that superior responsibility is a *sui generis* responsibility distinct from the ones provided for in Art. 7(1) ICTYst., the TC did not explicitly state whether a commander should be convicted for his dereliction of duty rather than for the crimes committed by his subordinates”); *id.* at 715 (noting Halilović was acquitted on the grounds that the prosecution failed to establish beyond a reasonable doubt that he was in either *de jure* or *de facto* command of the forces involved in the crimes, nor did he have the material ability to punish the perpetrators).

59. ICTYst., *supra* note 22, art. 7(3).

60. Rome Statute, *supra* note 19, art. 28(1).

61. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

62. *Id.*

stands, therefore, for the proposition that commanders who breach their duty of supervision to ensure that subordinates respect international humanitarian law are held criminally responsible for their own omissions rather than for the predicate crimes resulting from those omissions.⁶³ These holdings have garnered academic support.⁶⁴ Unfortunately, the ICTY has not been consistent. The clear majority of decisions at the ad hoc tribunals have applied a mode of liability approach. Van Sliedregt, though advocating for the adoption of a separate crime application of CR, probably speaks for a majority of observers when she concludes that “[i]n essence, superior responsibility at the ad hoc Tribunals is a mode of liability, a mode of participating in subordinate crimes.”⁶⁵

That contemporary jurists and academics take divergent views of CR stands in stark contrast to the unanimity of the World War II-era courts, who pioneered the doctrine, in finding that CR was a distinct crime.⁶⁶ In the pioneering case of *Yamashita*, the defendant general was convicted not for the underlying humanitarian law violations committed by his subordinates, but for his own dereliction of duty.⁶⁷ In fact, the US Military Commission hearing *Yamashita* held “[i]t is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape.”⁶⁸ This is a point often misunderstood, perhaps because of

63. See Van Sliedregt, *Article 28, supra* note 37, at 426-7. But see Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 MELB. J. INT'L L. 1, 12 (2012) (arguing that this is a “throwaway” statement, which has been taken out of context. Robinson notes that the defendant was still found guilty of war crimes under command responsibility, even though he didn't commit the crimes.).

64. See, e.g., Stefan Trechsel, *Command Responsibility as a Separate Offense*, 3 BERKELY J. INT'L L. PUBLICIST, 26, 34-35 (2009) (where the former ICTY *ad litem* judge concludes that the Trial Chambers in *Halilović* and *Hadžihasanović* “correctly [found] that command responsibility does not imply responsibility for the crimes committed by subordinates but a responsibility *sui generis* by omission”).

65. Van Sliedregt, *Article 28, supra* note 37, at 425; see also *id.* at 427 (concluding that while the separate crime theory is the one that best comports with principles of international criminal justice, the ICTY decisions construing command responsibility as a separate crime “cannot be regarded as part of the ICTY legal framework and the attempt to insert it into ICTY law should, therefore, be faulted”); see also *Prosecutor v. Orić*, Case No. IT-03-68-A, *Prosecution's Appeal Brief*, 11 152-203 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2006) (where the Prosecutor refers to ICTY case law (e.g., *Delalić Aleksovski*, *Blaskić*, *Naletelić*, *Krnjelac* cases) and ICTR case law (e.g., *Kambanda*, *Musema*, *Barayguiza* cases) and indictments arguing that at the ad hoc tribunals command responsibility is a mode of liability and not a separate offense); see also Meloni, *supra* note 5, at 625.

66. Cf. Amy J. Sepinwall, *Failure to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 269 (2009) (arguing that “the weight of history and precedent lies on the side of the mode of liability view”); Meloni, *supra* note 5, at 621.

67. See *Yamashita*, *supra* note 4; see also CASSESE, *supra* note 14, at 183 (discussing *Yamashita*).

68. *Yamashita*, *supra* note 4, at 35-36.

the severe sentence meted out against the general (he was hanged).⁶⁹ Following *Yamashita*, the American military courts hearing the *Hostages* and *High Command* cases under Control Council Law No. 10 rejected the controversial strict liability approach of *Yamashita*, but affirmed its “dereliction of duty” approach.⁷⁰ That is, the post-World War II courts were in agreement that CR is a separate, distinct crime committed by commanders and not a mode of liability.⁷¹ The confusion regarding the nature of CR is a result of ambiguity in post-World War II developments, where international authority referring to the doctrine ceased defining its nature. Additional Protocol I of 1977 to the Geneva Conventions codified CR for omissions as a crime in an international treaty for the first time.⁷² Yet, as the ICTY Trial Chamber later noted in *Halilović*, this treaty is “silent as to the nature of the criminal responsibility.”⁷³ Similarly, when the International Committee of the Red Cross codified the customary rules of international humanitarian law, they did not address the nature of CR.⁷⁴ Ambiguity has remained the hallmark of CR in international criminal law since the Additional Protocol.

The divergent treatment of CR just outlined demonstrates that the world hardly speaks with a unified voice on this issue.⁷⁵ This

69. See CASSESE, *supra* note 13, at 183.

70. The Hostages Trial, U.N. War Crimes Comm’n, 8 *Law Reports of Trials of War Criminals* 1, 71-72 (1949).

71. See CASSESE, *supra* note 13, at 185.

72. Int’l Comm. of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1125 U.N.T.S. 42-43, art. 86(2) (“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”); see also Meloni, *supra* note 5, at 623-624.

73. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); see also Meloni, *supra* note 5, at 624 (the language of AP I “could allow both an interpretation of command responsibility as a mode of liability for the crimes of subordinates, as well as a separate offence of dereliction of duty of the superior. Moreover, not only does this provision remain in principle open to both these readings, but it also does not define the character of the responsibility, whether penal or disciplinary, primary or vicarious, to be imposed on the superior for failure to act. Such a determination is left to the domestic law.”).

74. See Int’l Comm. of the Red Cross, 1 Customary International Humanitarian Law: Rules, r. 153, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul (“Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”).

75. Damaška, *supra* note 17, at 457 (stating “international legal sources do not now speak with a single voice” on this issue).

inconsistent application of the nature of CR shows that the mode of liability approach is not “so deeply rooted in international practice nor so widespread, as to deserve recognition of customary status.”⁷⁶ The Court will not be breaking virgin ground if it should walk away from the mode of liability approach.

II. COMMAND RESPONSIBILITY FOR SPECIFIC INTENT CRIMES

When a commander knows of the impending or on-going criminality of his subordinates and does nothing to stop them, the commander's inactions can be read as tacit approval and his “omission shades into conventional complicity—aiding by omission.”⁷⁷ Neither the statutes of the ad hoc tribunals nor the Rome Statute require actual knowledge of subordinates' activities for a commander to be convicted based on omission liability. The ICTY and ICTR statutes provide for a specific, minimum *mens rea* for CR: evidence must be present to prove that the commander “had reason to know” that his subordinates were engaging or were about to engage in criminal behaviour.⁷⁸ This is a standard of recklessness, because the commander must have at least disregarded information available to him, which would have given him knowledge of crimes being or about to be committed. The ICTR made clear that this standard is not one of negligence and warned that “[r]eferences to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought”⁷⁹ The ad hoc tribunals vociferously rejected the notion that negligence sits at the heart of the *mens rea* of CR.⁸⁰ In fact, the tribunal noted in *Čelebići* that customary international criminal law does not recognize a criminal should have known level of *mens rea*.⁸¹ Whatever the wisdom, the drafters of the Rome Statute are free to contract out of customary international law and evidently chose to do just that.

76. *Id.* at 493.

77. *Id.* at 462; *see also* Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 280 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (where judge opined that superiors may be able to instigate by omission); VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 199-200.

78. ICTYst., *supra* note 22, art. 7(3), 6(3).

79. *See* SCHABAS, *supra* note 16, at 463 (quoting Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgement, ¶ 35 (July 3, 2002)); *see also*, Blaškić, IT-95-14-T at ¶ 63.

80. *See* SCHABAS, *supra* note 16, at 457 (citing *Bagilishema*, ICTR-95-1A-A, Judgement, at ¶ 35; Prosecutor v. Milutinovic, Case No. IT-05-87-T, Judgement, ¶ 79 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009)); *see also*, Blaškić, IT-95-14-T at ¶ 63.

81. *See* METTRAUX, *supra* note 11, at 209 (discussing *Čelebići*).

A. The Negligence Standard

Rome Statute Article 28 provides that a commander should have known that his subordinates were committing or were about to commit international crimes for liability to attach under CR.⁸² The commander need not have actually known anything. This is a standard of simple negligence.⁸³ The Chamber in *Bemba Gombo* affirmed that the should have known standard is a form of negligence.⁸⁴ This is not problematic if CR is understood to be a separate crime. If Article 28 were so construed, the Rome Statute would require a negligent *mens rea* for the crime to be committed, and a commander that is negligent will have the appropriate *mens rea* to fit the crime. If CR is a mode of liability, on the other hand, the commander's *mens rea* and the *mens rea* necessary to commit the underlying crimes are no longer in parity. The default *mens rea* necessary to commit crimes at the ICC is "intent and knowledge"—for some crimes, it is a higher, specific intent.⁸⁵ For all of these crimes, however, the commander's required *mens rea* remains only negligence.

Commentators have panned Article 28's should have known standard, because as a mode of liability it leads to culpability for intentional conduct, regardless of the fact that the defendant had no criminal intent.⁸⁶ The commander who should have known, but did not actually know that his subordinate was about to commit an international crime has breached an important duty of supervision, but he is not an accomplice to the crime.⁸⁷ Yet a mode

82. See Rome Statute, *supra* note 19, art. 28(1).

83. See Ambos, *supra* note 7, at 868 (stating "[i]t should be clear now, however, that the 'should have known' standard must be understood as negligence and that it, therefore, requires neither awareness nor considers sufficient the imputation of knowledge on the basis of purely objective facts") (internal citations removed).

84. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Pre-Trial Chamber II, ¶ 429 (June 15, 2009).

85. See Rome Statute, *supra* note 19, art. 30(1). Genocide and the crimes against humanity of extermination and forced pregnancy are examples of specific intent crimes in the Rome Statute. See *id.* arts. 6, 7(2)(b), (f).

86. See *e.g.*, SCHABAS, *supra* note 16. But see Ambos, *supra* note 7, at 864 (noting that the 'should have known' standard has support from the *Hostages* case ("information which should have enabled them to conclude") and 'reason to know' standards of the ILC and ICTYst); see also, SCHABAS, *supra* note 16, at 457 (citing U.N. Diplomatic Conf. of Plenipotentiaries on the Est. of an Int'l Crim. Ct., June 15-July 17, 1998, Summary Record of the First Meeting, ¶ 68, UN doc. A/CONF.183/C.1/SR.1 (1998) (Shabas notes that the U.S. delegate during negotiation of the Rome Statute "introduced the proposal that became the basis of article 28, presenting command responsibility of military superiors as a crime of negligence.")).

87. But see Ambos, *supra* note 7, at 854 (citing Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development, Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 274-89 (1997) (arguing that command responsibility is a form of accomplice liability).

of liability application of CR functions the same as accomplice liability.⁸⁸ Ambos notes that imposing negligence liability for intentional criminal acts represents “a construction which is not only logically impossible but, more importantly, hardly compatible with the principle of guilt.”⁸⁹ The should have known standard “effectively replaces the requirement of knowledge with a legal fiction of knowledge whereby a commander is attributed knowledge of a fact which he did not possess. In so doing, the ICC Statute greatly dilutes the principle of personal culpability that underlies the doctrine of superior liability under customary law.”⁹⁰ Labelling someone a negligent war criminal is oxymoronic, and negligence liability for intentional acts is clearly incongruent.⁹¹ As Damaška notes:

Sub silentio, as it were, a negligent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrators of those misdeeds. As a result of this dramatic escalation of responsibility, a commander's liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual *mens rea*.⁹²

The “should have known” test for military commanders objectivizes a defendant's mental state and divorces it from the concept of personal accountability.⁹³ Yet the negligent commander is branded with the same stigmatizing iron as commanders that order their troops to commit war crimes and crimes against humanity.⁹⁴ (There is no provision under the Rome Statute denoting the commander's indirect liability even though he has far

88. See Bert Swart, *Modes of International Criminal Liability*, in OXFORD COMPANION, *supra* note 6, at 91-92.

89. Ambos, *supra* note 7, at 871 (and further noting that the challenge for the ICC in coming years will be to restrain article 28 from becoming “a form of strict liability”).

90. METTRAUX, *supra* note 11, at 210.

91. See van Sliedregt, *Article 28*, *supra* note 37, at 430 (“‘Negligence liability’ for intentional acts is not a logical construction.”); see also Damaška, *supra* note 17, at 466 (“it appears inappropriate to associate an official superior with murderers, torturers, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape”).

92. Damaška, *supra* note 17, at 463-64.

93. See METTRAUX, *supra* note 11, at 211.

94. See Paul Behrens, *The Need for a Genocide Law*, in ELEMENTS OF GENOCIDE 238, 249 (Paul Behrens & Ralph Henham eds., 2013) [hereinafter Behrens, *Need for Genocide Law*].

less culpability than the direct perpetrators of the crimes.)⁹⁵ For a commander to be labeled *ex officio* as a war criminal based on negligence saps the stigmatizing power of those crimes. Simply put, holding a commander liable for atrocities committed by his troops when he neither ordered them nor knew about the crimes is “the most conspicuous departure . . . from the principle that conviction and sentence for a morally disqualifying crime should be related to the actor's own conduct and culpability.”⁹⁶ A mode of liability approach also dilutes the normative powers of international crimes and weakens their stigmatizing force.⁹⁷

The negligence standard for CR has little support in State practice when it is applied as a mode of liability. Eighteen States have enacted domestic legislation holding military commanders criminally responsible for the underlying crimes when committed by their subordinates (i.e. a mode of liability).⁹⁸ However, only six States provide for CR for the underlying crime when the commander is merely negligent. Of these, the United States, the United Kingdom and Finland provide for the same punishment for negligent commanders as for reckless and willfully blind commanders.⁹⁹ Germany, the Netherlands and Spain, on the other hand, provide for reduced charges for negligent military commanders.¹⁰⁰ In other words, 97% of the States in the world do not recognize CR as a mode of liability for negligent military commanders.¹⁰¹ Holding individuals criminally responsible when they negligently supervise their subordinates and those subordinates engage in egregious conduct makes perfect sense if

95. *See id.*

96. Damaška, *supra* note 17, at 468.

97. *See* Behrens, *Need for Genocide Law*, *supra* note 94, at 248 (“It is this tendency to blur the lines between the underlying crime and the conduct to which superior responsibility refers that causes problems in relation to the stigmatic principle.”).

98. *See* ICRC IHL Database, *supra* note 25. These states include Armenia, Australia, Bangladesh, Croatia, Democratic Republic of the Congo, Finland, France, Germany, Lebanon, Luxembourg, Netherlands, Peru, Republic of Korea, Serbia, Spain and Uruguay. This list does not include states that have adopted a criminal command responsibility provision by way of incorporating the Rome Statute into domestic law. For a list of the States that have done so, *see Implementation of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=romeimplementation> (last visited Apr. 18, 2014).

99. *See* U.S. DEPT. OF DEFENSE, MANUAL FOR MILITARY COMMISSION, *supra* note 33; *supra* notes 38-39 and accompanying text, discussing British legislation; CRIMINAL CODE, ch. 11, § 12-13 (Fin.).

100. *See* ACT TO INTRODUCE THE CODE OF CRIMES AGAINST INTERNATIONAL LAW OF 26 JUNE 2002 (Ger.), *supra* note 41; INTERNATIONAL CRIMES ACT art. 9, undated (Neth.); CRIMINAL CODE, art. 615 (2011) (Spain).

101. This approximate calculation is based off the fact that there are 195 independent states in the world. *See* U.S. DEPARTMENT OF STATE, *Independent States in the World* (Dec. 9, 2013) <http://www.state.gov/s/inr/rls/4250.htm>.

the commander is charged as a separate crime. But holding the commander vicariously liable for intentional criminal conduct without having any intent to commit criminal acts excises an essential element of criminal conduct and departs from a rational application of justice. The problem becomes even more pronounced when CR is applied to specific intent crimes, like genocide.

*B. The Mode of Liability Approach
in the Context of Genocide*

Rome Statute Article 30 contains the default mens rea necessary for conviction of crimes under the Rome Statute: intent and knowledge.¹⁰² The provision begins with the qualifier, “unless otherwise provided.”¹⁰³ Genocide is the quintessential specific intent crime at the ICC, though it is not the only one.¹⁰⁴ Genocide requires a very specific, heightened form of mens rea: the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”¹⁰⁵ What makes genocide the “crime of crimes” is its *dolus specialis*, the specific genocidal intent associated with the crime.¹⁰⁶ The *dolus specialis* makes genocide qualitatively different from other international crimes, and imbues it with a powerful stigmatic association.¹⁰⁷ As one commendatory noted, “[s]uch an intent presupposes that the act as such needs to be committed intentionally; because who kills negligently, cannot intent [sic] to destroy a protected group just by his negligent behaviour.”¹⁰⁸ This is exactly the outcome when a mode of liability approach is used.

As with the *ad hoc* tribunals’ treatment of the nature of CR, they have demonstrated a certain “judicial malaise” with the issue of how negligent omission liability is reconciled with the *dolus specialis*.¹⁰⁹ The Trial Chamber in *Prosecutor v. Stakić* held that because the specific intent was what made genocide a unique crime, the *dolus specialis* was required for responsibility even

102. See Rome Statute, *supra* note 19, art. 30(1) (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”).

103. *Id.*

104. See *supra* note 85.

105. Rome Statute, *supra* note 19, art. 6.

106. See, e.g., Karnavas, *supra* note 44, at 138.

107. See *id.* at 144 (“Specific intent distinguishes genocide from other international crimes.”).

108. OBSERVERS’ NOTES, *supra* note 12, at 817.

109. Karnavas, *supra* note 44, at 138 (quoting WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 309 (2002)).

under CR.¹¹⁰ Therefore, before a superior could be convicted for genocide under the CR, it must be proved that he possessed the requisite *dolus specialis*.¹¹¹ The Appeals Chamber disagreed, and found no difficulty in convicting an individual of genocide based on omissions and a lower mens rea.¹¹² The ICTR has also convicted for genocide based solely on CR.¹¹³ It is sufficient, the tribunals have said, that the commander later gains the knowledge that his subordinates committed their crimes with the requisite mens rea.¹¹⁴ This cannot be right. Not only does such a situation sever the mens rea and actus reus between individuals, but it also disjoins them temporally, offending the principle of simultaneity. Behrens has noted that under the principle of simultaneity (or contemporaneity):

[I]t is mandatory that the mens rea extends to the period in which the *actus reus* is performed. In other words, if a perpetrator kills a victim because he bore a personal grudge against him, and later develops a general desire to destroy the entire group to which the victim belongs, it

110. See *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *Bis* Motion for Judgment of Acquittal, ¶ 92 (Int'l Trib. for the Former Yugoslavia Oct. 31, 2002) (the Court further noted "the legal problems and the difficulty in proving genocide by way of an omission . . ."); see also SCHABAS, *supra* note 16, at 464.

111. See *Stakić*, Case No. IT-97-24-T, ¶ 92; see also Karnavas, *supra* note 44, at 139-40 (discussing the case).

112. See SCHABAS, *supra* note 16, at 464; see also *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶¶ 720-721 (Int'l Trib. for the Former Yugoslavia Sept. 1, 2004).

113. See *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Judgment and Sentence, ¶¶ 2160, 2278 (Dec. 18, 2008); *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶¶ 1051-1052 (Nov. 28, 2007) (where the conviction was for direct and public incitement to commit genocide); see also SCHABAS, *supra* note 16, at 464 & n.81.

114. See *Prosecutor v. Ntageura*, Case No. ICTR-99-46-T, Judgment and Sentence, ¶¶ 654, 821 (Feb. 25, 2004) (where the ICTR Trial Chamber considered the mens rea necessary for a commander to be liable for failing to prevent or punish genocide is actual or constructive knowledge). See also, *Brđanin*, Case No. IT-99-36-T, Judgment, ¶¶ 17, 711 (where the Trial Chamber said that it was sufficient if the subordinates had the *dolus specialis* and that the commander knew or had reason to know that his subordinates were going to commit or had committed genocide. The Trial Chamber further found that an accused "may be held liable for genocide as a result of his failure to carry out his duty as a superior . . ."); Behrens, *supra* note 94, at 248 n. 60 (noting that "[i]t does not appear that the [*Brđanin*] Trial Chamber saw any contradiction in this to para 171 of the *Krnjelac* Appeal Judgment, to which it referred in support of this statement"). See *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 171 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Karnavas, *supra* note 44, at 138-40 (noting that most jurisprudence from the *ad hoc* tribunals suggests that the commander need not share genocidal intent with his subordinates to be guilty of the crime); METTRAUX, *supra* note 11, at 226 ("The ICTY and ICTR have both said that, under customary international law, a commander may be held responsible for a 'special intent' crime without him personally sharing that intent with the actual perpetrators."). See, e.g., *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 686 (Int'l Trib. for the Former Yugoslavia Jan. 17, 2005).

would be inapposite to apply this desire to the act in question; it comes too late¹¹⁵

Similarly, if the commander learns of the crimes only after they have been committed (even if the legal fiction that the specific intent is transferred to the commander is adopted), the mental state and criminal conduct are not synchronized in time. Attaching a subordinate's intentional *actus reus* to the commander's negligent mens rea at some future point breaks the temporal connection between the crime's elements. This is simply not an issue if CR is treated as a separate crime, because the commander's responsibility is assessed on its own merits: the commander's negligent mens rea (not knowing when he should have known) arises at the same time that his *actus reus* (failure to act) occurs.

The case of *Stupar*, tried in the courts of Bosnia and Herzegovina, demonstrates the potential abuses associated with replacing the specific intent requirement of genocide by a looser CR standard.¹¹⁶ *Stupar* was convicted of genocide for the sole wrong of failing to punish his subordinates for committing that crime, and was sentenced to forty years in prison for the commission of genocide despite no evidence put forth showing he had any genocidal intent.¹¹⁷ The conviction was made possible by construing CR as a mode of liability.¹¹⁸ As such, *Stupar* represents a "woeful misapplication of the law on genocide," and "a startling example of genocide convictions 'through the backdoor.'"¹¹⁹ In 2011, the Appeals Chamber for the Special Tribunal for Lebanon

115. Paul Behrens, *A Moment of Kindness? Consistency and Genocidal Intent*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 125, 134 (Ralph Henham & Paul Behrens eds., 2007).

116. *Prosecutor v. Stupar*, [2008] X-KR-05/24, First Instance Verdict, 161-64 (Bosn. & Herz.).

117. *Id.* at 11; *see also* Karnavas, *supra* note 44, at 141 ("This judgment [*Stupar*] represents a woeful misapplication of the law on genocide: little to no legal authority is cited to support its conclusions and its discussion and application of the law are both contradictory and illogical. Incredibly, *Stupar* was sentenced to 40 years imprisonment for genocide, in the absence of any specific genocidal intent.").

118. *See* Karnavas, *supra* note 44, at 141; *see also* CRIMINAL CODE, art. 180(2), (2003) (Bosn. & Herz.).

119. Karnavas, *supra* note 44, at 140-41. On appeal, the Appellate Panel ordered a retrial, which resulted in acquittal. *See Stupar*, X-KRŽ-05/24, ¶ 67. However, as Karnavas has noted, the Appellate Court essentially ruled as it did because it was unconvinced that there was a sufficient superior-subordinate relationship. It did not revisit the trial court's logic on command responsibility and genocide. In other words, *Stupar* was acquitted on evidentiary grounds, not on the legal standard. Other commentators have scoffed at the decision. *See* Karnavas, *supra* note 44, at 142.

pushed back indirectly on this line of reasoning.¹²⁰ In an opinion written by Judge Cassese, the Chamber found that it was inappropriate to convict someone of joint criminal enterprise (JCE III) for terrorism.¹²¹ The case is illustrative here, because the Tribunal defined terrorism—like genocide—as a specific intent crime and the mens rea necessary for culpability under JCE III, like CR under the Rome Statute, as simple negligence (*dolus eventualis*).¹²² Except for the duty conferred on commanders to act under CR, the situations are otherwise analogous, and illustrative of a counter-trend.

When a commander lacks the specific intent to commit genocide (or any intent for that matter) the commander's "omission is not the contribution of a person who moves on the same level as the principal perpetrator."¹²³ Genocide is a heinous crime, but diluting its core element (the *dolus specialis*) is antithetical to the principles the Court strives to uphold, and does not comport with the principles put forth in the genocide convention.¹²⁴ A commander liable on CR grounds has breached an important duty, which "carries its own stigma, but a stigma which attaches not to the deliberate targeting of a group, but to a managerial lack of supervision."¹²⁵ A commander should be punished when his breaches of duty of supervision lead to the commission of crimes, but "he should not be transformed into a '*génocidaire*' without ever possessing specific genocidal intent."¹²⁶

Using a negligence standard for specific intent crimes, like genocide, forced pregnancy and extermination, effectively nullifies the prosecutor's need to prove an essential element of a crime, at least vis-à-vis defendants charged under CR.¹²⁷ If CR cuts out the need to show criminal intent or knowledge on the part of the defendant, why would a rational prosecutor ever charge direct

120. See Prosecutor v. Ayyash, Case No. STL-11-01/1, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib. for Lebanon Feb. 16, 2011).

121. See *id.* ¶¶ 248-249.

122. See *id.*

123. Behrens, *supra* note 94, at 248.

124. See Karnavas, *supra* note 44, at 137 (noting that "[c]ommand responsibility is not envisaged as a form of criminal participation in the Genocide Convention" and further noting that the obligations in the Convention to suppress and punish are "obligation[s] aimed at states. If it were intended to extend to individuals, the Genocide Convention would have included this obligation in the forms of participation listed in Article III." (emphasis in original)); see also, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

125. Behrens, *supra* note 94, at 249.

126. Karnavas, *supra* note 44, at 140.

127. See Behrens, *supra* note 94, at 249 (noting that this relegates specific intent "to the sidelines and bec[a]me irrelevant for the assessment" of the commander's culpability).

responsibility? The case of *Guterres* before the Indonesian Ad Hoc Human Rights Court for East Timor is a case representing that very concern. In *Guterres*, the prosecutor relied solely on command responsibility—in a statutory provision virtually identical to Article 28—notwithstanding evidence showing the defendant's direct involvement in crimes against humanity.¹²⁸ Presumably, the prosecutor still must prove the subordinate's specific intent, but as noted above, there is no requirement that a principal culprit be tried, appear at court, or even be identified, and this raises a host of evidentiary and ethical problems.¹²⁹ This forces defense attorneys into the untenable position of having to defend and represent multiple clients simultaneously, some of whom the attorney may never have even met. For tactical reasons, a defense attorney may not wish to argue that a subordinate did not have the requisite intent. The commander and subordinate may have conflicting defenses (one may argue that the crime did not occur whereas the other may argue that it did but that he is not responsible, etc.). This forces a situation where attorneys must either breach ethical duties to their clients to represent them above all, or giving prosecutors a pass on having to prove an essential element of a crime. Pursuant to the negligence standard, military commanders can automatically be attributed the specific intent if his (unrepresented) subordinates are found to have had the requisite intent at the time the crimes were committed, without the commander in fact knowing anything about it. Negligence is anathema to specific intent, and it is not an appropriate level of culpability to convict a commander of a specific intent crime.¹³⁰ On the other hand, if CR is a separate crime, no such imbalance between the commander's *mens rea* and the crime's *mens rea* arises.

128. See *Guterres*, Indonesian Ad Hoc Hum. Rts. Ct. for E. Timor, Judgment No. 04/PID (Cent. Jakarta Dist. Ct. Nov. 25, 2002); see also OXFORD COMPANION, *supra* note 6, at 707.

129. See METTRAUX, *supra* note 11, at 81.

130. See Karnavas, *supra* note 44, at 137 (“[T]he *mens rea* standard required for responsibility as a superior is considerably less than the *dolus specialis* required for genocide. Indeed, command responsibility is essentially liability through negligence. There is thus an obvious tension between specific genocidal intent, on the one hand, and the responsibility international law imposes on superiors who ‘knew or should have known’ that their subordinates were committing or about to commit crimes, on the other.”); see also METTRAUX, *supra* note 11, at 227; William A. Schabas, *General Principles of Criminal Law in the International Criminal Court (Part III)* 6 Eur. J. Crime, Crim. L. & Crim. Just. 400, 417 (1998); SCHABAS, *supra* note 109, at 307; Ambos *supra* note 7, at 852 (“[T]he peculiar structure of superior responsibility leads to a stunning contradiction between the *negligent* conduct of the superior and the underlying *intent* crimes committed by the subordinates.”).

Because of the conflict between specific intent crimes and negligent *mens rea*, the ICC might be required, in practice, to treat CR as a distinct crime.¹³¹ Schabas has concluded that “[i]t is logically impossible to convict a person who is merely negligent of a crime of specific intent. Accordingly, the Court, if Article 28 of the Statute is to have any practical effect, will be required to convict commanders of a crime other than genocide”¹³² That crime, he argues, “can only be negligent supervision of subordinates who commit genocide.”¹³³ Following this argument to its conclusion means that a mode of liability approach is just as illogical when applied to general intent crimes as it is to genocide. There is no textual support to suggest that Article 28 should apply differently to genocide than to any other crime in the Rome Statute. Schabas’s point above is just as salient when applied to general intent crimes. Those crimes (the war crimes of murder, torture, etc.), while not requiring a heightened *mens rea* still require a showing of the default, Article 30 *mens rea*, of intent or knowledge.¹³⁴ Substituting the negligence standard for the default standards still obliterates an essential element of each crime under the Rome Statute vis-à-vis the defendant. There is no indication that Article 28 is to be applied *mutatis mutandis*; it must be applied uniformly. Therefore, if CR as a mode of liability cannot apply to genocide, then it cannot apply to any other crime.¹³⁵ Article 28 should, therefore, be construed as providing for a distinct crime relating to the commander’s breach of duty of supervision. The question now becomes whether the Court has the authority to so construe Article 28.

III. INTERPRETING ARTICLE 28 AS A DISTINCT CRIME

One commentator has suggested that Article 28 looks more “like raw criminal law material” than a proper criminal code because of its undifferentiated treatment of the forms of CR.¹³⁶ This is an opportunity for the Court to construe CR as a separate

131. See Van Sliedregt, *supra* note 37, at 430 (quoting Ambos, *supra* note 8, at 852).

132. *Id.* (quoting William A. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 Y.B. INT’L HUMAN. L. 337, 342 (2000)).

133. *Id.*

134. See Rome Statute, *supra*, note 102.

135. *But see* METTRAUX, *supra* note 11, at 226 (suggesting that this conflict could be addressed by recognizing that the *chapeau* of genocide states not only the elements of the crime, but also a condition on the exercise of the Court’s jurisdiction).

136. Claus Kreß, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, in OXFORD COMPANION, *supra* note 6, at 149.

crime. In fact, it has already hinted that it might. In *Bemba Gombo* the ICC dealt with CR for the first time and used language suggesting that CR could be construed as a separate crime. The Chamber stated that the duty to prevent, to suppress, and to punish crimes deal with the past, present, and future.¹³⁷ Thus, the Chamber concluded, “a failure to fulfil one of these duties is itself *a separate crime* under Article 28(a) of the Statute.”¹³⁸ The Chamber was not abundantly clear whether it was saying that each prong deals with a separate mode of liability (three avenues of triggering responsibility for the same underlying crime) or are really three distinct crimes. The unexacting nature of the language stands in contrast to the careful scrutiny the Chamber gave to the relationship between the causation element contained in the *chapeau* of Article 28 and subsequent commander's liability (or the lack thereof) for failure to punish subordinates engaged in criminal activity.¹³⁹ *Obiter dicta* in the case went far to elaborate Article 28, but did not directly address the nature of CR beyond the abstruse language quoted above. However, the Court cited to a number of treatises, in particular by Cassese, and ICTY case law including *Orić*, *Brđanin* and *Hadžihasanović* in other parts of the decision addressing CR.¹⁴⁰ These sources contain considerable analysis on its nature and growing controversy. Thus, the Chamber knew (or had reason to know) that they were treading upon contested ground. That they used the phrase “separate crime” instead of “separate mode” of liability should not be discounted.

Robinson argues that Article 28 “is quite explicit.”¹⁴¹ He points out that the language in the Rome Statute holds commanders “criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control.”¹⁴² Therefore, Robinson suggests, this is a mode of liability.¹⁴³ This language is hardly explicit, and could just as easily be interpreted to mean that the commander is criminally responsible (and punishable for his own breach of duty) when crimes within the jurisdiction of the Court are committed by forces under his or her effective command and control. Despite Robinson's

137. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶¶ 435-36 (June 15, 2009).

138. *Id.* (emphasis added).

139. See, e.g., *id.* ¶¶ 420-426 (discussing the causation element in Article 8 *bis*' *chapeau*).

140. See, e.g., *id.* at 149 nn. 550-60.

141. Robinson, *supra* note 63, at 33.

142. *Id.* See Rome Statute, *supra* note 19, art. 28.

143. See Robinson, *supra* note 63, at 33; see also VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 200; Meloni, *supra* note 5, at 633.

assertion, there is nothing in this language to suggest that the commander is responsible as if he committed the crimes himself.

Likewise, Article 28 begins with the prefatory clause: "In addition to other grounds of criminal responsibility under this Statute . . ." ¹⁴⁴ This appears to some to be a nod towards the modes of liability in Article 25. Article 25 contains the aiding, abetting and "otherwise assists" modes of liability, but also reveals the obvious in that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." ¹⁴⁵ Therefore, some have concluded that Article 28 provides for an omission mode of liability, because otherwise, there would be no additional ground of liability in the Rome Statute, and that would conflict with Article 28's prefatory clause. A simpler explanation is that Article 28's introductory clause refers to the other grounds of responsibility for which a *commander* may be punished (ordering, for example): Besides commanders' possible liability under Article 28, they may also have liability based on Article 25(3)(b) (ordering), for example. The title of Article 28 is "[r]esponsibility of commanders and other superiors." ¹⁴⁶ The prefatory clause simply points out that forms of liability in that article are not the exclusive grounds of criminal liability relevant for commanders under the Rome Statute.

Further, the *chapeau* of Article 28 contains a causation element, meaning liability hinges on the commander's own "failure to exercise control properly," which is indicative of a breach of the duty of supervision, i.e. a separate crime. ¹⁴⁷ Thus, the commander's wrong is provided for in Article 28: the breach of his duty. That is the crime the commander should be held responsible for, not the crime committed by his subordinates. ¹⁴⁸ Under Article 28 the commander is still linked to the subordinates' crimes, but the scope of CR will be bounded by the *rationa material* of the Rome Statute. Article 5 crimes "trigger" a commander's liability. ¹⁴⁹ As van Sliedregt has noted, "instead of an extension of *subordinate* liability, superior responsibility in Article 28 is phrased as resulting from a subordinate's *act* Subordinate liability is still the starting point This allows the requirement of a less specific link to subordinate crimes and again affirms the 'separate of-

144. Rome Statute, *supra* note 19, art. 28.

145. *Id.* art. 25(2), (3)(c).

146. *Id.* at art 28.

147. *Id.*

148. See Van Sliedregt, *supra* note 37, at 429.

149. *Id.*

fense' interpretation."¹⁵⁰ There is textual and teleological support for such an interpretation.

A. Contextual Matters

The location of the CR provision in the Rome Statute raises interpretive questions, but ones that can readily be addressed. Robinson points out that the definitions of crimes appear in part II of the Rome Statute, "whereas command responsibility appears in p[ar]t III, 'General Principles of Criminal Law.'"¹⁵¹ This, he concludes, "indicate[s] that command responsibility is a principle of liability, not an offence."¹⁵² This argument can run both ways: in the Rome Statute, CR appears in Article 28, whereas Article 25 contains the modes of liability, suggesting that CR is not a mode of liability, but a separate offence. If CR were a mode of liability, one would expect to find it contained in Article 25, along the other modes of liability applicable before the Court. Instead it is found in a self-contained article between provisions on the "[i]rrelevance of official capacity" and the "[n]on-applicability of statute[s] of limitations."¹⁵³ This notional disjunctive suggests that CR could be a separate crime. More to the point, although the definitions of crimes appear in Part II, there is actually no clause in Part II stating that an individual that commits one of those crimes is punishable by the Court. That provision, like CR, is found in Part III.¹⁵⁴

If Article 28 is understood to provide for a separate crime, the Court would still have jurisdiction over it. (In fact, construing Article 28 as a distinct crime will actually expand the Court's jurisdictional reach.)¹⁵⁵ Article 5 of the Rome Statute lists the crimes the Court is competent to hear (war crimes, crimes against humanity, genocide and eventually aggression).¹⁵⁶ Nothing in

150. *Id.*

151. See Robinson, *supra* note 63, at 32.

152. *Id.*

153. See Rome Statute, *supra* note 19, arts. 25(2), 3(c), 27, 29.

154. *Id.* art. 25(2) ("A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment . . .").

155. Consider a situation where soldiers from State A (a non-member of the Rome Statute) are based on the territory of State B (a member of the Rome Statute). Troops from State A cross over into State C (a non-member of the Rome Statute) and commit war crimes without the commander's knowledge. After returning to State B, if the commander from State A becomes apprised of the war crimes and does not punish his subordinates, he will be violating article 28 and the Court could have jurisdiction, although the war crimes were committed by soldiers of a State that has not ratified the Rome Statute on a territory of a State that has not ratified the Rome Statute.

156. See Rome Statute, *supra* note 19, art. 5 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

Article 5 indicates a crime for dereliction of duty of supervision; therefore, one might conclude that the Court would not have competency to try CR if it was construed as a separate crime. This is incorrect. First, under general statutory and treaty drafting practice, Article 5 leaves open the question of whether it is exclusive or inclusive. If the enumerated crimes were exhaustive, the last semicolon in the list of crimes would be followed by an “or” or “and.” This would indicate that the list is complete. This method is used elsewhere in the Rome Statute.¹⁵⁷ No disjunctive or conjunctive term follows the final semicolon in Article 5, leaving the matter unresolved. More importantly, other crimes are undoubtedly found in the Rome Statute beyond those listed in Article 5. It is not unusual to have “adjunct” crimes listed in various parts of criminal codes, such as those containing general principles.¹⁵⁸ This is the case with the Rome Statute. The most conspicuous examples are incitement to commit genocide and attempt, both found in Article 25.¹⁵⁹ For an individual to be guilty of inciting genocide under the Rome Statute, no genocide need be committed.¹⁶⁰ The point here is easy to miss because incitement is found amongst modes of liability in Article 25; however, it is not a means of attributing the underlying crime to a defendant, but a unique crime. This proposition can be proven by observing that, if no genocide were committed, it would be impossible to connect one who incites through a mode of liability (there being no liability for actual genocide) and yet an individual could still be punished under Article 25(3)(e).¹⁶¹ Sanctioned for what crime? Sanctioned not for the crime of genocide, but for incitement to commit genocide. Similarly, Article 25(3)(f) provides:

The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”)

157. See, e.g., *id.* arts. 13, 19(2).

158. See Robinson, *supra* note 63, at 32-33 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 381 (LexisNexis, 5th ed., 2009) (“By ‘adjunct’ offences I mean a general set of offences that map on to and are defined by reference to the specific crimes enumerated in the definitions of crimes [sometimes *inchoate* crimes]. For example, ‘attempt’ and possibly ‘incitement’ are plausibly characterised as adjunct crimes, since neither requires actual completion of the referent crime.” “In national systems, attempt and possibly incitement would be understood as adjunct offences (more specifically as *inchoate* offences) and this seems, subject to further reflection, a most plausible characterization.” *Id.* at n.143.).

159. See Rome Statute, *supra* note 19, arts. 25(3)(e), (f). See generally VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 151-54 (discussing attempt in the Rome Statute).

160. See Rome Statute, *supra* note 19, art. 25(3)(e).

161. *Id.*

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [a]ttempts to commit such a crime by taking action that commences its execution by means of a substantial step, *but the crime does not occur* because of circumstances independent of the person's intentions . . .¹⁶²

In other words, even though a crime listed in Article 5 is not committed and not punishable by the Court, there is a crime that has been committed and which the Court is competent to try: attempt. Since attempt is not found in Article 5 and yet it is a crime within the Court's jurisdiction, this substantiates the argument that Article 5 is not exclusive. Clearly, these extra crimes must be linked to one of the four core crimes contained in Article 5, which acts as an anchor for the Court's jurisdiction. Attempt is sanctionable, so long as the defendant has attempted to commit one of the crimes in Article 5. Attempt to commit bank fraud, for example, would not be justiciable by the Court, because the linking crime (fraud) is not found in Article 5. Incitement is not sanctionable for any crime, but only for genocide. Similarly, the Court will only have jurisdiction to punish a commander under CR if the defendant's omissions share a connection with his subordinates' commission of one of the crimes enumerated in Article 5.

Another issue that could be raised is that, if the Court construes CR as a separate crime, the Court is not competent to try individuals because a commander's failure in his supervisory role is not a crime of the most serious concern to the international community. Article 1 of the Rome Statute limits the Court's jurisdiction to "the most serious crimes of international concern . . ."¹⁶³ Article 17(d) of the Rome Statute requires the Pre-trial Chamber to, when assessing admissibility of cases, ensure that such cases admitted are those of which are of "sufficient gravity to justify further action by the Court."¹⁶⁴ A commander's breach of duty is unquestionably of sufficient gravity to justify scrutiny by the ICC when his omissions are linked to the commission of crimes squarely in the interest of the Court to try—those in Article 5.¹⁶⁵

162. *Id.* art. 25(3)(f) (emphasis added).

163. *Id.* at pmb1. para. 4 ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .").

164. Rome Statute, *supra* note 28, art. 17(d).

165. *But see* Karnavas, *supra* note 44, 140 n.326 (quoting Schabas where he questions "whether international justice, with its limited resources, should be concerning itself with what is only negligent behavior").

B. Teleological Approach

A separate crime interpretation of CR is moreover warranted under a teleological reading of the Rome Statute. Pursuant to Article 2 of the Vienna Convention on the Law of Treaties (“Vienna Convention”), which is customary international law, the Rome Statute is a treaty and its interpretation is governed by the rules of treaty interpretation.¹⁶⁶ Article 31(1) of the Vienna Convention provides that treaty provisions “shall” be interpreted in “light of [the treaty’s] object and purpose.”¹⁶⁷ Article 31(2) explains that the object and purposes of a treaty can be determined by, *inter alia*, looking at the preamble of the treaty.¹⁶⁸ Explicit language providing for defendants’ rights and the guarantee of fair trial procedures are conspicuously absent from the preamble of the Rome Statute. However, they are incorporated implicitly. The Rome Statute “reaffirms” the principles and purposes of the United Nations Charter.¹⁶⁹ Human rights are a core precept of the UN Charter; due process rights, a liberal interpretation of criminal law, and fundamental fairness are surely part of human rights.¹⁷⁰ O’Reilly rightly concludes “respect for human dignity under the law requires a certain level of individualized fault before criminalization and punishment are appropriate. In those instances in which superiors are held liable for negligently failing to prevent or punish crimes of subordinates, the doctrine of command responsibility offends this basic tenet.”¹⁷¹

As the ICTY Appeals Chamber stated in *Tadić*, “[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally

166. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“[t]reaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”); see also *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 4 (Sept. 25) (where the ICJ applied the Vienna Convention to the dispute, even though neither state party was a member of the convention, because the convention reflects customary international law); see also *Frequently Asked Questions About Vienna Convention on Law of Treaties*, U.S. DEPT OF STATE, available at <http://www.state.gov/s/l/treaty/faqs/70139.htm>.

167. VCLT, *supra* note 166, art. 31(1).

168. *Id.* art. 31(2).

169. Rome Statute, *supra* note 19, pmb. para. 7.

170. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 441 (July 8) (Weeramantry, J., dissenting); LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* (Cambridge Univ. Press 2011).

171. Arthur Thomas O’Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles*, 20 AM. U. INT’L L. REV. 71, 101 (2004) (quoted in Sepinwall, *supra* note 66, at 301 n.252).

responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).¹⁷² After all, “[i]n virtually all national legal systems the fundamental principle applies that criminal liability is based on personal guilt.”¹⁷³ The separate crime theory comports with these notions; CR as a mode of liability, however, is liability based on someone else’s personal guilt. Under a mode of liability approach, there is insufficient connectivity between the commander’s behavior and his criminal responsibility. At least obliquely, the Rome Statute does indirectly incorporate fundamental principles of fairness as a governing principle of the Rome Statute. Since the Rome Statute is a treaty, it must be interpreted in light of its principles and purposes (*i.e.*, with promoting human rights not only of victims), but of defendants as well. A mode of liability approach offends human rights and due process; a separate crime theory does not.

Further, the Preamble of the Rome Statute states that the States Parties to the Rome Statute established the ICC because they were “[r]esolved to guarantee lasting respect for the enforcement of international justice.”¹⁷⁴ The moral philosopher John Rawls has explained that justice must be understood as “fairness.”¹⁷⁵ CR as a mode of liability is not fair in that it offends the retributive sense of justice—that the punishment is just when it is deserved—because the punishment does not fit the crime.¹⁷⁶ To turn “a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate and plainly unfair.”¹⁷⁷ There is no “moral link between punishment and guilt,” under a mode of liability approach to CR.¹⁷⁸ The commander’s guilt is negligence and his punishment must be for negligence (breach of duty, failure of supervision, etc.), not for intentional criminal activity. The commander does not receive his just deserts, but those belonging to someone else.¹⁷⁹ The

172. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); see also VAN SLEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 17-21 (discussing the philosophical and cultural origins of the principle of individual responsibility and the trend in broadening of the scope of criminal responsibility).

173. OXFORD COMPANION, *supra* note 6, at 89.

174. Rome Statute, *supra* note 19, pmb. para. 11.

175. BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 349 (2d ed. 2009) (citing JOHN RAWLS, A THEORY OF JUSTICE 12 (1971)).

176. *Id.* at 142.

177. METTRAUX, *supra* note 11, at 211.

178. BANKS, *supra* note 175, at 142 (citing PHILIP BEAN, PUNISHMENT: A PHILOSOPHICAL AND CRIMINOLOGICAL INQUIRY 14-15 (Oxford, 1981)).

179. *Id.* at 146-49 (discussing the theory of just deserts).

most frequently advanced rationale for CR is the special need for deterrence in international criminal justice, but superimposing modes of liability onto omissions without knowledge does not comport with utilitarian notions of punishment like deterrence.¹⁸⁰ Deterrence rests on the presumption that individuals will refrain from acting a certain way because they fear the consequences of those actions. But deterrence does not work to stop someone from acting that has not acted, and it will not deter individuals from inaction when they were not aware there was a need to act. Utilitarian philosophers like Jeremy Bentham reasoned that if punishment does not deter future crime, it simply adds to the aggregate suffering of society.¹⁸¹ It is hard to see how anyone is better off when a commander that is merely negligent is punished as if he were amongst the ranks of war criminals and *génocidaires*. The separate crime theory, however, comports with the retributive theory of justice and the implicit demand of the Preamble of the Rome Statute to mete out justice in a fair manner. One might retort that the Preamble of the Rome Statute also states that it is being established “to put an end to impunity for the perpetrators of these crimes”¹⁸² Besides the obvious problem that the commander under omission liability is not the perpetrator of a crime, Trechsel notes this argument is “a mere tautology, a circular argument; the purpose of punishment, of course, is to punish.”¹⁸³

C. *Nullum Crimen Sine Lege*

Robinson argues that punishing CR based on omissions as a separate offence would “solve the culpability problem,” but “at the price of an even more disconcerting legality problem.”¹⁸⁴ *Nullum crimen sine lege*, or the principle of legality, is a foundational principle of international justice, which guarantees adequate notice to individuals that certain conduct may result in penal sanction.¹⁸⁵ The principle of legality will not bar the Court from adopting a separate crime theory because the principle exists exclusively for the benefit of defendants. It cannot be used to tether them to someone else’s crimes. Even if commanders are

180. See Damaška, *supra* note 17, at 471.

181. See BANKS, *supra* note 175, at 139 (discussing Bentham) (internal citation removed).

182. Rome Statute, *supra* note 19, pmbl. para. 5.

183. Trechsel, *supra* note 64, at 33.

184. Robinson, *supra* note 63, at 30.

185. See SLYE AND VAN SCHAACK, *supra* note 7, at 85.

given the same period of detention under a “separate crime” approach as they would be under the “mode of liability” one, the stigmatic branding is lesser under the former and a separate crime approach is therefore beneficial to the defendant (being adjudicated a negligent supervisor is surely less caustic than as a war criminal). The only uncertainty is the nature of the criminal responsibility. There is no question that the commander’s omission is going to lead to criminal responsibility. Therefore, the legality principle is satisfied. If anything, *nullum crimen sine lege* militates in favor of construing CR as a distinct crime. As Schabas notes, “the canon of strict construction of penal law is a corollary of the principle of legality. Ambiguity or doubt is to be resolved in favour of the accused: *in dubio pro reo*.”¹⁸⁶ Article 22(2) of the Rome Statute demands that “ambiguity . . . shall be interpreted in favour of the person being investigated, prosecuted or convicted.”¹⁸⁷ The judges at the ICC will be bound by this provision when they interpret Article 28 and the nature of command responsibility.

Academics who have examined Article 28 have come to dramatically opposed understandings of the provision, suggesting at best the provision is ambiguous.¹⁸⁸ Cherif Bassiouni, for example, writes conclusively “an accused under the command responsibility doctrine will be held individually criminally liable for participation in war crimes, crimes against humanity, genocide, or for command over individuals who committed such crimes, and not for a lesser offense, such as dereliction of duty.”¹⁸⁹ Conversely, Ambos who has also contributed to a well-regarded commentary on the Rome Statute, reasons that CR under Article 28 is:

186. SCHABAS, *supra* note 17, at 410 (referring to Rome Statute, *supra* note 20, art. 22(2)).

187. Rome Statute, *supra* note 19, art. 22(2); see Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶ 369 (June 15, 2009); see also OBSERVERS’ NOTES, *supra* note 13, at 410 (noting that Pre-Trial Chamber II used this canon of interpretation in *Bemba Gombo*, when it construed Article 30’s *dolus eventualis* (recklessness) exclusion).

188. See, e.g., METTRAUX, *supra* note 11, at 80 (“Under international law, a conviction based on superior responsibility does not lead to a conviction for ‘dereliction of duty’ or for any particular category of misprision. Instead, liability pursuant to that doctrine is incurred in relation to the actual criminal offence which subordinates have committed and which the superior has failed to prevent or failed to punish.”) (internal citations removed); Karnavas, *supra* note 44, at 138 (“[C]ommand responsibility is not itself a crime but merely a mode of liability.”); OBSERVERS’ NOTES, *supra* note 12, at 823 (“[C]ommand responsibility [in the Rome Statute] is an additional, inherent responsibility ‘for crimes within the jurisdiction of the court’, and not for a *crimen sui generis*.”).

189. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW: SECOND REVISED EDITION 361 (2013).

[A] separate crime of omission that consists, on an *objective* level, of the superior's failure properly to supervise subordinates. The underlying crimes of the subordinates are neither an element of the offence nor a purely objective condition of the superior's punishability. Rather, they constitute the point of reference of the superior's failure of supervision¹⁹⁰

Van Sliedregt suggests the Rome Statute "presents superior responsibility as a mode of liability but also leaves room for a 'separate offense interpretation.'" ¹⁹¹ Cassese too splits the difference and argues that commanders who know or have reason to know that subordinates are about to or are committing grave crimes and fail to stop them should be legally treated as direct participants in the crime.¹⁹² But when the commander fails to punish, Cassese advocates for the application of a separate crime.¹⁹³

The unexacting language of Article 28, guarantees that reasonable people—like the above mentioned commentators—can and will interpret the provision to mean dramatically different things. Some will come to the conclusion that Article 28 provides for imputed responsibility for the predicate crimes, and others will conclude the article provides for a distinct crime based on the commander's breach of the duty of supervision. Pursuant to *in dubio pro reo*, when reasonable people disagree in equal measure on the interpretation of a criminal provision, the interpretation that most favours the defendant must prevail. The drafters of the Rome Statute could have provided for CR as a mode of liability in clear language, similar to that put forth by a UN Commission of Experts four years prior.¹⁹⁴ The fact that they did not suggests they left open the possibility of a separate offence. *In dubio pro reo*

190. Ambos, *supra* note 7, at 851 (internal citations removed).

191. Van Sliedregt, *Article 28, supra* note 37, at 431.

192. CASSESE, *supra* note 13, at 191.

193. *Id.*

194. See U.N. Secretary-General, Letter dated May 24, 1994 from the Secretary-General addressed to the President of the Security Council, ¶ 52, U.N. Doc. S/1994/674 (May 27, 1994). See UN Comm'n of Experts Est. pursuant to S.C. Res. 780 (1992). In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the Commission of Experts wrote "[s]uperiors are . . . individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act." In the same report, the Commission of Experts rejected the negligence standard for command responsibility.

and the requirements of Article 22(2) weigh in favour of the ICC adopting the separate crime interpretation of CR.¹⁹⁵

IV. CONCLUSION

Some proponents have been candid in advocating for CR as a mode of liability based on their understanding that the separate crime theory would result in lenient sentences, as was the case in *Prosecutor v. Orić*, (following the *Halilović* line of cases), where the defendant was sentenced to only two years.¹⁹⁶ But there is nothing that sets in stone lenient sentences for commanders convicted of the separate crime. Yamashita, after all, was convicted for a dereliction of duty and was given the ultimate punishment.¹⁹⁷ The concerns regarding sentencing are valid, but this is an issue correctly addressed through legislation to provide for appropriate sentences for breach of duty. It is inappropriate to advocate for bad legal reasoning in order to arrive at one's desired sentencing outcome.

The ICC should interpret CR in the Rome Statute as a separate crime. There is enough textual support to allow the Court to do so in good faith. Ultimately, the Court must choose between such a reading of Article 28 and an irrational, unfair application of the Rome Statute. Choosing the mode of liability route means that the Court will either have to muddy the heightened *mens rea* of specific intent crimes, or they will have to refrain from an application of CR for genocide and other specific intent crimes all together. The separate crime theory of CR comports with traditional notions of justice, personal accountability for wrongdoing, and theories of punishment such as deterrence. An application of the mode of liability framework for CR saps the Court of its moral authority in its formative period. Support for the mode of liability approach for CR is no doubt driven in part to ensure someone is held accountable for atrocities. This is understandable, but just because the commander who has omitted to act (when he did not know there was a reason to) may be the easiest person to convict, or may be the most high profile individual available for punishment, does not mean they are the

195. See OBSERVERS' NOTES, *supra* note 12, at 808 ("In case this principle [of ambiguity] is applicable, does not the notion of article 28 deserve priority, not only as *lex posterior*, but because its application requires prove[sic] of more elements and, thus, is more favourable to the suspect?").

196. See Sepinwall, *supra* note 66, at 270 (discussing the case and suggesting that if Orić had been convicted under a mode of liability instead, he could have faced up to eighteen years in prison); see also, Meloni, *supra* note 6, at 620-21, 632.

197. See CASSESE, *supra* note 13, at 183.

right person to answer for atrocities. In such a situation the commander is culpable and should be punished, by way of pretending that he committed the crimes himself. An outcome that Judge Shahabuddeen pointed out in *Orić*, “is both untrue in fact and erroneous in law.”¹⁹⁸ Commanders should be held responsible for their omissions, but that responsibility should reflect their level of culpability, not the level of culpability of someone else.

198. Prosecutor v. Orić, Case No. IT-03-68-A, Judgement, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008) (Declaration of J. Shahabuddeen).

**SYNAGOGUE AND STATE:
BRINGING BALANCE TO THE
ROLE OF RELIGION IN ISRAELI LAW**

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I. INTRODUCTION

On May 14, 1948, after 1,878 years of statelessness, a new declaration of independence established the State of Israel and made it the third Jewish nation state in history.¹ In the founding document, Israel's forefathers declared "the establishment of a Jewish State in *Eretz-Israel*, to be known as the State of Israel"² The founders also declared that Israel "will be based on freedom . . . will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion . . . it will safeguard the Holy Places of all religions."³ With the declaration, the founders established Israel as both a Jewish state and a free state—a nation for the Jews, but also equally for its other inhabitants.

Since its inception, Israel has styled itself as a liberal democracy in the Western tradition. Israel is a parliamentary democracy, consisting of interconnected legislative and executive branches, with a strong independent judicial branch.⁴ Israel uses a nation-wide proportional representation electoral system, with universal suffrage for all Israeli citizens eighteen or older, regardless of ethnicity or religion.⁵ Israel further formalized its status as a democracy in a 1985 amendment to its Basic Laws, a key component of Israel's constitutional law, by referring to the State of Israel as a "Jewish and democratic state."⁶

But apropos to its name,⁷ Israel has often wrestled with its declared identity as both a democracy and a Jewish state. And while the Declaration of Independence promises freedom of religion,⁸ a proclamation alone cannot guarantee the right will be protected and enjoyed as promised.⁹ It is not difficult to

1. GARY JEFFREY JACOBSON, *APPLE OF GOLD* 5 (2010).

2. Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, 4 (1948) (Isr.) (emphasis omitted) [hereinafter "Declaration of Independence"].

3. *Id.*

4. See The World Factbook, Isr., Gov't, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Jan. 15, 2014).

5. See *id.*

6. Basic Laws, Basic Law: Human Dignity and Liberty, THE KNESSET, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited, Apr. 18, 2014).

7. In the Torah, Jacob, one of the patriarchs of Judaism, literally wrestled with G-d in a dream. G-d later decreed that Jacob's new name would be "Israel." One common interpretation of the meaning of "Israel" is "one who struggles with G-d." Daniel J. Elazar, *Jacob and Esau and the Emergence of the Jewish People*, JERUSALEM CENTER FOR PUB. AFF., <http://jcpa.org/dje/articles/jacob-esau.htm> (last visited Apr. 18, 2014).

8. Declaration of Independence, *supra* note 2.

9. Especially considering that the Declaration of Independence's place in Israeli politics and jurisprudence has long been questioned. Early Israeli jurisprudence largely dismissed the document's purpose and usefulness, stating "the only object of the Declaration was to affirm the fact of the foundation and establishment of the State for the purpose of its

understand how non-Jews in Israel, especially Israel's 1.3 million Muslims who make up approximately 17.4% of all Israeli citizens,¹⁰ could feel isolated by Israel's status as a "Jewish State."

Creating greater potential for alienation of its minority populations, the state does not take a laissez-faire approach to religion. Instead, Israel has enacted national laws and regulations based on *Halakha*¹¹ (Jewish religious law),¹² and has allowed local municipalities and religious authorities to do the same.¹³ The state also recognizes and provides significant funding for religious courts, clergypersons, religious events, and the maintenance of both prominent Holy Places and local religious buildings.¹⁴ And though Israel provides funding to Jewish and non-Jewish religious institutions alike, complaints of discrimination and disproportionate support for Orthodox¹⁵ religious institutions persist.¹⁶

However, Israel has taken some proactive steps to protect the interests of its minority religious communities. Israel employs a system of religious courts, derived from the Ottoman Millet system, to handle personal status issues of law.¹⁷ These religious courts are the courts of original jurisdiction for most personal status issues, including marriage and divorce.¹⁸ Each major religious community has its own court system, which applies that

recognition by international law." H CJ 10/48 Zeev v. Acting District Commissioner, 72(1) PD 85 [1948] (Isr.). Though, as Jacobsohn notes, the Court and other legal scholars later argued that the document carries a greater significance to Israeli politics than initially recognized. JACOBSON, *supra* note 1.

10. See The World Factbook, Isr., Demography, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Feb. 26, 2013). These figures are limited to Israeli citizens and exclude Palestinians who do not hold Israeli citizenship, as well as migrants and guest workers.

11. Halakhah, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/252201/Halakhah>.

12. See, e.g., Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-1951) (Isr.).

13. Cf. CA 6024/97 Shavit v. Reshon Lezion Jewish Burial Soc'y 53(3) PD 600 [1999] (Isr.) (overturning a Local Rabbinical Authority's ruling that prohibited non-Hebrew characters on tombstones). Though, as seen in *Shavit*, the Knesset and Supreme Court generally seek to limit the application of *Halakha*-based laws to Jews or areas where there are few non-Jewish residents.

14. See Asher Maoz, *Religious Human Rights in the State of Israel*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 349, 366-71 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

15. Often included in the Orthodox spectrum are the Ultra-Orthodox, or *Haredim*, who practice an even more traditional and stricter form of Judaism than the Orthodox. As discussed below, they enjoy disproportionate political power and financial support by the Israeli government, while also benefiting from special status in the law, such as exemption from conscription.

16. See Maoz, *supra* note 14, at 366, 370.

17. See, e.g., Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.) [hereinafter "Marriage and Divorce Law"].

18. See, e.g., *id.*

community's laws to the cases it adjudicates.¹⁹ This system serves to ensure that sensitive personal status issues are handled by a person's own belief system, rather than the belief system of the Jewish majority. However, as discussed below, they too have serious drawbacks.

Only officially recognized religious communities may receive direct state funding and the rights to self-regulation of their personal status issues. While Israeli law recognizes over a dozen religious communities, including nine individual Christian sects, other major denominations have had their applications for recognition pending for years or have been outright denied, such as the Jehovah's Witnesses.²⁰ As such, the religious court system is limited to just five major religious groups: Jewish, Muslim, Christian, Druze, and Baha'i.²¹ Perhaps the system's biggest fault is that the religious authorities that administer the respective court systems are not required to take a pluralistic view of their religious laws.²² But while non-Jews in Israel may feel alienated by the state's declared status as a Jewish state, counterintuitively, non-Orthodox Jews and secular Israelis often experience even more disenfranchisement than non-Jews in personal status matters.

This marginalizing, particularly of Jews that identify with the less traditionalist Reform, Reconstructionist, and Conservative denominations, stems from the monopoly that Orthodox Jews enjoy over Jewish life in the state. A continuation of the status quo that existed when Israel gained independence, Orthodox Judaism is the only denomination of Judaism fully and officially recognized by the Israeli government.²³ As such, Orthodox Judaism controls most aspects of state-regulated Jewish life, including governing the Jewish Holy Places such as the Western Wall, administering the Rabbinical Court system, and applying only Orthodox *Halakha*

19. See, e.g., *id.*

20. See U.S. DEPT OF STATE, *Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report for July-December 2010: Israel and the Occupied Territories* (Sept. 13, 2011), available at http://www.state.gov/j/drl/rls/irf/2010_5/168266.htm [hereinafter "Religious Freedom Report"].

21. See YVONNE SCHMIDT, FOUNDATIONS OF CIVIL AND POLITICAL RIGHTS IN ISRAEL AND THE OCCUPIED TERRITORIES 110 (2001).

22. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.) ("Matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical courts . . . in accordance with Jewish religious law.")

23. Cf. Yair Ettinger, *Prominent Orthodox Rabbi Calls on Israel to Recognize Reform Judaism*, HAARETZ (Dec. 11, 2012, 11:26 PM), <http://www.haaretz.com/jewish-world/jewish-world-news/prominent-orthodox-rabbi-calls-on-israel-to-recognize-reform-judaism.premium-1.484150> (discussing a prominent Orthodox rabbi's call for other branches of Judaism to be recognized by the state, notably to the chagrin of his community).

(Jewish law). Because of its status, Orthodox institutions also receive a grossly disproportionate amount of the state religious funding allocated to the Jewish community.²⁴

Unsurprisingly, the inequitable divide in power has led to high tensions between the Orthodox and the non-Orthodox Jewish communities. Non-Orthodox Jews are unsatisfied by their perceived status as second-class citizens in the Jewish State and protest against the Orthodoxy's imposition of religious laws on their lives. This past year, five Jewish women were arrested at the Western Wall, one of the most sacred sites in Judaism. Their crimes were wearing *tallitot*, Jewish prayer shawls, which the Orthodox Rabbinical authority that administers the holy site believes should only be worn by men, though they are also often worn by non-Orthodox Jewish women when praying.²⁵

The current system, where the religious—namely the Orthodox and ultra-Orthodox Jews—hold a monopoly on religious matters and state-regulated personal status issues, is no longer tenable. As a liberal democracy, Israel must respect and protect the religious liberties and rights of all of its citizens, regardless of religion. In this paper, I will discuss the background of the Israeli political and religious system, the challenges the current system poses to the norm of religious liberty, and potential solutions for these issues. Part II reviews the political, constitutional, and religious foundations of the state. Part III analyzes modern challenges to religious liberty in Israel. Part IV presents potential solutions and alternatives to the issues. I conclude in Part V with a brief review of the need for Israel to protect the religious liberty of all of its citizens.

II. THE POLITICAL, CONSTITUTIONAL, AND RELIGIOUS FOUNDATIONS OF THE MODERN JEWISH STATE

To best understand the intricacies of the current role of religion in Israeli law, it is necessary to identify the political, constitutional, and religious foundations of the state. Though these three areas are intertwined in the Jewish State, they are best viewed through their respective scopes.

24. See Or Kashti, *In Israel, Not All Religious Funding was Created Equal*, HAARETZ (Nov. 25, 2012, 1:40 AM), <http://www.haaretz.com/print-edition/features/in-israel-not-all-religious-funding-was-created-equal.premium-1.480272>.

25. Jeremy Sharon, *Police Arrest 5 Women at Western Wall for Wearing Tallitot*, JERUSALEM POST (Apr. 11, 2013, 9:17 PM), <http://www.jpost.com/National-News/Police-arrest-5-women-at-Western-Wall-for-wearing-tallitot-309436>.

A. The Political Reestablishment of Israel

The notion of *Eretz Yisrael*, the Land of Israel—the Promised Land—has been sacred to Judaism since Biblical Times.²⁶ The Jews received their Promised Land and enjoyed independence for hundreds of years until the Jewish kingdoms were conquered.²⁷ After the fall of the second Jewish nation in 70 C.E., the Jews were once again scattered to the world.²⁸ Since then, the Jewish diaspora had prayed for a return to Zion—to *Eretz Yisrael*.²⁹

From 70 C.E. to the modern era, the Jewish people always managed to sustain at least a small but consistent presence in the ancient lands of Israel.³⁰ In the mid-nineteenth century, Jews in the diaspora began making another push to return to their ancient homeland, now called Palestine and controlled by the Ottoman Empire.³¹ In 1917, towards the end of World War I, the United Kingdom, with the help of the Jewish Legion, captured the majority of the land of Palestine from the Ottoman Empire.³² In November of 1917, shortly after the British success in World War I, and following thousands of years of exile, decades of work, and years of negotiations with the British Government, British Foreign Secretary Arthur Balfour sent a letter to the prominent Jewish and Zionist leader Baron Walter Rothschild, declaring Britain's interest in establishing a Jewish "national home" in Palestine.³³ In the letter, Foreign Secretary Balfour stated:

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet.

"His Majesty's Government view with favour the establishment in Palestine of a *national home for the Jewish people*, and will use their best endeavours to facilitate the achievement of this object, *it being clearly*

26. "And the L-RD thy G-d will bring thee into the land which thy fathers possessed, and thou shalt possess it; and He will do thee good, and multiply thee above thy fathers." *Deuteronomy* 30:5.

27. See FOREIGN AREA STUDIES - THE AM. UNIV., ISRAEL - A COUNTRY STUDY x-xii (Richard F. Nyrop ed., 2d ed. 1979).

28. MARTIN GILBERT, ISRAEL: A HISTORY 3 (2008).

29. *Id.*

30. See *id.* at 3-5.

31. See *id.*

32. See *id.* at 34-35.

33. Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), available at http://avalon.law.yale.edu/20th_Century/balfour.asp (last visited Apr. 18, 2014) [hereinafter Balfour].

understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”

I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.³⁴

The Balfour Declaration was the first significant declaration by a world power favoring the creation of a “Jewish Home” in *Eretz Yisrael/Palestine*, and it set off new waves of *aliyah* to Israel.³⁵ In 1919, the Paris Peace Conference granted the Mandate of Palestine to Britain and accepted “the promise of the Balfour Declaration to ‘facilitate’ the establishment of a Jewish National Home there.”³⁶ Because of this, the Balfour Declaration, which notably includes explicit recognition of the “civil and religious rights of existing non-Jewish communities in Palestine,”³⁷ is recognized as a key document in the establishment of Israel.³⁸

However, British support for the Zionist movement quickly waned. Though Zionists spent the next thirty years lobbying for a Jewish National Home independent from British control, it would take the horrors of the Holocaust, in which six million Jews were brutally and systematically murdered throughout Europe, North Africa, and the Middle East, for the Zionist movement to once again gain real traction in the international community.³⁹ Finally, on February 15, 1947, after increasing hostilities between the British, Jews, and Arabs in Palestine, Great Britain announced it would be turning over the issue of Palestine to the United Nations.⁴⁰

Exactly three months later, the United Nations established a Special Committee on Palestine (UNSCOP).⁴¹ Tensions continued to rise within Palestine as the committee examined reports, heard testimony from British, Jewish, and Arab leaders, and visited the land in person.⁴² On August 31, 1947, UNSCOP held its last meeting and released its majority report the next day.⁴³ The

34. *Id.* (emphasis added).

35. GILBERT, *supra* note 28, at 34-35.

36. *Id.* at 42.

37. Balfour, *supra* note 33.

38. *See* Declaration of Independence, *supra* note 2 (evoking the Balfour Declaration).

39. *See* GILBERT, *supra* note 28, at 123 (discussing the “turning point in the path to Jewish statehood”).

40. *See id.* at 142.

41. *See id.* at 144.

42. *See id.* at 144-49.

43. *See id.* at 149.

report, which came to be known as the Partition Plan, “proposed the creation of two separate and independent states, one Arab and one Jewish, with the city of Jerusalem as a *corpus separatum*” that would be governed by a special international regime and administered by the United Nations.⁴⁴

On November 29, 1947, the United Nations General Assembly passed Resolution 181,⁴⁵ the Partition Plan, with some minor amendments from the original UNSCOP plan.⁴⁶ Notably, the final resolution referred to the future State of Israel as Jewish and democratic—referring to the future state as a “Jewish State” over twenty times and declaring that it would have a democratic government and would “draft a democratic constitution.”⁴⁷

On May 15, 1948, the British Mandate was set to expire, at which time independence of the Jewish and Arab states could be declared.⁴⁸ The UN General Assembly worked until the final moments to pass a resolution to officially put Jerusalem under UN rule.⁴⁹ However, all of the submitted resolutions failed to pass, with the Arab states committed to seeing the city governed by Arab powers rather than international control.⁵⁰ After the General Assembly failed to establish UN control of the city by the end of the British Mandate, Jerusalem became a legally open and unclaimed city.⁵¹ At 5:00 PM on May 14, 1948, the Jewish leaders in Palestine declared the independence of the State of Israel, immediately establishing a provisional government and appointing David Ben-Gurion as Prime Minister.⁵²

44. *See id.*

45. By a vote of thirty-three votes in favor, thirteen opposed, and ten abstentions. *Id.* at 150.

46. Interestingly, the anti-religious Soviet Union came out as one of the biggest proponents of the plan, with the Soviet Representative stating:

The Jewish people had been closely linked with Palestine for a considerable period in history As a result of the war, the Jews as a people have suffered more than any other people. The total number of the Jewish population who perished at the hands of the Nazi executioners is estimated at approximately six million. The Jewish people were therefore striving to create a State of their own, and it would be unjust to deny them that right.

Id.

47. The Future Government of Palestine, G.A. Res. 181(II), ¶14, U.N. Doc. A/RES/181/(II) (Nov. 29, 1947) [hereinafter The Partition Plan]. As discussed below, Israel still does not have a final, formalized constitution, though Israel’s constitutional law system is based on its Basic Laws, as well as precedence from the Israeli Supreme Court. Drafts of proposed constitutions also exist. *See* FACULTY OF LAW OF THE UNIV. OF TEL AVIV, PROPOSED DRAFT OF THE CONSTITUTION OF THE STATE OF ISRAEL (Steven F. Friedell trans.) (1987).

48. *See* GILBERT, *supra* note 28, at 185-189.

49. *Id.*

50. *Id.* at 185.

51. *See id.*

52. *Id.* at 186.

B. The Constitutional Framework

The 1947 UN Partition Plan stipulated that the future Jewish State was to draft a democratic constitution.⁵³ Israel's 1948 Declaration of Independence also mandated that a constitution "be adopted by the Elected Constituent Assembly not later than the 1st October 1948."⁵⁴ However, the body that was to create the document—the Constituent Assembly—was unable to complete their task and instead ultimately evolved into the Knesset, Israel's legislative body.⁵⁵ Despite these requirements and various attempts at writing a formal constitution,⁵⁶ Israel still lacks a final formal constitution.⁵⁷

Instead, in 1950 the constitutional question was answered with the "Harari Resolution," which established a process where subsequent governments would incrementally adopt individual chapters of constitutional law that would eventually come to form a final constitution.⁵⁸ The Resolution allowed Basic Laws to be passed by a simple majority of the Knesset, and was vague as to when and how the constitution would be considered complete.⁵⁹ This procedure allows for every subsequent Knesset to be both a legislative body and a constitutional assembly, indefinitely.⁶⁰ The Resolution also has the perverse effect of allowing a Knesset to pass laws that, theoretically, have constitutional superiority over subsequent ordinary laws, but, like ordinary law, only require a simple majority to pass.⁶¹

53. The Partition Plan, *supra* note 47, at ¶14.

54. Declaration of Independence, *supra* note 2.

55. *See id.*

56. *See* JACOBSON, *supra* note 1, at 95-110.

57. It is worth noting three of the main reasons why a constitution was not drafted as required in those early years: (1) the country was focused primarily on defending itself in the War of Independence and establishing agencies and infrastructure necessary for survival; (2) David Ben-Gurion, Israel's first Prime Minister, and his political coalition were largely against drafting a formal written constitution, calling it a "novelty" and arguing Israel was not yet ready for a formal constitution; (3) the ultra-Orthodox and other religious Jews were strongly opposed to the idea of a secular constitution—with the potential to limit their rights and authorities—as they believed the Torah should act as the fundamental law for the Jewish state. *Id.*

58. *Id.* at 106.

59. Basic Laws, *Introduction*, THE KNESSET, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm (last visited Apr. 18, 2014).

60. JACOBSON, *supra* note 1, at 106.

61. *See id.* It is worth highlighting the obvious pitfalls created by the Knesset's ability to pass Basic Laws—which are treated as constitutional law—as easily as it can pass ordinary laws. Each new government can theoretically overcome any limitations on its powers or laws created by prior Basic Laws by simply amending them, removing them, or creating new Basic Laws to overcome them with only simple majority votes. Even if the Supreme Court recognizes the precedence set by the prior Basic Laws and limits the ability of a government to marginalize or repeal the prior laws, a government could still theoretically pass

Despite the essentially identical requirements for enactment, the Israeli Supreme Court has treated the Basic Laws as Israel's constitution.⁶² In 1969, the Israeli Supreme Court first held that the Knesset is capable of limiting itself—and therefore future governments—through entrenched clauses in Basic Laws, though the holding specifically sought to avoid ruling on larger issues of constitutionalism.⁶³ However, in 1995, the Court—led by Justice Aharon Barak as part of Israel's so-called “Constitutional Revolution”⁶⁴—held that the Knesset, in its capacity as the Constitutional Authority of Israel, has the ability to enact Basic Laws with entrenched clauses of superior authority to ordinary statutes and has the ability to bind future governments.⁶⁵ In the style of *Marbury v. Madison*, the ruling also saw the Court recognizing its own power of judicial review, holding that the Court may invalidate laws that are unconstitutional under the Basic Laws.⁶⁶ This ruling treated the Basic Laws as constitutional law,⁶⁷ thus cementing the Court's recognition of the supremacy of the laws.

Israel's notably strong⁶⁸ and generally well-respected Supreme Court views the Basic Laws, together with case precedence, and, to a lesser extent, the Declaration of Independence,⁶⁹ as the core of

as many Basic Laws as it wishes, with the apparent effect of future governments being unable to repeal the laws. While it is doubtful the Supreme Court would allow such an abuse of the system, it is unclear how the Court would be able to disallow such abuse while continuing to recognize the supremacy of the Basic Laws and the ability of a government to pass them by simple majorities. Fortunately, this potential constitutional crisis has yet to be realized, and the Knesset has successfully amended and repealed Basic Laws without major controversy.

62. See Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1329-30 (1999).

63. See *id.* at 1329; HCJ 98/69, *Bergman v. Minister of Finance*, 23(1) PD 693 [1969] (Isr.).

64. See generally Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 82 (1993) (discussing Israel's Constitutional Revolution of the early 1990's).

65. Dorner, *supra* note 62, at 1329-30; CA 6821/93 *United Mizrahi Bank Ltd. v. Migal Collective Vill.* 49(4) PD 221 [1995] (Isr.) [hereinafter *United Mizrahi Bank*]. It was partially translated in 31 ISR. L. REV. 754, 764 (1997). See also translated in 1995-2 ISR. L. REPORTS 1, available at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

66. Dorner, *supra* note 62, at 1329-30; *United Mizrahi Bank*, *supra* note 65.

67. Dorner, *supra* note 62, at 1330; see also Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On The Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2012) (discussing Israel's treatment of constitutional law and judicial review).

68. The World Factbook: Isr.: Gov't, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Feb. 26, 2014).

69. Dorner, *supra* note 62, at 1326 (noting that, though a law cannot be invalidated on the basis that it conflicts with the Declaration of Independence, “all laws of Israel, including those enacted during the British Mandate before the establishment of the State, must be interpreted in light of the principles expressed by the Declaration”).

Israel's system of constitutional law.⁷⁰ As noted, the Declaration of Independence guarantees that Israel "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex; it will guarantee freedom of religion."⁷¹ The Basic Law on Freedom of Occupation establishes "the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel."⁷² Likewise, the Basic Law on Jerusalem also promises "Holy Places shall be protected . . . from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings towards those places."⁷³ However, these guarantees of freedom of religion, of equality, and of access to Holy Places have failed to protect the rights of all Israelis who these laws are supposed to protect.

C. Religious Foundations and the Status Quo

1. The Religious Court System

At the establishment of Israel there was already a system of law in place, leftover from the Ottoman period (1517-1917) with some changes made during the British Mandate period (1918-1948).⁷⁴ As part of Israel's preservation of the status quo between religion and state, this system was mostly adopted by Israel at its creation, and has remained largely unchanged from that time.

During its rule, the Ottoman *Caliphate* granted non-Muslim communities autonomy in matters of communal affairs and personal status issues.⁷⁵ The Millet system, as it was known, gave power to the leaders of the Empire's recognized religious communities to set up their own court systems and apply their own religious laws.⁷⁶ The Millets' jurisdictions varied by community but typically included marriage, divorce, alimony and support, inheritance, education, and charity.⁷⁷

70. *Id.* at 1325-26.

71. Declaration of Independence, *supra* note 2.

72. Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 p. 90, § 1 (Isr.).

73. Basic Law: Jerusalem, Capital of Israel, 5740, 34 LSI 209, § 3 (1979-1980) (Isr.).

74. Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. REV. 239, 251 (2007).

75. *Id.*

76. *Id.*

77. *Id.* at 251-52.

When the British Mandate succeeded Ottoman rule in Palestine, the British maintained a similar version of the Millet system. Under Britain's 1922 Palestine Order in Council,⁷⁸ ten religious communities were recognized: Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic Melkite, Maronite, Syrian Orthodox, and Jewish, which was referred to as "Knesset Israel."⁷⁹ The 1922 Order also codified the religious courts' respective jurisdictions, and defined personal status issues as "Suits Regarding Marriage Or Divorce, Alimony, Maintenance, Guardianship, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of Absent Persons."⁸⁰

One significant modification drafted by the British was a provision allowing civil marriages for persons who were neither Muslim nor a member of a recognized religious community.⁸¹ As Natan Lerner notes, this provision could have solved Israel's modern problem of persons who either do not belong to one of the recognized religious communities or who opted out of the religious communities.⁸² Unfortunately, the provision was never implemented, and civil marriage and divorce remain elusive in modern Israel.⁸³ Instead, Israel maintained the system of religious courts as part of the larger Status Quo Agreement.⁸⁴

78. It is worth noting that this Order also recognized the Balfour Declaration, while reaffirming the civil and religious rights of existing non-Jewish communities in Palestine. The Palestine Order in Council (1922-1947) preamble, in 3 *The Laws of Palestine* 2569 (Robert Harry Drayton ed., 1936), available at <http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656> [hereinafter "Palestine Order"] (stating, "[a]nd whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country").

79. *Id.* at art. 52; Lerner, *supra* note 74, at 252. As under Ottoman rule, where they were the majority and official faith and did not need recognition, the Islamic community was not considered a "recognized community," though the Islamic courts still maintained jurisdiction over personal status issues for Muslims. Lerner, *supra* note 74, at 252.

80. Palestine Order, *supra* note 78, at art. 51. The Muslim courts had a wider jurisdictional reach than the Jewish and Christian courts, including exclusive jurisdiction over all personal status issues involving Muslims. The Jewish and Christian courts only had exclusive jurisdiction over matters of marriage, divorce, alimony, and the confirmation of wills of members of their community. *Id.* at arts. 51-54.

81. Lerner, *supra* note 74, at 252.

82. *Id.* at 252-53.

83. *Id.* at 253.

84. *Id.*

2. The Status Quo

During the years leading up to the Partition Plan, Jews, Arabs, and the British in Palestine regularly clashed.⁸⁵ Shortly after Israel declared its statehood and independence, its Arab neighbors—Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan, and Yemen—launched a multi-front war on the newborn nation.⁸⁶ But achieving independence from the British and the threat of destruction by Israel's Arab neighbors were not the only concerns of the founders of the new state. The founders knew that Israel would not be a homogeneous society, even amongst the Jews. Instead they recognized it would be a state with Jews from all different ethnicities, political ideas, and religious beliefs, with a large Muslim minority, that would also maintain sizeable Christian communities, and be holy to all monotheistic faiths.⁸⁷

Of particular concern to the forefathers at the time of founding was the potential for a civil divide between the Jewish communities that would leave the government unable to function and would mean the political failure of the state, which would likely result in its complete destruction at the hands of its Arab neighbors.⁸⁸ The ultra-Orthodox party, Agudat Yisrael, represented the interests of the sizeable *Haredi* (ultra-Orthodox) minority. Agudat Yisrael and the *Haredim* were notoriously anti-Zionist, as they believed that only G-d could establish a Jewish state and that the Israeli government would be too secular.⁸⁹ Still, Agudat Yisrael was an active political player with considerable power and influence; the party dated back to 1912 and, before the fall of Poland to Nazi Germany, even enjoyed representation in the national Polish parliament.⁹⁰

David Ben-Gurion, the de facto leader of pre-state Israel and the first Israeli Prime Minister, recognized the importance of

85. Lerner, *supra* note 74, at 121-142.

86. See generally GILBERT, *supra* note 28, at 186-249 (discussing the Israeli War of Independence).

87. Letter from David Ben-Gurion, for the Jewish Agency Exec. to The World Agudat Isr. Fed'n (June 19, 1947), in ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS, PRE-1948 TO THE PRESENT 58, 58-59 (Itamar Rabinovich & Jehuda Reinharz eds., 2d ed. 2008) [hereinafter The Status Quo Agreement].

88. See generally GILBERT, *supra* note 28, at 186-249 (discussing the first days of the state of Israel and the Israeli War of Independence).

89. See Benjamin Beit-Hallahmi, *Israel's Ultra-Orthodox*, MIDDLE E. RES. & INFO. PROJECT, <http://www.merip.org/mer/mer179/israels-ultra-orthodox> (last visited Apr. 18, 2014).

90. Aguddat Israel, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Politics/aguddat.html> (last visited Apr. 18, 2014).

maintaining a united Jewish front and the necessity of bringing Agudat Yisrael into the fold. With that goal in mind, Ben-Gurion sent a letter to the leaders of Agudat Yisrael, which became the basis for what is known as the Status Quo Agreement.⁹¹ The foundation laid out in the letter would eventually be adopted by the state and, though the “status quo” continues to evolve, remains the basis for modern interaction between religion and state in Israel.⁹²

In the letter, Ben-Gurion noted that the establishment of the state would require the approval of the United Nations, which would not be possible if Israel intended on becoming a theocratic state or failed to guarantee “freedom of conscience for all its citizens.”⁹³ Ben-Gurion also noted that, “neither the Jewish Agency Executive nor any other body in the country is authorized to determine the constitution of the Jewish state-in-the-making in advance.”⁹⁴ However, Ben-Gurion and the Jewish Agency nevertheless outlined what they called the “Structural Foundation for Religio-Political Accommodation.”⁹⁵

The “foundation” laid out four major concessions that the Agency was willing to make for the *Haredim*. First, the letter recognized that Saturday, the Jewish Sabbath, would be the “legal day of rest,” though other faiths would be able to rest on their own “weekly holiday” instead.⁹⁶ Second, the letter stated that all means would be taken to “ensure that every state kitchen intended for Jews will have kosher food.”⁹⁷ Third, the letter promised that the Agency recognized the seriousness and sensitivity of the issue of marital affairs,⁹⁸ and that they would “do all that can be done to satisfy the needs of the religiously observant in this matter and to prevent a rift in the Jewish People.”⁹⁹ Finally, the letter guaranteed “[f]ull autonomy of every stream in education,” thus promising that the *Haredim* would be allowed to have their own independent school system, and that their students would not be required to attend a state schooling system so long as the *Haredi* schools met minimal educational requirements.¹⁰⁰ As shown in

91. The Status Quo Agreement, *supra* note 87, at 58-59.

92. Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 618-19 (1999).

93. The Status Quo Agreement, *supra* note 87, at 59.

94. *Id.* at 58.

95. *Id.* at 58-59.

96. *Id.* at 59.

97. *Id.*

98. Inherently included in this promise is the matter of all other personal status issues. See Sapir, *supra* note 92, at 620.

99. The Status Quo Agreement, *supra* note 87.

100. *Id.*

Part III, the promises made in this foundation were not only kept, but were expanded into much greater guarantees for the *Haredi* and Orthodox than originally conceived.

III. THE CURRENT IMBALANCE BETWEEN SYNAGOGUE AND STATE

In a 1998 self-report to the United Nations Human Rights Committee, Israel accurately described the balance between religion and state in the country as “quite labyrinthine” and “a patchwork of laws and practices that are not easily susceptible to generalization.”¹⁰¹ Israel is not a theocracy, nor is there an official state religion; however Israel does not embrace the same principles of separation between religion and state that most liberal democracies observe. Still, Israel’s acknowledged intermingling of religion and state should not bar the state from being recognized as a liberal democracy, so long as Israel respects the democratic norm of religious liberty.¹⁰² Israel’s obligations to ensure religious liberty lie not only under democratic norms, but also exist in its own Declaration of Independence,¹⁰³ the spirit of its Basic Laws,¹⁰⁴ and its treaty and international law obligations.¹⁰⁵ The Israeli

101. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Initial Report of States Parties Due in 1993: Addendum: Israel, ¶¶532, U.N. Doc. CCPR/C/81/Add.13 (Apr. 9, 1998).

102. Israel must also of course respect the other democratic norms that lie outside the purview of this paper.

103. See Declaration of Independence, *supra* note 2. As noted, while the Declaration of Independence is not binding law, the Court interprets all laws “in light of the principles expressed by the Declaration.” Dorner, *supra* note 62, at 1326.

104. See Ruth Lapidoth, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 446 (1998) (noting that “the general reference to ‘Fundamental Human Rights’ in the context of ‘Basic Principles’ [of the two 1992 Basic Laws on “Human Dignity and Liberty” and “Freedom of Occupation,” respectively] may perhaps be interpreted as a recognition of . . . freedom of religion, although not specifically mentioned in the text.”); cf. Basic Law: Jerusalem, Capital of Israel, 5740, 34 LSI 209, § 3 (1979-1980) (Isr.) (protecting the religious rights of different religious groups by establishing that the “Holy Places shall be protected . . . from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings towards those places”).

105. Israel has signed and ratified into law the 1966 International Covenant on Civil and Political Rights, which guarantees freedom of religion. International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 172, 178 [hereinafter “ICCPR”]. However, Israel issued a reservation limiting the covenant’s application in the area of personal status law, thus avoiding application of the treaty against the religious courts’ authority over personal status issues and the lack of a civil marriage system. See International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Apr. 18, 2014). In its treaty with the Holy See, Israel also “affirm[ed] its continuing commitment to uphold and observe the human right to freedom of religion and conscience. See Fundamental Agreement Between the Holy See and the State of Israel art. 1, Vatican-Isr., Dec. 30, 1993, 33 I.L.M. 153, 154 (1994) [hereinafter “Holy See-Israel Treaty”].

Supreme Court has also explicitly recognized the right to freedom of religion in Israel.¹⁰⁶ However, by examining a non-exhaustive list of current areas of entanglement between religion and state in Israel, it is apparent that Israel is not fully upholding its responsibility to protect the religious liberty of all of its citizens.

*A. Religious Courts and
Issues of Personal Status*

1. Marriage

Israel's religious court system is a true continuation of the status quo that was created under the Ottoman Millet system and survived through British Rule in Mandate Palestine.¹⁰⁷ As discussed, that system allowed religious groups in the Ottoman Empire self-rule over most legal issues within their respective communities.¹⁰⁸ Shortly after its founding, Israel codified the maintenance of the system.¹⁰⁹ In 1953, Israel enacted the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, which further defined the Jewish rabbinical courts' exclusive jurisdiction over all marriage, divorce, and other personal status issues for Jews in Israel, while also establishing Orthodox Jewish *Halakhic* law as the sole law of these courts.¹¹⁰ Israel maintained this system for two primary reasons: (1) it allowed religious minority communities to maintain self-rule over matters of personal status, which was necessary to satisfy the communities and which the Israeli government had no interest in concerning itself with anyway, and (2) it allowed Orthodox Judaism exclusive reign over marriage and divorce for all Jews in the state.¹¹¹

There are five religious court systems in Israel: the Rabbinical Courts (Jewish), the Muslim Religious Courts (Sharia Courts), the Druze Religious Courts, and the juridical institutions for the nine

106. *E.g.*, H CJ 243/62 Israel Film Studios Ltd. v. Gary, 16 PD 2407, 2416 [1962] (Isr.) (“Every person in Israel enjoys freedom of conscience, of belief, of religion, and of worship. This freedom is guaranteed to every person in every enlightened, democratic regime, and therefore it is guaranteed to every person in Israel.”); *see also* Sapir, *supra* note 92, at 635-36.

107. *See* discussion *supra* Part II.B.

108. *Id.*

109. Law and Administration Ordinance, 1948, 1 LSI 7, ¶17 (1948) (Isr.).

110. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.) (“[M]atters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical courts . . . in accordance with Jewish religious law.”); Sapir, *supra* note 92, at 620-21.

111. Daphne Barak-Erez, *Law and Religion under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495, 2497 (2009).

recognized Christian communities and the Baha'i community, respectively.¹¹² Each system has the power to adjudicate most personal status issues of their own communities.¹¹³ The Dayanim Law of 1955 (for Jewish courts),¹¹⁴ the Qadis Law of 1961 (for Islamic courts),¹¹⁵ and the Druze Religious Courts Law of 1962¹¹⁶ each set out how the judges for the respective courts are chosen.¹¹⁷ The courts and their judges are all funded by state funds.¹¹⁸ While the religious courts have their own internal appellate systems, their decisions are also reviewable by the Israeli Supreme Court to ensure that they conform to any superseding civil laws.¹¹⁹

Dayanim (Jewish court judges) are officially appointed by the Israeli President, based on the recommendations of the Commission to Appoint Religious Court Judges.¹²⁰ The commission is composed of ten members: Israel's two chief rabbis (both Orthodox or ultra-Orthodox), two *dayanim* from the Rabbinical Court of Appeals, the justice minister, another minister appointed to the commission by the prime minister, two members of the Knesset, and two practicing lawyers representing the Israel Bar Association.¹²¹ By law, "[c]andidates for appointment as *dayanim* must be ordained Orthodox rabbis" and must be "examined and certified by the Council of the Chief Rabbinate," which is also run by the Orthodox.¹²² The rabbis must be Orthodox because, by law, Orthodox Judaism is the only officially recognized branch of Judaism in Israel.¹²³ Civil marriages are not available in Israel to

112. See SCHMIDT, *supra* note 21, at 110.

113. S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 138-39 (1997). Except the rabbinical courts, which are limited to matter pertaining to marriage and divorce. *Id.*

114. Dayanim Law, 5715-1955, 9 LSI 74 (1954-1955) (Isr.).

115. Qadis Law, 5721-1961, 15 LSI 123 (1960-1961) (Isr.).

116. Druze Religious Courts Law, 5722-1962, 17 LSI 27 (1963-1964) (Isr.).

117. The Christian and Baha'i court systems are less regulated by the state and pick their own judges. SCHMIDT, *supra* note 21, at 110.

118. Sapir, *supra* note 92, at 621.

119. See HCJ 1000/92 Bavli v. Great Rabbinical Court 48(2) PD 221 [1995] (Isr.) (holding that the decisions of all religious courts, including the Great Rabbinical Court, are in principle subject to review by the Supreme Court. See also CA 3077/90 Plonit v. Ploni, 49(2) PD 578 [1997] (Isr.) (implicitly holding that *Bavli* also applied to the Islamic Sharia religious courts); see also HCJ 51/69 Rodnitsky v. Rabbinical Court of Appeals, 24(1) PD 704 [1970] (Isr.) (overruling a rabbinical court decision on the basis that it conflicted with a fundamental principle of the freedom of conscience).

120. Sharon Shenhav, *Choosing Religious Court Judges in Israel: A Case Study*, JEWISH POL. STUD. REV. 18:3-4 (Oct. 1, 2006), available at <http://jcpa.org/article/choosing-religious-court-judges-in-israel-a-case-study/>.

121. *Id.*

122. *Id.*

123. See Movement for Progressive Judaism in Israel Fund v. Minister of Religious Affairs, 43(2) PD 661 [1989] (Isr.). In this case, the Supreme Court rejected an appeal by an

anyone with a recognized religion under the Nationality Law, and all persons with a recognized religion—which applies to all but a few Israelis—may only be married or divorced through their respective religious court system.¹²⁴

The system's two most significant challenges to the norms of religious liberty are: (1) virtually all Israelis are forced to use these courts for at least some matters of personal status, including marriage and divorce, and (2) the courts do not take a pluralistic view of the religious laws they apply, instead applying strict Orthodox *Halakha*, Shari'a, Canonical law, or Baha'i law. This creates obvious issues when the personal beliefs or desires of an individual or couple do not conform to the relevant established religious law.¹²⁵ For example, all Jewish marriages in Israel must be performed under Orthodox law in order to receive legal state recognition.¹²⁶ While secular, Reform, Conservative, and other non-Orthodox Jews may have additional ceremonies in adherence to their own beliefs and officiated by their own rabbi or other leader, they must have a ceremony under Orthodox *Halakhic* laws and officiated by an Orthodox rabbi for their marriage to be legal.¹²⁷ This deprives secular and non-Orthodox Jewish couples from truly being married the way they wish, by their own religious leader, and within their own religious beliefs and, instead, forces Orthodox beliefs and law on them.

Besides preventing many couples from being married in the tradition of their preference, some couples are prohibited from

advocacy group for progressive (non-Orthodox) forms of Judaism to order the Minister of Religious Affairs to recognize Reform rabbis as having "registering authority" to perform marriages and divorces which would be recognized by the state. The ruling maintained that ceremonies and adjudications performed by Reform, Conservative, and other non-Orthodox rabbis were not recognized under Israeli law, even if all parties agreed to the forum. *Cf. Ettinger, supra* note 23.

124. Until recently, civil marriage was completely unavailable in Israel. In 2010, the Knesset passed a bill that allows civil marriages for partners who are both labeled as "lacking a religion." HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 214 & n.16 (2011). However, this law applies to very few Israelis, as most Israelis are automatically recognized as having a religion based on their parentage. For example, even if an Israeli declares herself as secular or having no religion, if her mother was recognized as Jewish, she will be legally recognized as Jewish under the Nationality Law, and will be unable to obtain a civil marriage. *See* Nationality Law, 5712-1952, 6 LSI 50 (1951-1952) (Isr.); *see also* Lerner, *supra* note 74, at 247-249 (discussing the issue of religion and nationality in Israel).

125. Including, and especially for, same-sex couples who wish to be married. It is worth noting, however, that same-sex marriages that occur abroad must be recognized by the Israeli government. HCJ 3045/05 Ben Ari v. Dir. of the Population Registry in the Ministry of Interior [2006] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.pdf.

126. *See* Movement for Progressive Judaism in Israel Fund v. Minister of Religious Affairs, 43(2) PD 661 [1989] (Isr.).

127. *See id.*

marriage entirely under the rabbinical courts' laws. For example, under Orthodox *Halakha*, *Cohens*—the descendants of the ancient Jewish priests—are not allowed to marry widows, divorcees, or persons whose parents are not both Jewish.¹²⁸ Interfaith couples have it much worse, as no religious court in Israel will marry them, and since they have religions they are ineligible for the limited civil marriage exception.

Under an even more unfortunate crack in the system, some partners who each identify as Jewish (but are not *Cohens*), and whom the state accepted as a Jew, are ineligible for marriage because the rabbinate considers them to be “interfaith.”¹²⁹ This gap exists because the rabbinate only recognizes a person as a Jew if her mother is Jewish or if she has converted to Judaism, while the Law of Return allows anyone with at least one Jewish grandparent to immigrate to Israel.¹³⁰ As such, people like Alexander Skudalo, whose father is Jewish but whose mother is not, may immigrate to Israel, but will not be recognized as a Jew by the rabbinate, and therefore will be unable to marry his Jewish fiancé in Israel unless he goes through an official conversion.¹³¹ There are an estimated 270,000 Israelis who are not recognized by the rabbinate as being Jewish, but who also have no other religious affiliation and are not legally recognized by the state as being “without religion.”¹³²

Unrecognized religious groups, like a number of denominations of Evangelical Christianity and the Jehovah's Witnesses, among others, also cannot be legally married in Israel.¹³³ This is because they do not have their own courts that can conduct such marriages, the civil marriage exception does not apply to them because they do have a religion, and of course none of the other religious courts can or would conduct the marriage. Hiddush, an

128. See, e.g., Amiram Barkat, *Not Jewish Enough to Marry a Cohen*, HAARETZ (Feb. 18, 2005, 12:00 AM), <http://www.haaretz.com/print-edition/news/not-jewish-enough-to-marry-a-cohen-1.150715> (discussing the rabbinate's refusal to marry a *Cohen* to his Jewish fiancé, even though she is recognized as a Jew by the rabbinate, because the fiancé's father was not Jewish. Somewhat counterintuitively, Rabbi Shaul Farber, an expert on Jewish family law, believed the rabbinate may be willing to recognize the couple's marriage retroactively “if [the female partner] becomes pregnant.”).

129. Rachael Gelfman Schultz, *Civil Marriage in Israel*, MY JEWISH LEARNING, http://www.myjewishlearning.com/israel/Contemporary_Life/Society_and_Religious_Issues/Freedom_of_Religion/civil_marriage_in_israel.shtml (last visited Apr. 18, 2014).

130. Law of Return (Amendment No. 2), 5730-1970, 24 LSI 28 (1969-1970) (Isr.).

131. Schultz, *supra* note 129.

132. *Id.* Notably, because of their status, these persons also cannot be married in Jewish cemeteries, even if their families are buried there. See Religious Freedom Report, *supra* note 20.

133. See, e.g., Ruth Moon, *Christians Fight Israel's Marriage Ban*, CHRISTIANITY TODAY (Nov. 06, 2012, 9:43 AM), <http://www.christianitytoday.com/ct/2012/november/marriage-petition.html>.

organization calling for religious reform in Israel, estimates that approximately 5 percent of Israelis cannot be legally married in the state due to various cracks in the system.¹³⁴

However, since a 1963 decision by the Israeli Supreme Court, the Interior Ministry has had to recognize civil marriages performed abroad.¹³⁵ This decision allows Israelis to travel abroad to be married in their own beliefs and have their marriage legally recognized by Israel.¹³⁶ An estimated five to ten Israeli couples travel to nearby Cyprus every day just to be married.¹³⁷ With 47.7 percent of Jewish Israeli self-identifying as “not religious” or “not so religious,”¹³⁸ it is no wonder that this travel has turned into lucrative business for Cyprus.¹³⁹ Still, not all Israelis can afford to travel abroad for a civil marriage or to be married under their own beliefs; moreover this loophole is not a viable solution to the courts’ overall encroachment on the religious liberties that Israel supposedly guarantees.¹⁴⁰

2. Divorce

Similarly, the status of divorce law in Israel leaves much to be desired. As noted, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law grants exclusive jurisdiction to the actual enactment of the divorce.¹⁴¹ However, the 1974 Spouses (Property Relations) Law established that each spouse has an equal share in marital property, setting aside the *Halakhic* rule that the husband maintains total ownership over all property.¹⁴² This law, along with the 1962 Capacity and Guardianship Law, which dealt with

134. *Civil Marriage in Israel*, HIDDUSH (May 26, 2011, 1:56 PM), http://www.hiddush.org/article-2167-0-Civil_Marriage_In_Israel.aspx.

135. See H CJ 143/62 Funk-Schlesinger v. Minister of the Interior, 17 PD 225 [1963] (Isr.).

136. Interestingly, just a few years after the Funk-Schlesinger decision, an Israeli Supreme Court Justice was married in New York by a Conservative rabbi and had his marriage recognized in Israel. S. CLEMENT LESLIE, *THE RIFT IN ISRAEL: RELIGIOUS AUTHORITY AND SECULAR DEMOCRACY* 58-60 (1971).

137. Sarah Stricker, *Wedding Refugees*, YNETNEWS (Nov. 20, 2009, 7:58 AM), <http://www.ynetnews.com/articles/0,7340,L-3807730,00.html>.

138. ISRAELI CENT. BUREAU OF STATISTICS, *STATISTICAL ABSTRACT OF ISRAEL* (2011), available at http://www.cbs.gov.il/shnaton62/st07_04x.pdf.

139. Stricker, *supra* note 137.

140. Lucy Endel Bassli, *The Future of Combining Synagogue and State in Israel: What Have We Learned in the First 50 Years?*, 22 HOUS. J. INT'L L. 477, 517 (2000).

141. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.).

142. Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-1973); Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. OF WOMEN & L. 333, 341-42 (2012).

child custody issues,¹⁴³ empowered civil courts to also adjudicate alimony, child custody, division of property, and all other ancillary matters to a divorce, save for the literal granting of the divorce itself.¹⁴⁴ But while the religious courts have to decide the principles of equality established by the civil law,¹⁴⁵ they still have jurisdiction over the ancillary matters as well.¹⁴⁶ As Margit Cohn noted in her 2004 article on the subject, “[o]nce one of the systems is chosen, the issue is ‘captured’ and cannot be decided by its brother-system, or rival-system.”¹⁴⁷ For contentious divorces, this situation has created a perverse system of forum shopping which results in a race to the courts, as the civil courts are known to be more sympathetic to women than the rabbinical courts made up entirely of male Orthodox rabbis.¹⁴⁸

For Jewish women, even obtaining the *Get*—the official religious decree of divorce which is required for the divorce to be legal and final, and which is only awardable by the rabbinical courts—can be extremely challenging. Under Orthodox *Halakha*, the husband must agree to grant the divorce himself; the courts cannot order a divorce finalized without the husband’s approval.¹⁴⁹ Some husbands simply refuse to grant the *Get*, while others use the *Get* as leverage against the wife in the negotiations over the ancillary matters such as alimony, child custody, and division of property.¹⁵⁰ Fortunately, the rabbinical courts have recently been more willing to combat this abuse by ordering husbands to grant their wives a *Get* in some cases where the court feels that a *Get* is clearly legally justified (under *Halakhic* law), even going so far as ordering the husbands detained until they grant the *Get*.¹⁵¹ Civil family courts have also recently shown a willingness to step in to reduce *Get* refusal, with some courts having recognized a cause of

143. Capacity and Guardianship Law, 5722-1962, 16 LSI 106 (1961-1962) (Isr.).

144. Fournier et al., *supra* note 142, at 341-42.

145. See HCJ 1000/92 Bavli v. The Grand Rabbinical Court, 48(2) PD 6 [1994] (Isr.) (nullifying the ruling of the Grand Rabbinical Court which failed to apply principles of equality to the divorce proceeding).

146. *Id.*

147. Margit Cohn, *Women, Religious Law and Religious Courts in Israel – The Jewish Case*, 27 RETFÆRD 57, 64 (2004).

148. See Fournier et al., *supra* note 142, at 341-42.

149. Deuteronomy 24:1; Basheva E. Genut, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT’L L.J. 2120, 2156-57 (1996).

150. Basheva E. Genut, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT’L L.J. 2120, 2157 (1996).

151. See Mary Oster, *Jailed ‘Get’ Refuser Escapes from Hearing*, JEWISH TELEGRAPHIC AGENCY (Mar. 6, 2013, 8:14 PM), <http://www.jta.org/2013/03/06/news-opinion/israel-middle-east/jailed-get-refuser-escapes-from-hearing>.

action for “*Get* refusal.”¹⁵² Still, these cases are the exception, and only the husband can grant a divorce; if the husband should decide to sit in jail instead of granting the divorce, the wife will remain trapped in the marriage indefinitely. Similarly, in tragic cases such as a situation where the husband is in a vegetative state and cannot grant a divorce, the wife remains legally trapped in the marriage.¹⁵³ If a woman is unable to obtain the *Get*, she will be unable to marry again under Jewish law. Any children she might have in future relationships will be considered *mamzerim*—illegitimate—and those children will only be able to marry other *mamzerim* under Orthodox *Halakha*.¹⁵⁴

As noted, just as secular, Reform, Conservative, and other non-Orthodox Jews are subject to Orthodox law regardless of the parties’ preferred choice of law, so must the secular, the less religious, and the members of unrecognized Muslim, Christian, Druze, or Baha’i sects submit to the officially recognized governing law of the Muslim, Christian, Druze, or the Baha’i courts, respectively. As such, a secular Muslim couple must still settle their personal status issues under the Muslim courts which apply strict Sharia law, regardless of the preference of the couple.

B. State Codification of Religious Law

1. Work and Rest Laws

The application of religious law does not end with personal status issues, but rather extends further into the public sphere. The Hours of Work and Rest Law recognizes the Jewish Sabbath—sundown Friday through sundown Saturday—as the official day of rest for Israel.¹⁵⁵ On the Jewish Sabbath, or “Shabbat,” Jewish employees and employers—including the self-employed—are obliged to rest and must obtain special permission to be allowed to

152. See Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT’L & COMP. L. 279 (2009) (discussing the emerging cause of action for “*Get* refusal”). Like Orthodox *Halakha*, Sharia law favors the rights of the husband, allowing him to divorce his wife without her consent by simply declaring them divorced. Interestingly though, Israeli civil courts have also recognized a tort claim for women who are divorced by their husbands without their consent. *Id.* at 298.

153. See Lourdes Garcia-Navarro, *Under Israel’s Divorce Laws, Men Get the Final Word*, NPR (Apr. 07, 2010, 2:39 PM) <http://www.npr.org/templates/story/story.php?storyId=125673859> (noting one such case where a husband attempted suicide and was left in a vegetative state, leaving the wife unable to obtain a divorce).

154. Genut, *supra* note 150, at 2156-57.

155. Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-1951) (Isr.).

work,¹⁵⁶ non-essential government services completely shut down, and most public transportation ceases.¹⁵⁷ Non-Jews also receive off for their requisite weekly holy day, and the law protects them from employer discrimination based on which day they require off.¹⁵⁸ Municipalities also enjoy the right to order businesses to close on religious days such as Shabbat.¹⁵⁹

The Work and Rest law has caused frequent headaches for secular employers, especially financial institutions that do business on the global market¹⁶⁰ and merchants and service businesses that would rather remain open for secular, less religious, and non-Jewish customers during Shabbat. However, because the law requires all Jewish employees and employers to rest on Shabbat, most businesses are forced to close. This direct application of Jewish Orthodox *Halakha* that forces most businesses to close and most public transportation to cease also results in the de facto enforcement of Shabbat on the public lives of most Israelis. Since the Israeli weekend is Friday and Saturday, this is the equivalent of most of the country shutting down in the United States from Saturday night until sundown on Sunday. This has an obvious chilling effect on the service and retail industries in Israel, especially for foreign businesses that seek to expand to the country and are unaccustomed to this situation. It is worth noting that because non-Jews in Israel tend to live in the same areas as each other, many businesses in their respective areas are allowed to remain open on Shabbat; of course these businesses still close on their respective days of rest, and government services and most public forms of transportation are still unavailable to them on Shabbat.

156. This provision is strictly followed, especially by government offices. I learned this first hand as a Fellow with the Israeli Ministry of Foreign Affairs after I tried to go into work on a Saturday. Even though I carried the requisite employee identification card and the building was technically open, I was barred from even entering the building because it was Shabbat, and I did not have special permission to be allowed to work, though I had previously been allowed to work on other non-religious holidays.

157. Hours of Work and Rest Law, 5711-1951, 5 LSI 125, § 7, 9, 12 (1950-51) (Isr.); Arthur Gross-Schaefer & Wayne Jacobsen, *If Not Now, When? The Case for Religious Liberty in the State of Israel*, 44 J. CHURCH & ST. 539, 545-46 (2002); Sapir, *supra* note 92, at 622-23.

158. Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-1951) (Isr.).

159. Municipalities Ordinance (Amendment No. 40), 5750-1990, SH 114 (Isr.).

160. Due to the time difference, when Shabbat starts in Israel, it is still a part of the normal workweek in much of the rest of the Western world. As Shabbat starts at sundown on Friday, there are many Fridays during the winter months that the American workday has not even begun by the time many Israeli businesses must legally close.

The Supreme Court has even noted the negative effect that the Work and Rest Law has on non-Orthodox public cultural life.¹⁶¹ However, in the same case, the Court upheld the legality of the law prohibiting Jews from working on Shabbat.¹⁶² The Court acknowledged that the law was in conflict with the fundamental right to freedom of occupation established in the Basic Law concerning Freedom of Occupation.¹⁶³ Still, Justice Barak reasoned this conflict did not render the law illegal, noting that “[i]f the law allowed each worker to choose for himself a day of rest . . . , in many cases the real choice will be made by the employer and not by the workers.”¹⁶⁴ Of course by having the state mandate the day of rest, the actual choice is entirely out of the worker’s hands, and she does not even have the chance to contract around it.

2. Kashrut Laws

As set out in the Status Quo Agreement, Orthodox Kosher dietary laws are strictly followed by all government institutions, schools,¹⁶⁵ military facilities, and for all soldiers.¹⁶⁶ In 1986, the state enacted the Festival of Matzot (Prohibition of Leaven) Law, which prohibits merchants from openly displaying products that are not Kosher for Passover during the holiday.¹⁶⁷ In 1994, the state also enacted a law regulating the import of pork and other non-kosher meats,¹⁶⁸ to the point of effective prohibition.¹⁶⁹ And in 2010, the Knesset passed a tax that applies exclusively to non-Kosher meats.¹⁷⁰

These laws, especially the Prohibition of Leaven and the Meat Products laws, create problems for both businesses and consumers, effectively turning the trade of bread during Passover and

161. See HCJ 5026/04 Design 22 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Dep’t, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.); Lerner, *supra* note 74, at 263.

162. HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Dep’t, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.)

163. *Id.*

164. *Id.*

165. Except in non-Jewish areas. See Lerner, *supra* note 74, at 266.

166. Kosher Food for Soldiers Ordinance, 2 L.S.I. 37, (1948), *discussed in* Sapir, *supra* note 92, at 624 (notably, this was one the earliest laws passed by the Knesset, and it was enacted while Israel was fighting for its survival in the War of Independence, which underscores how the first Knesset viewed this law as vital to the new state).

167. Festival of Matzot (Prohibition of Leaven) Law, 5746-1986, 40 LSI 231 (1985-1986) (Isr.).

168. Meat and Its Products Law, 5755-1995, SH No. 92 (Isr.).

169. Barak-Erez, *supra* note 111, at 2500.

170. See Amnon Meranda, *Knesset Approves Taxation on Non-Kosher Meat*, YNETNEWS (Mar. 17, 2010, 9:17 PM), <http://www.ynetnews.com/articles/0,7340,L-3864363,00.html>.

non-Kosher meats into a black market industry. While previously the Prohibition of Leaven law was rarely enforced,¹⁷¹ the state and municipalities are now more proactive in applying the law.¹⁷² Israel's heavy regulation of the pork and non-Kosher meat industry also hurts Christians and other consumers in Israel who eat non-Kosher and non-Halal foods.¹⁷³

Additionally, while most businesses are not required by the state to be Kosher, they receive heavy pressures from local municipalities and by the Orthodox religious community to maintain strict Kosher facilities, and often cannot stay in business without a Kosher certificate—sometimes being literally forced out by their landlords.¹⁷⁴ Private and state-backed Kosher licensing authorities have also been known to be unnecessarily severe in their application of Kosher law and in their punishments for violations.¹⁷⁵ In a recent case, a baker had her Kosher certificate revoked by a public rabbinate after they discovered that she was a Messianic Jew (“Jew for Jesus”).¹⁷⁶ The Supreme Court found the revocation illegal, as it was based not on whether the bakery met the Kosher requirements, but on the owner's religion, which is irrelevant under Kosher *Halakha*.¹⁷⁷ However, the public rabbinate refused to return the certificate and violated the Court's order.¹⁷⁸ Rather than holding the rabbinate in contempt of court for its violation—which would anger the Orthodox community—

171. *Id.*

172. *See, e.g.*, Maayana Miskin, *Haifa's 'Chametz Hotline' for Passover*, ISRAEL NATIONAL NEWS (Mar. 24, 2013, 12:31 PM), <http://www.israelnationalnews.com/News/News.aspx/166515#.UY7vcsquCPA> (noting the Deputy Mayor of Haifa's call for residents to report illegal displays and sales of leavened bread to a police hotline).

173. *See, e.g.*, Jeffrey Yoskowitz, *Israel's Pork Problem*, SLATE (Aug. 8, 2012, 3:45 AM), http://www.slate.com/articles/life/faithbased/2012/08/israel_s_pork_problem_and_what_it_means_for_the_country_s_christian_arabs_.html (discussing the negative effects of current Kosher laws and new proposed regulations on Christian Arabs in Israel).

174. *See, e.g.*, Yair Ettinger, *Not Kosher? No Business: Jerusalem Eatery Closes after 8 Years of Operation*, HAARETZ (Mar. 19, 2013, 5:18 AM), <http://www.haaretz.com/news/national/not-kosher-no-business-jerusalem-eatery-closes-after-8-years-of-operation.premium-1.510345>.

175. *See, e.g.*, Patrick Cockburn, *Restaurants Rebel against Kosher Laws*, THE INDEPENDENT (July 2, 1995), <http://www.independent.co.uk/news/world/restaurants-rebel-against-kosher-laws-1589461.html>. In that incident, the public rabbinate ordered a restaurant owner to throw out all plates and utensils that may have come in contact with a spoon that was not Kosher and ordered the business closed for two days as punishment, terms that the owner said he could not afford. *Id.*

176. *See* Dan Izenberg & Matthew Wagner, *High Court: Jew for Jesus Baker Must Apply for New Kashrut Certificate*, JERUSALEM POST (Dec. 21, 2009, 11:00 PM), <http://www.jpost.com/Israel/High-Court-Jew-for-Jesus-baker-must-apply-for-new-kashrut-certificate>.

177. *Id.*

178. *Id.*

the Court stated that she should just apply for a new certificate at her own expense.¹⁷⁹

Further complicating both the Shabbat and Kosher laws and policies, individual municipalities have a general authority to enact ordinances, which can include prohibiting businesses from being open on Shabbat or banning the sale of pork products within the municipality.¹⁸⁰ Even when a municipality does not have the legal authority to directly ban a business from opening on Shabbat, it can coerce a business into agreeing that it will not open on Shabbat by refusing to grant business and building permits without such a stipulation.¹⁸¹

C. Religious Institutions and Funding

The religious courts are far from the only religious institutions and organizations in Israel that receive state funds. Instead, Israel also provides direct funding for the Chief Rabbinate, clergypersons, religious buildings and services, yeshivas and other institutions of religious education, religious cultural institutions, religious research organizations, religious social services, Holy Places, cemeteries for specific religious communities, and public and private religious schools, among other institutions.¹⁸² Institutions that do not automatically receive funding—such as the Holy Places, the religious courts, and the Chief Rabbinate—must apply for funding from the state.¹⁸³ Funding comes from various ministries within the government, including the Ministry of Religious Services, the Ministry of Education, the Ministry of Internal Affairs, and the Ministry of Labor and Welfare, among others, making it difficult to track which institutions receive how much money and from where.¹⁸⁴

179. *Id.*

180. Cf. Jeffrey Yoskowitz, *In Israel, a Pork Cookbook Challenges a Taboo*, N.Y. TIMES (Sept. 28, 2010), <http://www.nytimes.com/2010/09/29/dining/29trayf.html> (“[I]t is up to individual municipalities to determine whether pork can be sold in each neighborhood and whether shops will incur fines for selling it, much as they would for staying open on the Sabbath.”).

181. *See, e.g.*, Daniel K. Eisenbud, *Hundreds Protest J'lem Cinema City Shabbat Closure*, JERUSALEM POST (May 5, 2013, 3:22 AM), <http://www.jpost.com/National-News/Hundreds-protest-Jlem-Cinema-City-Shabbat-closure-312067> (“The [building] permit was accompanied by a stipulation from the municipality and the Finance Ministry that it remain closed on Shabbat.”).

182. Shimon Shetreet, *State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 442-43 (1999).

183. *Id.* at 442-46.

184. *Id.* at 442-43.

In 1985, the Knesset enacted the Budget Foundations Law to reduce discrimination and favoritism of individual institutions by appropriating a set amount of funding to each category of institution, which would then be equally distributed to all institutions within that category.¹⁸⁵ However, as former Israeli Minister of Religious Affairs Shimon Shetreet¹⁸⁶ noted in his article on the funding of religious institutions in Israel, due to loopholes purposefully left in the law, this system did little to relieve the financial discrimination.¹⁸⁷

These funds are also supposed to be available to all recognized religious groups, which includes Orthodox Judaism and ultra-Orthodox Judasim/*Haredi*,¹⁸⁸ Islam, certain Christian sects, the Baha'i, and the Druze.¹⁸⁹ Recently, in a landmark reversal, the state even agreed to fund Reform and Conservative rabbis as well.¹⁹⁰ However, the levels of religious funding have not been proportional or equal.¹⁹¹ Jewish institutions, and in particular, Orthodox and ultra-Orthodox/*Haredi* institutions, typically receive disproportionate amounts of state funding.¹⁹² In fact, knowledge of the *Haredi* institutions' most-favored status is so widespread that non-*Haredi* organizations have been known to claim *Haredi* status on their applications.¹⁹³

Unsurprisingly, institutions connected to certain Israeli political parties have also received especially large distributions of funds. As noted in a Haaretz article on religious funding, during the 2011 Israeli fiscal year, "Shas' El Hama'ayan educational network received NIS 12 million [approximately US \$3,361,344 at current exchange rates] from the Education Ministry for 'Torah and Jewish culture lessons not held within a formal learning framework.'"¹⁹⁴ The educational network is only one of many ultra-Orthodox educational institutions, and it is also worth noting that members of the Shas party have held the seat of the Minister

185. See Budget Foundations Law, 5745-1985, 1139 LSI 60 (1985); Shetreet, *supra* note 182, at 443.

186. Shetreet served as Minister before the ministry was renamed the Ministry of Religious Services.

187. Shetreet, *supra* note 182, at 443.

188. *Id.*

189. Maoz, *supra* note 14.

190. Kobi Nahshoni, *Reform, Conservative Rabbis to Receive State Funding*, YNETNEWS (May 30, 2012, 2:00 PM), <http://www.ynetnews.com/articles/0,7340,L-4235777,00.html>.

191. Maoz, *supra* note 14.

192. See *id.* at 369; see also Shetreet, *supra* note 182, at 442-46; see also Kashti, *supra* note 24.

193. See HC 4346/92 Ma'ale, Religious Zionist Center v. The Education and Culture Minister 46(5) PD 590 [1992] (Isr.); see also Shetreet, *supra* note 182, at 444.

194. Kashti, *supra* note 24.

of Religious Services since 2008. To put that amount in perspective, the entire Conservative Movement in Israel received less than NIS 100,000 (approximately US \$28,011 at current exchange rates) for all of its Jewish educational activities.¹⁹⁵ This discrimination should come as little surprise, as Shas and most other ultra-Orthodox parties in Israel are notorious for their open detestation of Reform and Conservative Judaism, even going so far as to publically acknowledge their loathing in their official capacities.¹⁹⁶

Government support for ultra-Orthodox schools and education networks like the one run by Shas has only grown in recent years. Support for ultra-Orthodox-run schools was once conditional on their program having minimal core curriculum standards, such as history and science, as Ben-Gurion delineated in the 1947 Status Quo Agreement letter.¹⁹⁷ However, due to the growing power of Shas and the other religious political parties as swing parties that can make or break a government, recent governments have regularly kowtowed to the religious parties' demands.¹⁹⁸ One such demand was for the amendments to the state education laws to allow public funding for religious schools even if they fail to meet the core curriculum requirements set out under state law, in violation of the Status Quo Agreement.¹⁹⁹

195. *Id.*

196. *See, e.g.,* George Potter, *Reform, Conservative Rabbis Set to Receive Funding through Culture Ministry*, THE TIMES OF ISRAEL (May 30, 2012, 11:40 PM), <http://www.timesofisrael.com/refromed-conservative-movements-to-receive-funds-through-ministry-of-culture/>. While the Ministry of Religious Services is normally responsible for paying clergypersons, the Minister of Religious Services, a leader in the Shas party, threatened to resign if his ministry was ordered to provide direct funds for any non-Orthodox clergypersons. *Id.* As such, the recent agreement to provide limited funds to Reform and Conservative had to be delegated to another ministry. *Id.* Upon solving the impasse, the spokesperson for the Ministry of Religious Services proudly stated that “every link between the ministry and heads of the Reform and Conservative communities has been cut off.” *Id.*

197. “The state, of course, will determine the minimum obligatory studies—Hebrew language, history, science and the like—and will supervise the fulfillment of this minimum, but will accord full freedom to each stream to conduct education according to its conscience and will avoid any adverse effects on religious conscience.” The Status Quo Agreement, *supra* note 87.

198. *See* Bassli, *supra* note 140, at 506-08 (noting the power of the religious parties as swing parties, and discussing their focus on securing money for their institutions). It is also worth noting that most ultra-Orthodox Jews refuse to work and instead study Torah; “58% of all adult males in the ultra-Orthodox community are not in the workforce.” *Id.* at 499. However, the government provides stipends and subsidies for their Torah study and provides welfare to their large families. *Id.* at 498. Despite all of the public assistance, over half of the community lives in poverty. *Id.* at 499.

199. *See* State Education (Amendment no. 7) Law, 5768-2007, SH No. 318 (Isr.); Unique Cultural Education Institutions Law, 5769-2008, SH No. 742 (Isr.); Barak-Erez, *supra* note 111, at 2505.

The state also regularly discriminates against the other recognized religious communities, such as the Islamic and Christian communities. A 2010 U.S. State Department report on religious freedom in Israel found that the 2010 budget for Jewish religious services and institutions was approximately NIS 1.6 billion (approximately US \$433 million).²⁰⁰ Non-Jewish religious communities, which constitute slightly more than 20 percent of the population, received approximately NIS 47 million (approximately US \$12.7 million), or less than 3 percent of total funding.²⁰¹ Despite the high level of funding for Jewish religious education institutions, the report also noted that “[m]any mosques lack an appointed imam, which is the responsibility of the [government’s] Muslim religious affairs department. The country also lacks any academic training center for the study of Islam to educate future imams and qadis”²⁰² Religious communities that are not recognized by the state receive no public funding but may be eligible for tax exemptions.²⁰³

D. Holy Places

Despite its limited landmass, Israel is home to a disproportionate number of buildings, sites, and antiquities that are holy to one or more faiths.²⁰⁴ Among the Holy Places in Israel are the Western Wall (a Jewish holy site), the Temple Mount (a holy site to both Jews and Muslims), the Dome of the Rock (a Muslim holy site that sits on top of the Temple Mount), the Church of the Holy Sepulchre (a Christian holy site), and the Baha’i World Centre (a Baha’i holy site and the administrative center of the faith). These sites are each some of the holiest, if not the holiest, sites for their respective faiths. Israel is also home to the city of Jerusalem, which is not only Israel’s capital, but is considered one of the holiest cities in the world and has regularly been the subject of religious conflicts and wars.

Israel has recognized its responsibility to protect the sites and has also guaranteed the maintenance and freedom of access to these sites in various laws and treaties, including the Declaration of Independence,²⁰⁵ the Basic Law on Jerusalem,²⁰⁶ the Protection

200. RELIGIOUS FREEDOM REPORT, *supra* note 20.

201. *Id.*

202. *Id.*

203. Lerner, *supra* note 74, at 254-55.

204. RELIGIOUS FREEDOM REPORT, *supra* note 20.

205. *See* Declaration of Independence, *supra* note 2.

206. *See* Basic Law: Jerusalem, Capital of Israel, 5740, 34 LSI 209, § 3 (1979-1980) (Isr.).

of Holy Places Law,²⁰⁷ and its treaties with Jordan²⁰⁸ and the Holy See.²⁰⁹ International law, including the ICCPR, which Israel has ratified and incorporated into its law, has also recognized the principle of freedom of religious access and worship at these sites.²¹⁰ However, Israel has not always met its responsibilities here. Two of the most noteworthy examples are Israel's failures to guarantee freedom of access and worship at the Temple Mount and the Western Wall.

1. The Temple Mount

Because the Temple Mount is holy to both Jews and Muslims, there have always been high tensions regarding the holy site. Shortly after Israel gained control of the Old City of Jerusalem during the Six Day War of 1967, Israel allowed the Muslim *Waqf* to continue its administrative control over the Temple Mount.²¹¹ This was done in an attempt to maintain the status quo and to avoid conflict over the holy site. However, the Temple Mount has been the site of frequent clashes between Jews and Muslims, many of which have led to larger riots through Israel and the Palestinian Territories.²¹² Because of the tensions, and despite the laws and treaties guaranteeing freedom of access and worship at holy sites, Jews are only allowed on the Temple Mount during limited times and are forbidden from praying or wearing any religious symbols while on the Mount.²¹³ The Supreme Court has regularly upheld or refused to hear challenges to the legality of these restrictions on public security grounds.²¹⁴ In some cases, the Supreme Court has even found it acceptable to temporarily ban all Jewish access to the site for public safety reasons.²¹⁵ However, on May 8, 2013, the

207. See Protection of Holy Places Law, 5727-1967, 21 LSI 76 (1967) (Isr.).

208. See Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Jordan-Isr., Oct. 26, 1994, 34 I.L.M. 43.

209. See Holy See-Israel Treaty, *supra* note 105.

210. ICCPR, *supra* note 105.

211. Lerner, *supra* note 74, at 257-58.

212. See, e.g., Melanie Lidman, *Palestinians Clash with Police on Temple Mount*, JERUSALEM POST (Mar. 08, 2013, 1:57 PM), <http://www.jpost.com/National-News/Palestinians-clash-with-police-on-Temple-Mount> (noting the riots on the Temple Mount and clashes between Jewish and Muslim women); see also *Temple Mount: Arabs Throw Firebombs at Police*, YNETNEWS (Mar. 08, 2013, 6:06 PM), <http://www.ynetnews.com/articles/0,7340,L-4354034,00.html> (noting the same riots on the Temple Mount and additional clashes in the West Bank).

213. See Lerner, *supra* note 74, at 257-58; RELIGIOUS FREEDOM REPORT, *supra* note 20.

214. See, e.g., HCJ, see also Maayana Miskin, *Supreme Court Rejects Temple Mount Discrimination Case*, ISRAEL NATIONAL NEWS (Oct. 8, 2009, 10:06 PM), <http://www.israelnationalnews.com/News/News.aspx/133767#.UY6XdcqCPA>.

215. HCJ 1663/94 Salomon v. Police Officer Givati, 94(1) Takdeen-Elyon 1078 [1994] (Isr.).

Director-General of the Ministry of Religious Services announced that the ministry will be reviewing the ban and will seek to allow times for Jews to pray on the Temple Mount.²¹⁶ Still, it is likely that current Israeli Prime Minister Benjamin Netanyahu will quash any proposed change in the interest of public security and diplomacy.²¹⁷

2. The Western Wall

Despite the fact that it is only considered a Holy Place for Jews, the Western Wall has also been the site of numerous clashes, especially recently. The Western Wall is administered by an ultra-Orthodox rabbi and though access to the Wall is available to all who wish to visit, there are strict gender segregation and “modesty” requirements at the site, enforced by permanent dividers at the Wall²¹⁸ and a “modesty patrol.”²¹⁹ Women are also not allowed to recite prayers at the Wall while wearing *tallitot* (Jewish prayer shawls)²²⁰, nor may they read from Torah scrolls, because these forms of prayer violate Orthodox *Halakhic* laws of prayer.²²¹ In a 2003 decision on the issue, the Israeli Supreme Court upheld the right of the state, acting through the administrators of the Wall, to prohibit women from wearing *tallitot* and from reading from Torah scrolls at the Wall, so long as they provided a separate location near the wall for women to pray freely.²²²

However, this location—Robinson’s Arch—is located further away from the Western Wall, and recently a pro-women’s group has been holding prayers with *tallitot* and Torahs at the main women’s section of the Wall itself, in defiance of the Supreme Court’s rulings.²²³ This “defiance” has led to clashes at the Wall

216. Lahav Harkov, *Ministry to Arrange Jewish Prayer on Temple Mount*, JERUSALEM POST (May 8, 2013, 5:28 PM), <http://www.jpost.com/Diplomacy-and-Politics/Ministry-to-arrange-Jewish-prayer-on-Temple-Mount-312496>.

217. Cf. Barak Ravid, *Jordan Summons Israeli Ambassador over Temple Mount Riots*, HAARETZ (May 8, 2013, 10:43 PM), <http://www.haaretz.com/news/diplomacy-defense/jordan-summons-israeli-ambassador-over-temple-mount-riots.premium-1.519996> (discussing riots on the Temple Mount, after 200 Jews were allowed to visit the Mount, and noting Jordan’s statement that “Jerusalem and the Al Aqsa Mosque are a red line for Jordan”).

218. It is also worth noting that the area provided for men to access the wall is over twice the size of the area provided for women. RELIGIOUS FREEDOM REPORT, *supra* note 20.

219. *Id.* Women’s tops must cover their shoulders and their bottom clothing must go past the knees.

220. Tallit, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/581625/tallit>.

221. RELIGIOUS FREEDOM REPORT, *supra* note 20.

222. H CJ 4128/00 Prime Minister’s Office v. Anat Hoffman 57(3) PD 289 [2003] (Isr.).

223. Sharon, *supra* note 25.

and the arrests of the women involved in the prayer.²²⁴ Notably though, the Jerusalem District Court recently upheld a lower court's decision to dismiss the arrests on the basis that women who wear *tallitot* at the Wall are not disobeying "local custom" or causing a de facto public disturbance, and therefore are not committing a criminal offense.²²⁵ While mediators have advanced a compromise that would create an egalitarian, mixed-gender prayer section at the Wall,²²⁶ the plan now appears to be in jeopardy.²²⁷

E. Equal Application of Law

Israel's military is conscription-based with a mandatory three year service requirement for Israeli men and a two year service requirement for Israeli women after turning eighteen and graduating (or otherwise leaving) high school.²²⁸ But, as part of the special arrangements Ben-Gurion made with Agudat Yisrael known as the *Torato Omanuto* arrangement, for most of Israel's history, ultra-Orthodox men have been able to defer conscription indefinitely so long as they continue to study in a state-sanctioned yeshiva.²²⁹ While in 1948 the religious exemptions only applied to approximately 400 men, that number has increased to an estimated 40,000-60,000 able-bodied men who, if not for the exemption, would currently be required to serve.²³⁰ Though all other Israeli

224. *Id.*

225. See Jeremy Sharon, *Historic Victory in Court for Women of the Wall*, JERUSALEM POST (Apr. 25, 2013, 11:37 PM) <http://www.jpost.com/National-News/Historic-victory-in-court-for-Women-of-the-Wall-311127>.

226. Yair Ettinger, *Sharansky Sees Egalitarian Section at Western Wall within Two Years*, HAARETZ (May 7, 2013, 7:42 PM), <http://www.haaretz.com/news/national/sharansky-sees-egalitarian-section-at-western-wall-within-two-years.premium-1.519761>.

227. Nathan Jeffay, *Women and Orthodox Waver Over Plan for Egalitarian Prayer at Western Wall*, FORWARD (May 10, 2013), <http://forward.com/articles/176312/women-and-orthodox-waver-over-plan-for-egalitarian/>.

228. See Gili Cohen, *Israeli MKs to Vote on Extension of Military Service for Women*, HAARETZ (Dec. 16, 2013, 1:39 PM), <http://www.haaretz.com/news/national/.premium-1.563790>.

229. BADIR BAYRAMOV, *THE TYRANNY OF THE MINORITY: THE EFFECTIVENESS OF POLICY MAKING IN ISRAEL* 5 (2013). Women can also receive exemptions for religious reasons, though they do not attend yeshivas. See Gili Cohen, *IDF Increases Probes into Female Draft Dodgers Claiming to be Religious*, HAARETZ (Dec. 12, 2013), <http://www.haaretz.com/news/national/.premium-1.563247>. (As Cohen's article notes, this exemption is sometimes sought by women who do not meet the religious requirements for exemption, with mixed success. Generally, except for women who improperly claim an exemption under the law, there has been little protest by either the government or ultra-Orthodox groups concerning the current state of female exemptions) *Id.*

230. See Bayramov, *supra* note 229; see also Douglas Stanglin, *Israel Drops Military Exemption for Ultra-Orthodox Jews*, USA TODAY (Aug. 1, 2012), <http://content.usatoday.com/communities/ondeadline/post/2012/08/israel-to-drop-military-exemption-for-ultra-orthodox-jews/1#.UsBuBrTDtbe>. These estimates include not only newly eligible would-be draftees,

women and men were required to serve in Israel's military for two and three years, respectively, the ultra-Orthodox received an indefinite "get-out-of-service" free card if they so desired.²³¹

However, in 1998, Justice Barak led the Supreme Court in the landmark *Rubinstein v. Minister of Defense* decision that found that the Defense Ministry's practice of allowing yeshiva students to defer their conscription indefinitely lacked proper legal authority.²³² In response, the government formed the Tal Committee, which, in 2002, created what became known as that Tal Law.²³³ The Tal Law codified the government's ability to grant such deferments, but set additional requirements on the applicant, including requiring that, after reaching twenty-two, the applicant perform a year of civil service in order to be permanently released from his conscription responsibilities or instead perform twenty-one days of civil service a year to receive additional yearly deferrals.²³⁴ The law was created as a temporary measure, which would have to be renewed every five years.²³⁵ However, in another landmark decision in 2012, the Supreme Court found the Tal Law itself was unconstitutional as it violated the rights of equality guaranteed by the Basic Laws.²³⁶ In the ruling, Supreme Court Justice Dorit Beinisch also noted that the government had failed to implement the Tal Law properly, by again allowing most Haredi to avoid the draft despite the clear service requirements in the law.²³⁷

but also those who continue to renew their deferments annually until they are too old to draft or otherwise would be exempted for non-religious reasons.

231. It is of course worth noting that Israeli Muslim and other non-Jewish Israeli citizens, except for the Druze, are also exempt from draft requirements, though they may voluntarily choose to serve. This provision has proven much less controversial and, despite the obvious inherent inequalities, has been generally accepted with little complaint from either Israeli Jews and Israeli Druze or Israeli Muslims and other non-Jewish Israeli citizens. More recently, however, in a protest to their own draft requirements, some ultra-Orthodox leaders are demanding that the government also subject Israeli Arabs to the draft. See The World Factbook: Isr.: Military, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Mar. 26, 2013); see Jonathan Lis, *Habayit Hayehudi Demands that IDF Draft Reform Includes Arabs*, HAARETZ (May 26, 2013, 8:41 AM), <http://www.haaretz.com/news/national/habayit-hayehudi-demands-that-idf-draft-reform-includes-arabs.premium-1.525928>.

232. HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PD 481, 528 [1998].

233. See Israel: Supreme Court Decision Invalidating the Law on Haredi Military Draft Postponement, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/haredi-military-draft.php> (last updated Feb. 28, 2014) [hereinafter Decision Invalidating Haredi Draft Postponement].

234. See *id.*

235. See *id.*

236. HC 6298/07 Resler v. Knesset 63 [2012]; see Decision Invalidating Haredi Draft Postponement, *supra* note 233.

237. Decision Invalidating Haredi Draft Postponement, *supra* note 233; see also Aviad Glickman, *High Court Rules against Extending Tal Law*, YNETNEWS (Feb. 22, 2012, 12:53 AM), <http://www.ynetnews.com/articles/0,7340,L-4193034,00.html> (quoting Justice Bei-

Since the Tal Law's expiration on August 1, 2012, the Israeli government has lacked the legal ability to give deferrals on the basis of religious practice.

Despite the Supreme Court's rulings, the government and ultra-Orthodox communities have returned to the status quo. The government sends out the army summons to the yeshiva students, who answer them and usually receive passes to return to their studies indefinitely.²³⁸ Now, however, both sides recognize that this status quo will only be temporary. The government continues to pursue legislation that would allow for a general draft of the ultra-Orthodox that would not again run afoul of the Supreme Court while also being sufficiently palatable to the community's demands as to not result in widespread non-compliance, which would make it nearly impossible for the government to enforce the law.²³⁹ In a preemptive response to such legislation, some ultra-Orthodox leaders have called for the civil unrest of the community, which has resulted in non-compliance with draft summons (even though those ignoring their summons would likely have received indefinite deferrals), the arrest of the draft dodgers, and protests that frequently turn violent.²⁴⁰ The unrest has also resulted in attacks against the many ultra-Orthodox Jews that do serve, and proudly so,²⁴¹ with the soldiers being labeled as traitors, spit on, and otherwise discriminated against in their own communities.²⁴² This strife involving one of the largest communities in Israel is exactly what Ben-Gurion sought to avoid by establishing the "status quo." While part of protecting religious liberty is respecting the sensitivities and needs of diverse communities, as the Supreme Court has recognized, religious equality necessitates that Israel cannot continue to provide blanket exemptions and favoritism either under or outside of Israeli law for the benefit of the ultra-Orthodox community at the detriment of the less religious in Israel who inherently must do

nisch, "Can one say that with the passage of nine years the enlistment of 898 haredim and the joining of another 1,122 for a short, undefined national service out of a group of 61,877 constitute fulfillment of the law's objectives?").

238. See *Protest against Arrest of Draft Dodgers Turns Violent*, TIMES OF ISRAEL (Dec. 9, 2013, 8:57 PM), <http://www.timesofisrael.com/protest-against-arrest-of-draft-dodgers-turns-violent>.

239. See *id.*

240. See *id.*

241. See Emily Harris, *Israel's Internal Battle Over Ultra-Orthodox Soldiers*, NPR (July 12, 2013, 3:19 AM), <http://www.npr.org/blogs/parallels/2013/07/12/200471990/israels-internal-battle-over-ultra-orthodox-soldiers>.

242. See Isabel Kershner, *Service Brings Scorn to Israel's Ultra-Orthodox Enlistees*, N.Y. TIMES (July 6, 2013), http://www.nytimes.com/2013/07/07/world/middleeast/service-brings-scorn-to-israels-ultra-orthodox-enlistees.html?_r=0.

more than their fair part to fill in the gaps left by the mass religious exemptions.

As shown, Israel has struggled with its duty to uphold the principles of religious liberty. However, through the enactment of some or all of the proposals discussed in Part IV, Israel can better satisfy this democratic responsibility.

IV. PRESERVING RELIGIOUS LIBERTY

Jewish law encompasses virtually all aspects of life; even the use of computers and the internet are covered under modern *Halakha*.²⁴³ Besides the laws of the Tanakh, which includes the Torah and additional books not included in the Torah, there are Talmudic laws (written by ancient rabbis), as well as the *Midrash* (later rabbinical interpretation of those laws), and modern rabbinical law.²⁴⁴ In addition to laws pertaining to rituals and traditional religious matters, there are extensive Jewish laws that govern financial dealings, civil and criminal issues, and war and diplomatic relations.²⁴⁵ Because Orthodox and ultra-Orthodox Jews strive to adhere to these laws as strictly as possible, and due to the laws' all-encompassing nature, it is not hard to understand why Orthodox and ultra-Orthodox Jews refuse to concede their *Halakhic* vision for the state. Similarly, secular, less religious, and non-Jewish Israelis tend to value a more secular and free public society, where they are not governed by religious law unless they choose to be governed by religious law.

As a Jewish state with a Jewish majority, some public law is inevitably inseparable from Jewish religious law and values. Even in secular nations, the religious cultural majority of the nation will inevitably be heavily influential on that nation's laws, as shown by the influence of Judeo-Christian laws and values on American law, or the influence of Islamic laws and values on Turkish law.²⁴⁶ Even a close relationship between religious laws and values and state law can be acceptable for a liberal democracy.²⁴⁷ However, as

243. See, e.g., Rabbi Doniel Neustadt, *The Internet: Halachic Guidelines*, TORAH.ORG (2010), <http://www.torah.org/advanced/weekly-halacha/5770/emor.html> (discussing the need for religious Jews to install internet filters to block images of immodesty).

244. Sapir, *supra* note 92, at 625 n. 28, 626 n. 29.

245. *Id.*

246. Though the United States and Turkey each hold themselves out as being secular, the laws of each nation are heavily influenced by the large Christian and Muslim majorities that exist in these nations, respectively.

247. See generally STEVEN V. MAZIE, *ISRAEL'S HIGHER LAW: RELIGION AND LIBERAL DEMOCRACY IN THE JEWISH STATE* (2006) (discussing the concept of the separation between religion and state in regards to democracy, and the balance of Israel's status as a liberal democracy with its state religious laws and policies).

shown, Israel's religious laws have encroached on the democratic norm of religious liberty and even Israel's own Declaration of Independence, Basic Laws, and treaties.²⁴⁸

The role of religion in Israel today went far beyond the initial promises Ben-Gurion made in his letter to the leaders of Agudat Yisrael, which limited its assurances to protecting the religious rights of the Orthodox and ultra-Orthodox.²⁴⁹ Instead, the laws created and fostered a system where the Orthodox and ultra-Orthodox enjoy a monopoly of power over the entire population of Israel in areas where personal status, religion, and even employment and dietary policy are concerned.

These conditions have also fostered abuse of the system where certain religious communities, including and especially ultra-Orthodox communities view themselves as above the law. This ultra vires self-image is both evident and encouraged by situations like the Supreme Court's refusal to hold the rabbinate in contempt after it willfully and publicly violated a direct order by the Supreme Court.²⁵⁰ By showing that they will not equally enforce the law on the ultra-Orthodox communities, for example, the state and the Supreme Court have acknowledged that these groups are indeed above the law. This de facto recognition has only encouraged the communities' regular use of violent protests,²⁵¹ attacks on non-Orthodox clergypersons,²⁵² and a recent wave of attempted forced gender segregation in public,²⁵³ especially on

248. See discussion *supra* Part III.

249. See The Status Quo Agreement, *supra* note 87. For a discussion of how the status quo evolved from the 1947 agreement to where it is today, see Barak-Erez, *supra* note 111, at 2501-04.

250. See Izenberg et al., *supra* note 176. For another such example of state-sanctioned discrimination and de facto recognition that the ultra-Orthodox are above the law, see Potter, *supra* note 196 (discussing the state's acceptance of the refusal of the Minister of Religious Services to provide direct funding to reform or conservative rabbis, despite the official change in policy).

251. See, e.g., Judy Maltz & Yair Ettinger, *Protesters Hurl Rocks in Clashes over Women of the Wall Prayer Service at Kotel*, HAARETZ (May 10, 2013, 10:57 AM), <http://www.haaretz.com/news/national/protesters-hurl-rocks-in-clashes-over-women-of-the-wall-prayer-service-at-kotel.premium-1.523333?localLinksEnabled=false> (discussing the violent protests directed at women who wore *talitot* at the Western Wall); see also Agence France-Presse, *Ultra-Orthodox Jews Attack Woman in Israeli Town*, THE RAW STORY (Jan. 24, 2012, 4:16 PM), <http://www.rawstory.com/rs/2012/01/24/ultra-orthodox-jews-attack-woman-in-israeli-town/>; see also Yori Yalon, *Ultra-Orthodox Target Non-Kosher Deli in Non-Religious Neighborhood*, ISRAEL HAYOM (July 15, 2011), http://www.israelhayom.com/site/newsletter_article.php?id=360.

252. Oz Rosenberg, *Ultra-Orthodox Spitting Attacks on Old City Clergymen Becoming Daily*, HAARETZ (Nov. 04, 2011, 7:50 AM), <http://www.haaretz.com/news/national/ultra-orthodox-spitting-attacks-on-old-city-clergymen-becoming-daily-1.393669>.

253. See, e.g., *Gender Segregation on Rise in Israel*, YNETNEWS (Nov. 15, 2011, 3:15 PM), <http://www.ynetnews.com/articles/0,7340,L-4145922,00.html>.

public transportation.²⁵⁴ By enabling these incidents, while allowing restrictions on the religious freedoms of secular, less religious, and non-Jewish Israelis, Israel is heading towards an internal political struggle that may threaten its status as a “Jewish and democratic state.”²⁵⁵ Though Israel is undeniably still a liberal democracy that generally respects religious liberty, the state must make adjustments to its laws and policies in order to better conform with democratic norms and fully meet the promises made in its Declaration of Independence, Basic Laws, and international obligations.

A. Solutions

Below is an overview of potential methods for Israel to better conform to the modern democratic norm of religious liberty, including the strengths and drawbacks of each concept. They may be taken separately or as a whole; certain concepts are complementary—but not dependent—to each other, while other concepts can be applied completely independently with full effect.

1. Basic Law Guaranteeing Religious Liberty

Though the Declaration of Independence guarantees “equality of social and political rights to all its inhabitants irrespective of religion,” as noted, the Declaration is not binding on Israeli law.²⁵⁶ Additionally, while the Supreme Court has recognized the right to freedom of conscience²⁵⁷ and the Basic Laws touch upon issues related to religious freedoms, none of the Basic Laws directly guarantee a blanket “freedom of religion” or “right to religious liberty.”²⁵⁸ Therefore, Israel should enact a Basic Law clearly guaranteeing the right to religious liberty and equality for all persons and religions in Israel, including different denominations within those religions, and the rights of secular persons from religious coercion.

254. See, e.g., *Wave of Gender Segregation and Harassment on Buses in Israel*, HIDDUSH (Feb. 21, 2013, 4:23 PM), http://hiddush.org/article-2433-0-%20Wave_of_gender_segregation_and_harrasment_on_buses_in_Israel.aspx; see also *Ultra-Orthodox Men Order Woman to Rear of Bus*, THE TIMES OF ISRAEL (Feb. 15, 2013, 7:56 PM), <http://www.timesofisrael.com/ultra-orthodox-men-order-woman-to-rear-of-bus/>.

255. YUVAL ELIZUR & LAWRENCE MALKIN, *THE WAR WITHIN: ISRAEL'S ULTRA-ORTHODOX THREAT TO DEMOCRACY AND THE NATION* (2013).

256. See JACOBSON, *supra* note 1; see also Dorner, *supra* note 62, at 1330.

257. See, e.g., H CJ 243/62 *Israel Film Studios Ltd. v. Gary*, 16 PD 2407, 2416 [1962] (Isr.).

258. See Sapir, *supra* note 92, at 638; see also Lerner, *supra* note 74, at 261.

The language of this Law should be clear and thorough in order to reduce the need for interpretation of the Law.²⁵⁹ Most of Israel's Basic Laws are concise, not unlike most Amendments in the U.S. Constitution. However, this Basic Law should be as clear and comprehensive as possible in order to attempt to avoid the same fierce debates that arise over constitutional interpretation in America.²⁶⁰ Israel should instead model the Basic Law off of a country with a more modern constitution, such as Canada or Germany, which tend to be more thorough and therefore require less potentially controversial judicial interpretation.²⁶¹

The purpose of this Law is self-apparent: to clearly and conclusively recognize the rights of religious liberty and equality for all Israelis, religions, and religious denominations within Israel. This Law would reduce or eliminate any confusion on the status of religious liberty in Israel and would clearly extend the rights enjoyed by the controlling denominations of the recognized faiths in Israel²⁶² to other denominations in the state. With a Basic Law clearly guaranteeing religious liberty, fewer questions regarding religious liberty will turn on issues of interpretation of the current Basic Laws and other sources of law in Israel. It would also act to discourage the enactment of laws that go against the spirit of religious liberty. Moreover, it would send a clear message to secular, less religious, and non-Jewish Israelis—as well as to the more religious Israeli Jews—that Israel recognizes and will protect their personal and religious rights.

Of course, this Basic Law is likely to meet vehement opposition both within the Knesset and by the already outspoken Orthodox and ultra-Orthodox communities. It would be unlikely to pass the Knesset today, even though for the first time in recent history the governing coalition does not include any ultra-Orthodox parties²⁶³ and, for the first time ever, the coalition agreement does not include a promise to maintain the status quo.²⁶⁴ Even if it did pass the Knesset, or if it was passed through a national referendum, it would likely cause a serious rift in Israeli society and would be met

259. See Sapir, *supra* note 92, at 662.

260. See *id.*

261. See *id.*

262. The Law would also of course effectively require that Israel recognizes more religious faiths in addition to the currently recognized faiths' unrecognized denominations.

263. Linda Gradstein, *Yair Lapid, Naftali Bennett Part Of New, Young Israeli Parliament*, THE HUFFINGTON POST, (Apr. 22, 2013, 11:40 AM) http://www.huffingtonpost.com/2013/04/22/yair-lapid-naftali-bennet_n_3131947.html.

264. Maayana Miskin & Chana Ya'ar, *For the First Time, Religious 'Status Quo' Out of Government*, ISRAEL NATIONAL NEWS (Mar. 17, 2013, 11:20 AM) http://www.israelnationalnews.com/News/News.aspx/166292#.UY_UnquCPB.

by refusals to enforce it.²⁶⁵ Still, this Law has the best chance to pass today as it has since Israel's establishment, and the real threat of such a Law might be enough to bring otherwise generally uncooperative religious parties to the negotiating table on issues of religious liberty. As such, even if the Law cannot actually get passed, progress can likely be achieved through the mere drafting of the Law.

The Law may also be potentially difficult to implement or follow, considering the wide range of entanglements between state and religion, as discussed above. However, by making the Law as thorough as possible and by clearly delineating its intended applications,²⁶⁶ this problem can be reduced, though not eliminated. Of course, with any major change in law, implementing the law will be challenging in the short term.

Even if a clear and defined Law dealing with religious liberties could not pass, a Basic Law that merely guaranteed "the right to religious liberty and equality for all persons and religions in Israel" would still be productive. While this Law would be somewhat empty, it would still show the clear intent of the Knesset—or the public if passed by referendum—to support the right of religious liberty in Israel, and would encourage the courts to decide questions related to issues of religious liberty on the side of the protection of that right.

2. Civil Marriage and Divorce

Israel should also create a civil marriage and divorce system for individuals and couples who do not want to be, or cannot be, married or divorced in the religious court system. Additionally, Israel should adopt a national forum selection law that would allow either party in a divorce to demand the action be permanently removed from religious court to civil court,²⁶⁷ unless the party explicitly waived her right in a prior agreement, such as a

265. As suggested by the unrest involving the forthcoming ultra-Orthodox conscription laws discussed in Part III.E.

266. For example, the Law could clearly establish that it is not meant to alter or provide cause to challenge in court the current system of funding to Holy Places and religious institutions. The Law should also take into account how Israel recognizes—or fails to recognize—certain denominations and religions, like Reform Jews, Jehovah's Witnesses, and Messianic Jews. To avoid issues of interpretation, this subject should be settled in the language of the Law, and a system of widespread recognition like the one seen in the U.S.—where many different denominations and faiths are recognized and receive tax-exempt status, but pseudo-faiths like "Jedi" are not—would be advisable.

267. Parties could make the demand up to a certain number of days or a particular stage of the trial, not unlike the ability of a party to demand a jury trial in the United States.

prenuptial agreement or a *Ketubah* (the traditional Jewish prenuptial agreement). The purpose of this system would be to allow couples to be married how they wish, instead of having to follow strict Orthodox, Sharia, Canonical, or Baha'i law. This would also create relief for the estimated 5% of Israelis who cannot be married in Israel because of their religious status,²⁶⁸ as well as for interfaith couples, and even same-sex couples, whose marriages abroad must already be recognized by the Israeli government, but who are largely barred from marrying within Israel itself.²⁶⁹ The national forum selection law would also eliminate the extreme system of forum shopping created by the alleged bias in favor of husbands in religious courts, which results in a race to the courts in contentious divorces.²⁷⁰ The cases are removable only to civil court and not to religious court because of the perceived bias in religious courts and because civil law should take precedence over religious law when both parties cannot agree on applying religious law, per the norms of religious liberty.²⁷¹

Notably, rather than forcing all divorces to be heard in civil courts or establishing that civil law will apply in divorce cases by default, the national forum selection law would only create the ability for a party to remove the case to civil court and can still be contracted around. Additionally, rather than forcing a religious court to only apply civil law, the case would be removed to civil court. This particular structure—recognizing the ability of the rabbinical courts to have original jurisdiction and avoiding the imposition of civil law on the religious courts—would make the law relatively more palatable to religious groups. The national forum selection law could also be extended to the other personal status issues that are handled by non-Jewish courts.

Still, these laws would likely meet stringent opposition from the more religious communities in Israel, including the non-Jewish religious communities that enjoy a monopoly over the personal status issues of all members of their faith. However, the right to civil marriage is a cause célèbre of one of the current major

268. *Civil Marriage In Israel*, HIDDUSH (May 26, 2011, 1:56 PM), http://www.hiddush.org/article-2167-0-Civil_Marriage_In_Israel.aspx.

269. H CJ 3045/05 Ben Ari v. Director of the Population Registry in the Ministry of Interior [2006] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/450/030/a09/05030450.a09.pdf.

270. See Fournier et al., *supra* note 142, at 341-42. This system goes against the public policy of encouraging couples to avoid divorce or at least to settle their divorces amicably, by rewarding the first party to make a dash for a divorce court.

271. Under this proposal, religious liberty would still exist for the religious party as well, as she previously had the chance at creating a choice of law provision in a prenuptial agreement that would have required religious law to govern the case.

political parties in the coalition government,²⁷² and with previous, more religious, governments having shown a willingness to accept civil divorce rights,²⁷³ there is real opportunity for progress on these issues.

3. Independent Funding Commission for Religious Services

As shown, the 1985 Budget Foundations Law was unsuccessful in eliminating favoritism and discrimination from the state's religious funding system.²⁷⁴ The current scheme still allows widespread abuse and open discrimination.²⁷⁵ These problems could be alleviated through the creation of an independent funding commission for religious services. This commission should be run as an independent agency, removed from the ministries and only overseen by an independent, separately appointed appellate body, and, above them, the Supreme Court. The commission should be made up primarily of independent economists, jurists, academics, and state elders, but should also include non-voting representatives from the major faiths and denominations within Israel. A committee to appoint the members of the commission should be set up similar to the Supreme Court Judge's Election Committee.²⁷⁶ The appellate body and selection committee for the appellate body should be similarly independent. The commission would ideally have the sole power to fund any religious institution for "religious purposes," and would award all funding based on a proportional system of allotted funds for each religion, denomination, and type of institution based on the community's population and need.

This concept would likely face the harshest backlash from Orthodox and ultra-Orthodox communities and political parties of all of the proposals, as it would remove the power that they currently enjoy over most religious funding in Israel. Even ministries not dominated by Orthodox or ultra-Orthodox parties would be opposed to surrendering so much of their funds and funding power. Additionally, a procedure to prevent "double-dipping"—religious institutions requesting money from ministries for "non-religious purposes" and then using them for religious purposes—would also be required. A clause against such action

272. See Sigal Samuel, *Lapid Demands Civil Marriage in Israel*, THE DAILY BEAST (Mar. 6, 2013, 2:15 PM), <http://www.thedailybeast.com/articles/2013/03/06/lapid-demands-civil-marriage-in-israel.html>.

273. See Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-1973).

274. See Budget Foundations Law, 5745-1985, 1139 LSI 60 (1985); Shetreet, *supra* note 182, at 443.

275. See discussion *supra* Part III.C.

276. See Basic Law: The Judiciary 5744-1984, 38 LSI 101, § 4 (1983-1984) (Isr.).

would not be overly difficult to construct; however, policing and enforcing the clause would be more challenging, especially if there is willful participation in the scheme on the part of sympathetic ministries.

Banning all religious institutions from receiving public funding from any source other than the commission is another possibility. Still, this would take even more funds and power away from the ministries and would likely prove even less popular. Further, it is not a stretch to believe that some institutions would set up shell organizations to funnel money back to them, especially with the assistance of sympathetic ministries. The proverbial devil would be in the details in ensuring the commission could successfully and proportionally fund the institutions at a level that they require and deserve, without allowing any institutions to take advantage of the system.

Another alternative would be to instead establish the commission as a strong regulating commission which would have supervision and auditing powers over all government funding for religious purposes or to any religious institutions. This system would still likely be met with tough opposition, and would require a strong enforcement power to back its decisions, or it would risk simply being ignored by obstinate ministries.

4. Holy Places Committee

Set up similarly to the independent funding commission, a mixed-faith committee to oversee the administration and, where appropriate, mediate shared use of the Holy Places would help protect the freedom of access and worship at Holy Places and could also strengthen interfaith relations. The committee could be aided by independent supervising by international parties, such as the United Nations or other international organizations and independent non-governmental organizations. Instead of being protected by Israeli police and military forces, the Holy Places, or at least the shared Holy Places, could also be protected by international peacekeeping forces.

As discussed, freedom of access and worship is not currently provided at all Holy Places, most notably the Temple Mount and the Western Wall.²⁷⁷ The United Nations Partition Plan originally envisioned Jerusalem to be an open city, with an independent governor who had final supervision over the administration of all

277. See discussion *supra* Part III.D.

Holy Places within the Mandate of Palestine.²⁷⁸ This domestic commission would enjoy similar power, and ideally would include all Holy Places in Israel and the Palestinian territories.

Unfortunately, this plan is likely to be vehemently opposed by all religious communities who currently administer a Holy Place. Due especially to the continued tensions and sensitivities between the various religious communities,²⁷⁹ as well as a genuine and reasonable desire to administer their own holy sites, it is extremely unlikely any group would be willing to give up sovereignty over the Holy Places they currently control. An alternative solution to create such a committee for only shared Holy Places would run into the same difficulties. Even an attempt to create a multi-denominational committee made up only of Israeli Jews to administer the Western Wall would be strictly opposed by the Orthodox and ultra-Orthodox, though it would ensure a more pluralistic approach to the holy site and would better serve the interests of freedom of access and freedom of worship.

5. Halakhic Public Laws

Israel's Hours of Work and Rest Law can be viewed as a labor law protecting the interests of employees by guaranteeing they do not have to work on their holy days. Many other democracies throughout the world have similar labor laws to protect workers' interests.²⁸⁰ However, Israel uniquely bans all employees and employers—even the self-employed—from working on their specific religious days of rest, and fines violators of the law.²⁸¹ While labor laws mandating rest are reasonable, the Hours of Work and Rest Law appears more concerned with encouraging the worker to adhere to her religion's laws regarding holy days, regardless of whether the worker personally subscribes to them. As noted, this law also has the—likely intended—effect of requiring most businesses to close on Shabbat, further encouraging adherence to

278. See The Partition Plan, *supra* note 47, ch. 1.

279. See, e.g., Aviva & Shmuel Bar-am, *1,000 Years of Rivalry—and a Little Bit of Harmony—at the Church of the Holy Sepulcher*, THE TIMES OF ISRAEL (Sept. 07, 2012, 4:44 PM), <http://www.timesofisrael.com/1000-years-of-rivalry-and-a-little-bit-of-harmony-at-the-church-of-the-holy-sepulcher/> (discussing the tensions between two Christian denominations surrounding a Christian Holy Place). Notably, the issue of control over the site is so sensitive that a ladder than was left leaning against an outside window 200 years ago has remained untouched ever since for fear of disrupting the status quo between the two sides. *Id.*

280. See generally THE TRANSFORMATION OF LABOUR LAW IN EUROPE (Bob Hepple & Bruno Veneziani eds., 2010) (for a discussion of European labor law).

281. See discussion *supra* Part III.B.1.

the Jewish day of rest by greatly limiting the opportunities of the public to “break” Shabbat.²⁸²

This law should therefore be amended to allow employees to choose their own days of rest rather than tying the days directly to the official religious day of their recognized religions. While, as Justice Barak noted, this amendment may in effect give the employer the choice of which day the employee has off,²⁸³ it would at least allow the employee and the employer to contract over the day, instead of the state forcing the day upon the employee. Further, the amendment could easily include a clause that guarantees that the employee can choose her religious day of rest to be the day she always receives off. While enforcement and employment discrimination issues may arise from this amendment, these issues already exist under the current law. Moreover, the negative effects of the law would be narrower in scope than the current law that simply bans employees and employers from working on their religion’s day of rest.

Even with such a clause protecting employees’ religious days of rest, religious communities and parties would likely oppose the amendment to the law, as it would make it easier for individuals to break their respective Sabbath or day of rest. Additionally, the religious Jewish community would greatly oppose the inevitable increase in public breaking of Shabbat, as more businesses would be allowed and would choose to stay open on Shabbat. However, the state and municipalities could still theoretically ban businesses from opening on Shabbat.²⁸⁴

6. Judicial Review

Finally, as noted, Israel has a strong and independent Supreme Court and civil court system.²⁸⁵ With the self-recognition of its powers of judicial review in the “Constitutional Revolution” of the mid-1990s, the Court has presented a new outlet for opposition to

282. *Id.*

283. HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.).

284. Municipalities Ordinance (Amendment No. 40), 5750 -1990, SH 114 (Isr.). It is worth noting that the ability of the municipalities to make religious ordinances could also be reined in by law or through judicial review, particularly when the municipalities are abusive of these powers. Municipalities can apply *Halakhic* public laws more narrowly and appropriately than the state can, as the makeup of most municipalities in Israel is more homogenous than the state as a whole. Still, municipal boards can also often overreach—especially in heterogeneous municipalities like Jerusalem—and can often affect an even harsher application of *Halakhic* public laws than the state.

285. The World Factbook: Isr.: Gov’t, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last updated Feb. 26, 2014).

religious laws. While the Court has rejected prior blanket challenges to *Halakhic* public laws like the Hours of Work and Rest Law,²⁸⁶ opponents of other *Halakhic* public laws,²⁸⁷ discriminatory practices at the Holy Places,²⁸⁸ and other religious actions against secular life,²⁸⁹ have achieved numerous successes in the Court as well. As such, where religious actors may prevent the above proposals from coming to fruition, the use of judicial review remains a viable option.²⁹⁰

Critics claim that the rise of judicial review in Israel is only because of the need of an alternative system for secular, less religious, and non-Jewish Israelis to have their policies enacted when they were unsuccessful in the political arena.²⁹¹ In his article on political empowerment through constitutional revolutions, Ran Hirschl claims that “[f]rom the early 1990s onward, the Israeli Supreme Court has increasingly exercised its power at the expense of politicians and administrators, gaining the authority to review primary legislation, political agreements, and administrative acts.”²⁹²

However, as shown, the relatively new power of judicial review has not resulted in a secular revolution or a great reduction in the powers of the Knesset. The Orthodox and ultra-Orthodox still enjoy a monopoly on religious funding and power in Israel, and *Halakhic* public laws still fill the code books. Moreover, the Supreme Court primarily bases its decisions on the Knesset’s own Basic Laws, which a majority of the Knesset can easily amend at any time.²⁹³ On occasion, the Knesset has even created an “overriding clause” that allows laws to simply state when they override any conflicting Basic Laws, which the Supreme Court has accepted.²⁹⁴ Rather than being a tool for abuse by the “secular

286. See HCJ 5026/04 Design 22 Design 22 Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs, 60(1) PD 38 [2005] (Isr.).

287. See, e.g., HCJ 465/89 Raskin v. Jerusalem Religious Council 44(2) PD 673 [1990] (Isr.); see generally Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 98-99, 120-21 (2000) (discussing the rise in the successful challenges of religious laws in the Supreme Court).

288. See, e.g., Sharon, *supra* note 25.

289. See, e.g., CA 6024/97 Shavit v. Reshon Lezion Jewish Burial Soc’y 53(3) PD 600 [1999] (Isr.).

290. The passage of the above proposed Basic Law guaranteeing religious liberty would greatly increase the chance of success for such challenges.

291. See generally Hirschl, *supra* note 287, at 106.

292. See generally *id.* at 98.

293. See JACOBSOHN, *supra* note 1, at 106.

294. See Sapir, *supra* note 92, at 639.

bourgeoisie,”²⁹⁵ the Supreme Court’s current power of judicial review allows it to appropriately and necessarily protect the norms of religious liberty and the rights of minority religious and secular communities in Israel.²⁹⁶

B. Alternative Solutions

There are two oft-circulated extreme alternative solutions to Israel’s current struggle with religious liberty: change Israel into a completely theocratic state, or completely end Israel’s relationship between religion and state. The theocratic model, unsurprisingly, primarily receives support in the ultra-Orthodox community.²⁹⁷ Supporters believe that because Israel was founded as the third incarnation of the Jewish nation state, and because it has declared its status as a Jewish state, Israel should follow strict Jewish religious law.²⁹⁸ These theocrats believe that the preservation of Israel by G-d depends on its acceptance of Jewish law as its national law.²⁹⁹ They further believe that even secular Jews possess a “spark of holiness that a religious state would reawaken” and that it is Israel’s responsibility to ignite these sparks by implementing Jewish law and serving as an example to its secular population.³⁰⁰

Separatists, however, believe that Israel must divorce itself from its religious connections, and become a secular state. Surprisingly, support for this movement comes from both secular and Orthodox communities in Israel, as well as from non-Jewish communities.³⁰¹ The secular, less religious, and non-Jewish communities that support complete separation believe that their lives should not be affected or governed by the religious beliefs and laws of others.³⁰² Orthodox separatists believe that politics have a corrupting effect on religion, and that the type of religion imposed

295. See Hirschl, *supra* note 287, at 106.

296. The continued failure of the Ministry of Defense to abide by the Court’s ruling in *Rubinstein v. Minister of Defense*, coupled with the increased unrest on the in the ultra-Orthodox community—many of whom proudly proclaim that they would pick jail over the military, as a few have already done—on the matter of compulsory service has also called into question whether the government would be able to properly execute Court rulings that “go too far.” HC 3267/97 Rubinstein v. Minister of Defense, 52(5) Piske Din [PD] [Decisions of the Supreme Court] 481, 491 [1998].

297. See Genut, *supra* note 150, at 2158.

298. See *id.*

299. See *id.*

300. *Id.* at 2159.

301. Julie Kamens, *Religious Law in Israel: The Debate Rages Forth Regarding the Anti-Missionary Bill and the Conversion Bill*, 13 TEMP. INT’L & COMP. L.J. 347, 365-66 (1999).

302. *Id.*

in Israel today is not “true religion,” but a system of “arbitrary choices fueled by political negotiation.”³⁰³ They also argue that the state’s control and funding of religious institutions have put them at the mercy of the state, further corrupting them.³⁰⁴

Each of these solutions would face heavy opposition from the majority of Israeli Jews who believe Israel should be both a Jewish and democratic state.³⁰⁵ Unlike any other law Israel has seen or any evolution Israel has been through, and even unlike any of the other solutions proposed above, a move to theocracy or complete separation would require a true revolution in Israel, and would clearly go against the founding principles of Israel, its Declaration of Independence,³⁰⁶ and its Basic Laws.³⁰⁷ Secularizing the government completely would also not actually end the influence of religion on public life, though it would better serve the democratic norms of religious liberty. However, the benefits to religious liberties that might come from complete secularization would be far outweighed by the extreme internal strife and political disorder that would accompany it. Besides the internal strife, a move from democracy to theocracy would also likely have serious geopolitical effects on Israel’s international relations and trade, even with its strongest ally, the United States. Obviously embracing theocracy would be a rejection of all norms of religious liberty.

However, there is another alternative that comes short of complete separation: the state could completely eliminate its religious funding and religious courts. Additionally, by adopting a model of funding similar to the “Church Tax” seen in Germany,³⁰⁸ and allowing religious laws to only be applied in civil court like in the United States,³⁰⁹ Israel could still maintain some support for its religious communities. While this solution would serve the interests of religious liberty, they would have even less of a chance at acceptance than any of the above proposals³¹⁰ in the current and

303. See Genut, *supra* note 150, at 2160-61.

304. See Kamens, *supra* note 301, at 366.

305. *Israel Should be a Jewish Democratic State, Most Israeli Jews Believe*, ISRAEL HAYOM (July 1, 2012), http://www.israelhayom.com/site/newsletter_article.php?id=4904.

306. Declaration of Independence, *supra* note 2.

307. Basic Law: The Knesset (Amendment No. 9), 5745-1985, 12 LSI 85, 35 LSI 192, § 7(a)(1) (1985-86) (Isr.).

308. See generally Stephanie Hoffer, *Caesar as G-d’s Banker: Using Germany’s Church Tax as an Example of Non-Geographically Bounded Taxing Jurisdiction*, 9 WASH. U. GLOBAL STUD. L. REV. 595 (discussing Germany’s Church Tax). This system lets the state tax members of religious communities and then remits those taxes to their respective religious institutions. *Id.* at 605-06.

309. Barbara Bradley Hagerty, *Religious Laws Long Recognized by U.S. Courts*, NPR (Sept. 8, 2010, 3:00 PM), <http://www.npr.org/templates/story/story.php?storyId=129731015> (noting that religious laws are recognized in U.S. courts).

310. Excluding the theocracy and secularization proposals, of course.

foreseeable Israeli political climate. Religious Israelis, regardless of religion, would still rather their religious courts apply their laws than secular judges who might not be of the same faith as them. Additionally, a “Church Tax” would likely be unable to sustain Israel’s religious institutions, especially as over half of the population of ultra-Orthodox Jews live in poverty and rely on public welfare and support from the religious institutions for survival.³¹¹ Finally, the “Church Tax” may encourage Israelis to disassociate from any religious affiliation in order to avoid paying the tax,³¹² which would be unpalatable to practically all religious groups, even Reform and Conservative Jews and non-Jewish religious communities.

V. CONCLUSION

Though Israel is undeniably still a liberal democracy that generally respects religious liberty, as shown, the state must make adjustments to its laws and policies in order to better conform with democratic norms and fully meet the promises made in its Declaration of Independence, Basic Laws, and international obligations. For the first time in recent history the governing coalition does not include any ultra-Orthodox parties, and, for the first time ever, the coalition agreement does not include a promise to maintain the status quo. Now is the time for Israel to reaffirm its commitment to democracy by directly facing its decades-long struggle with the principles of religious liberty. While many of the proposals listed above may be ambitious, Israel is known as the “start-up nation.”³¹³ The current government should take this opportunity to make progress on Israel’s path to meet its responsibilities to democratic norms and its secular, less religious, and non-Jewish populations, whether through negotiations with the more religious communities or through the application of the proposals suggested above.

311. Bassli, *supra* note 140, at 498-99.

312. *Cf.* Hoffer, *supra* note 308, at 605 (“Germans who wish to avoid the tax can do so by simply disclaiming membership in the taxing organization.”).

313. *See generally* DAN SENOR & SAUL SINGER, *START-UP NATION: THE STORY OF ISRAEL’S ECONOMIC MIRACLE* (2009).