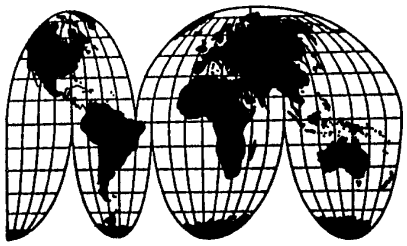
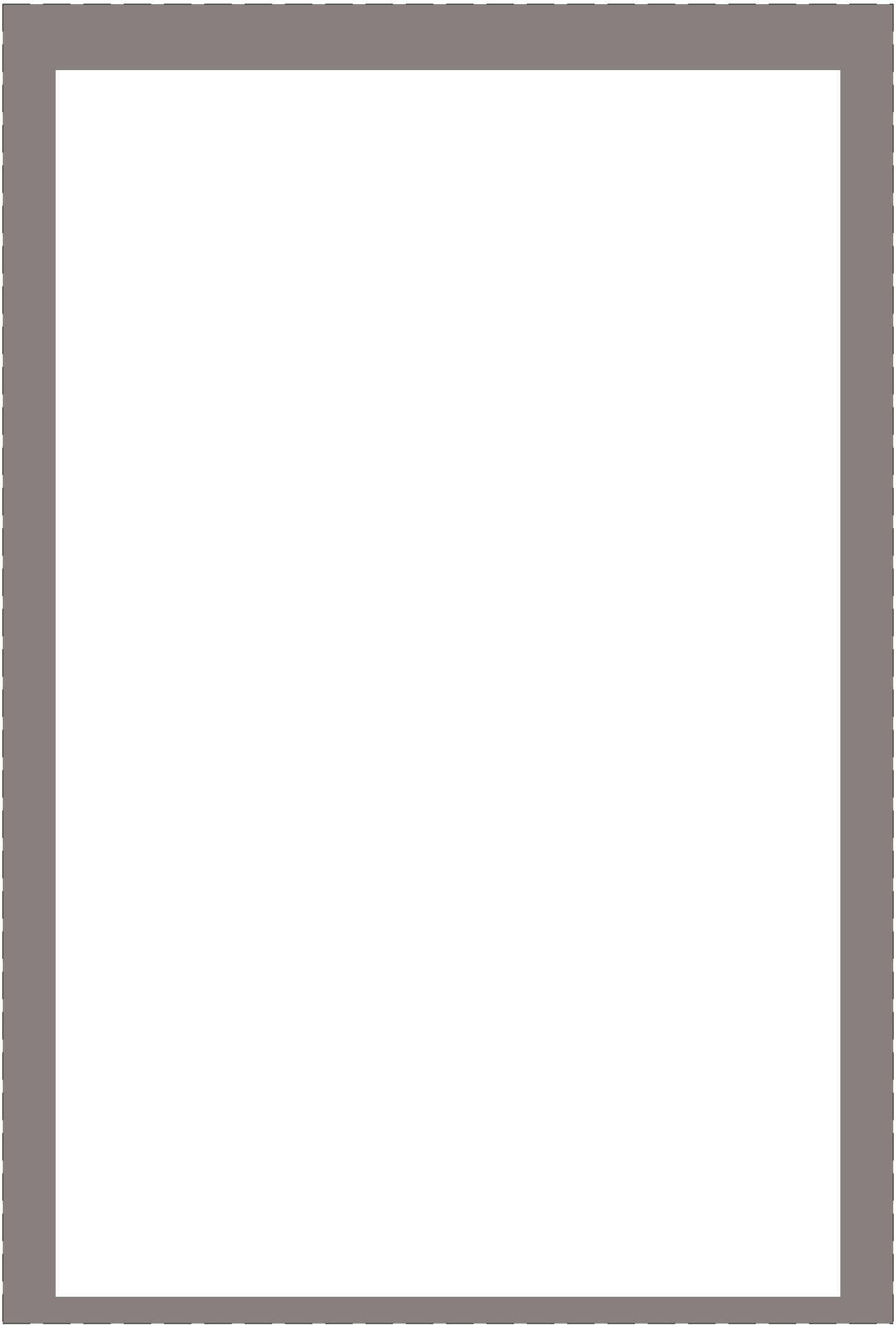
Michigan Journal of International Law



University of Michigan Law School
Ann Arbor, Michigan

33599-mil_34-3 Sheet No. 1 Side A 06/19/2013 08:32:46

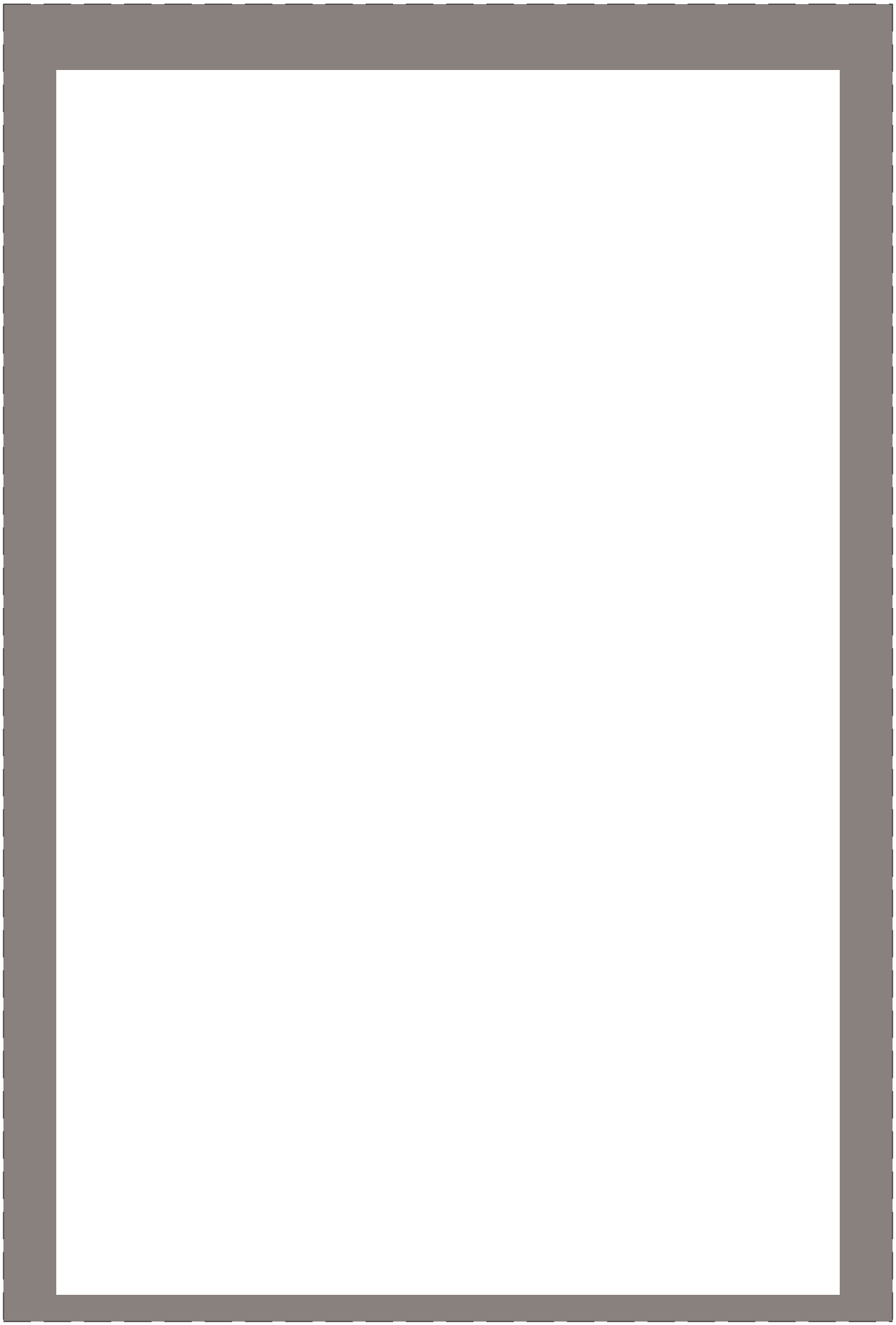


33599-mil_34-3 Sheet No. 1 Side B 06/19/2013 08:32:46

MICHIGAN JOURNAL OF INTERNATIONAL LAW
Volume 34, No. 3 Spring 2013

CONTENTS

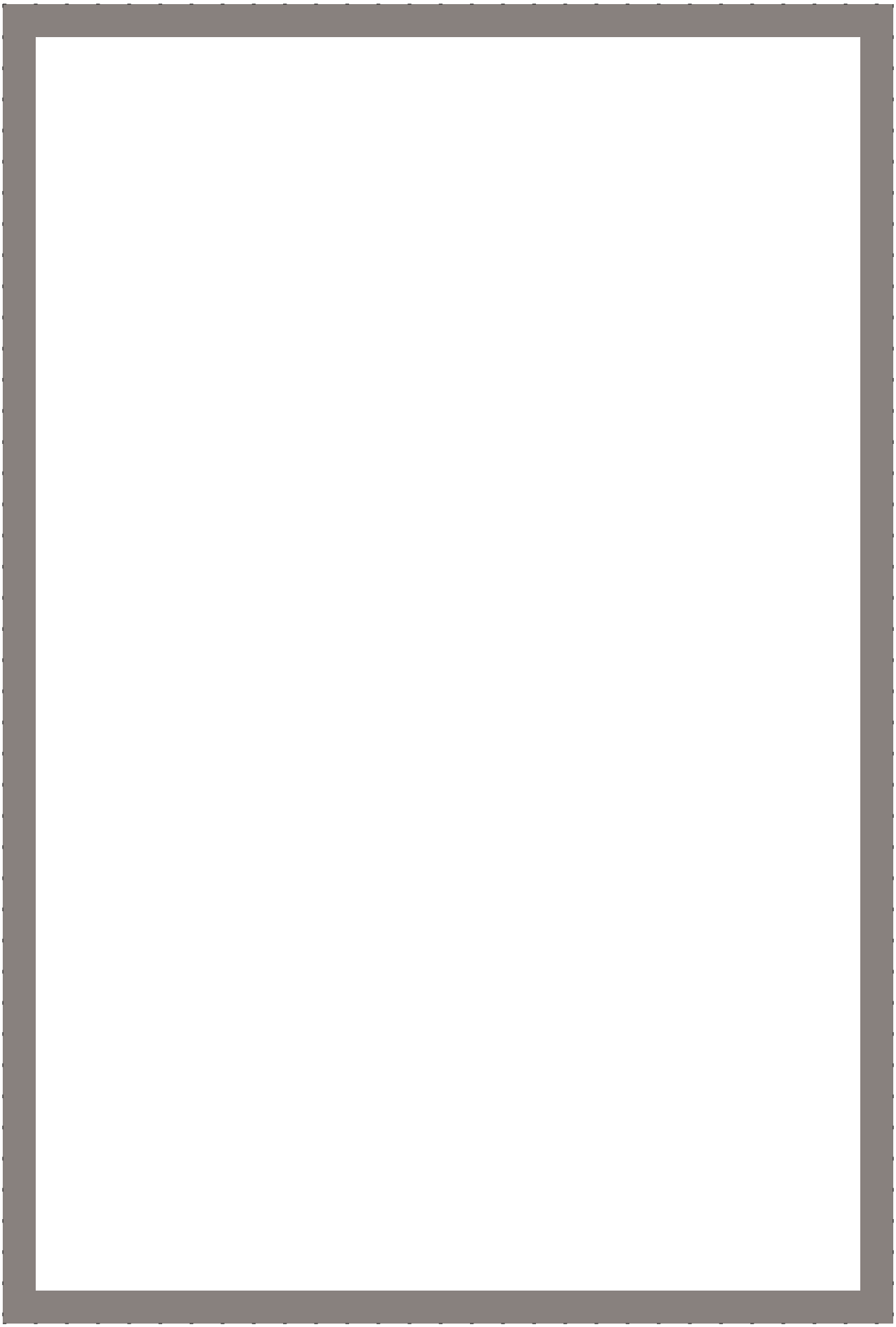
ARTICLES



33599-mil_34-3 Sheet No. 2 Side B 06/19/2013 08:32:46

Michigan Journal of International Law

Volume 34 Editorial Board



33599-mil_34-3 Sheet No. 3 Side B 06/19/2013 08:32:46

ARTICLES

RECONCEPTUALIZING STATES OF EMERGENCY UNDER INTERNATIONAL HUMAN RIGHTS LAW: THEORY, LEGAL DOCTRINE, AND POLITICS

*Scott P. Sheeran**

INTRODUCTION

States of emergency are today one of the most serious challenges to the implementation of international human rights law (IHRL). They have become common practice and are associated with severe human rights violations as evidenced by the Arab Spring. The international jurisprudence on states of emergency is inconsistent and divergent, and what now constitutes a *public emergency* is ubiquitous. This trend is underpinned by excessive judicial deference and abdication of the legal review of states' often

* LL.M. (Cambridge). Senior Lecturer and Co-Director of the LL.M. in International Human Rights Law, School of Law and Human Rights Centre, University of Essex. This Article benefited from the helpful suggestions of Professor Sir Nigel Rodley and Dr. Noam Lubell. All mistakes are the author's alone.

dubious claims of a state of emergency. The legal regime, as positively expressed in international human rights treaties, does not adequately reflect the underlying theory and politics of emergency situations. The renaissance of IHRL as an effective constraint and regulator of states of emergency requires the articulation of a more holistic understanding and a new approach to the legal doctrine. This Article seeks to provide an enriched account of the international law on states of emergency, which can be reconciled with both theory and practice, and which will better protect human rights from regression in times of emergency.

The modern origins of the state of emergency as a legal concept came from nineteenth-century Western Europe and from the liberal democratic tradition. States of emergency are built on the somewhat artificial dichotomy of norm and exception, which endorses a bifurcated approach to balancing the interests of societal goals and individual rights. "State of emergency" is therefore a label that may provide instant legitimacy to the greater limitation of human rights by government.

Serious violations of human rights often accompany emergency situations, which are variously known as "states of emergency," "states of exception," "states of siege," and "martial law."[1] The central international human rights treaties envisage a regime of derogation allowing states parties to temporarily adjust their obligations under the treaties in exceptional circumstances. The two legal questions that constitute the heart of the derogation regimes are first, whether a situation constitutes a "public emergency which threatens the life of the nation," and second, whether the measures are "strictly required by the exigencies of the situation."[2] A third question or requirement is that the state derogating must notify the treaty depositary and therefore in practice the other state parties of its public emergency and measures of derogation.[3]

While states do not deny that human rights should continue to apply during an emergency,[4] in practice they have co-opted and distorted the derogation regime under IHRL. One in-depth U.N. study concluded that about ninety-five states, or around half of the countries in the world, had been under a state of emergency, actual or declared, during the period of

1. Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Tenth Annual Rep.*, ¶¶ 20, 33, 48, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/19 (June 23, 1997) (by Leandro Despouy) [hereinafter Special Rapporteur's Tenth Report].

2. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* Human Rights Committee [H.R. Comm.], General Comment No. 29: States of Emergency, ¶¶ 2, 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment No. 29] ("Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.").

3. *E.g.*, General Comment No. 29, *supra* note 2, ¶ 17; *see also* ICCPR, *supra* note 2, art. 4. R

4. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 8. R

1985–1997.[5] The so-called Arab Spring—the popular uprisings in Tunisia, Egypt, Libya, Syria, Bahrain, Yemen, and elsewhere—are evidence of the need to reconsider this legal issue. It is no coincidence that many countries within the Arab Spring had in place abusive states of emergency that had lasted decades.[6] Furthermore, many of the recent situations of "emergency" in these Arab states were arguably brought about by the respective governments' violent responses to initially peaceful protests by their own people.

The jurisprudence on states of emergency and derogations under IHRL is inconsistent and divergent. The most prominent jurisprudence on this subject derives from the International Covenant for Civil and Political Rights (the Covenant) and the European Convention on Human Rights, both of which evidence a clear gap between the principles espoused and actual international decisions and determinations. This is unsurprising. It was a recognized view in the U.N. Commission on Human Rights in the 1950s, during the process of drafting the two international covenants, that the article on derogations "might produce complicated problems of interpretation and give rise to considerable abuse."[7]

A central issue in the jurisprudence is determining the existence of a situation of emergency—a public emergency that threatens the life of the nation—that justifies derogation of international human rights obligations. The human rights treaty bodies have often abdicated responsibility for making this determination (for example, the European Court of Human Rights through the "margin of appreciation"[8]) and seldom overturn the assertion of a state of emergency by a government.[9] The treaty bodies prefer to focus instead on the issue of proportionality of the emergency measures or rely on other elements of the legal test. The European Court of Human Rights, for example, has acquiesced to a government assertion that the threat of terrorism prior to any actual attack was a public emergency threatening the life of the nation.[10] With such a potentially low threshold, it has become commonplace for regimes that do not respect

5. *See* Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Final Rep.*, add., U.N. Doc. E/CN.4/Sub.2/1997/19/Add.1 (June 9, 1996) [hereinafter Special Rapporteur's Final Report].

6. The situation in Egypt and Syria is an example of this. *See infra* Part II.B.

7. *Cf.* U.N. Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights*, ch. V, ¶ 36, U.N. Doc. A/2929 (July 1, 1955).

8. The "margin of appreciation" doctrine associated with the European Convention on Human Rights (ECHR) is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & POL. 843, 844–45 (1999).

9. The treaty bodies usually decide the cases on another basis. *See infra* Part III.A (concerning jurisprudential interpretation of the ICCPR and ECHR).

10. A & Others v. United Kingdom, App. No. 3455/05, ¶¶ 175–181 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403; *see also infra* text accompanying notes 246–258.

R

human rights to claim a state of emergency in many situations that are ill fitted to the language and intent of the international human rights treaties. The elasticity of what now jurisprudentially constitutes a "state of emergency" has provided a veneer of legality to specious claims by governments and has undermined the normativity of the law.

In attempting to address these difficulties in recent decades, there has been no shortage of prescriptive solutions provided by scholarly projects in IHRL.[11] These however have tended to be highly formalist—calling essentially for more and stricter rules—and based on unrealistic reform proposals of the human rights implementation machinery. More recently, the terrorist attacks of September 11 and the subsequent "war on terror" brought a renewed interest in emergencies in political theory and constitutional law scholarship.[12] That scholarship has debated many of the key underlying themes of states of emergency but has failed to grapple meaningfully with the regimes of derogation contained in the human rights treaties and the particular perspective of international law.

This Article demonstrates that the problems concerning states of emergency under IHRL require a more nuanced understanding of and solution to the problem. The relevant treaties provide a conception of law that does not fully account for underlying issues of theory and politics. This conception is based heavily on a rule-of-law model, as opposed to a sovereignty model, and on the legal dichotomy of normality and exception although without the necessary implementation superstructure to support

11. *See, e.g.*, General Comment No. 29, *supra* note 2; The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, *in* Permanent Rep. of the Neth. to the U.N., Note verbale dated Aug. 24, 1984 from the Permanent Rep. of the Neth. to the U.N. Office at Geneva addressed to the Secretary-General, annex, U.N. Doc. No. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter Siracusa Principles]; Workshop on the Norms and Procedures in Times of Public Emergency or Internal Violence, Oslo, Nor., June 15–17, 1987, *Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence*, U.N. Doc. E/CN.4/Sub.2/1987/31, *reprinted in* TURKO INST. FOR HUMAN RIGHTS, DECLARATION OF MINIMUM HUMANITARIAN STANDARDS (1991); INT'L LAW ASS'N, REPORT OF THE SIXTY-FOURTH CONFERENCE 12–13, 232–36 (1990), *reprinted in* 85 AM. J. INT'L L. 716 (1991); INT'L LAW ASS'N, REPORT OF THE SIXTY-FIRST CONFERENCE 56–97 (1984) [hereinafter PARIS MINIMUM STANDARDS], *reprinted in* 79 AM. J. INT'L L. 1072 (1985). For a fuller discussion of these studies, see generally JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 66–81 (1994).

12. *See, e.g.*, GIORGIO AGAMBEN, THE STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005) (2003); DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006); OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1021–24 (2003); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 655 (2005); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); William E. Scheuerman, *Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61 (2006).

R

such important legal assumptions. The jurisprudence has also failed to grapple with other key challenges of principle including the role of the separation of powers, emergencies based on ongoing terrorist threats, democracy as a check on emergency powers, and issues of government causation of emergencies. In this regard, the jurisprudential evasions and work-arounds developed over time can be seen as unsurprising reactions to deeper forces at work.

This Article seeks to provide an enriched account and reconceptualization of the IHRL on states of emergency. Based on a holistic review of the theory, legal doctrine, and politics, it proposes a new interpretive approach to the key legal questions concerning states of emergency. The objective is a more coherent and intellectually honest account of the relevant international human rights treaties, and one that will restore greater normativity to the law. This Article argues that the most effective solution is to reconceive the traditional *substantive* question of the existence of a public emergency. This is done by understanding it as subsumed firstly into the *procedural* question of notification and secondly into the substantive question of proportionality of measures. This therefore does not mean the traditional legal assessment and threshold of a public emergency is irrelevant. The assessment and threshold will form an inherent and integral part of the proportionality assessment of the measures of derogation as compared to the nature of the public emergency. This reinterpretation will obviate the false assumption that the existence of a public emergency—that is, the distinction between exception and normality—is an objective and stand-alone legal question under IHRL. The redistribution of the formal competence to determine a public emergency (that is, from the courts or tribunals to the government) reinstates a concept of separation of powers to states of emergency and IHRL. Making the existence of public emergencies formally a *political* question, not a *legal* one, is a necessary concession to the highly sensitive nature of such emergencies that better reflects constitutional and political theory and also general legal principles. The proposed approach does not require significant changes in the IHRL implementation machinery, nor even changes in the essence of determinations of international courts or treaty bodies. Rather, it requires an implicit acceptance of broader theoretical and political influences, but in a way that enhances the normativity of IHRL. Most importantly, this reinterpretation makes clear that it is not necessary for courts and tribunals to determine a public emergency and therefore constantly affirm, both directly and indirectly, the specious assertions of states.

This Article sets out a thesis for a new interpretation of states of emergency under IHRL in four main parts. First, it briefly reviews the background of the theory and law on states of emergency, highlighting the key themes from the historical and conceptual basis of international human rights treaties. Second, the Article describes the practice and problems concerning states of emergency, using examples from the Arab Spring countries, and considers the limits of the IHRL implementation machinery. Third, it reviews the problems with the current conception of the two

central legal questions for states of emergency by analyzing European and U.N. jurisprudence and the key challenges mentioned in this introduction. Finally, it sets out and explains a new interpretative approach that harmonizes the theory, legal doctrine, and current practice in the unsettled but important area of protecting human rights in emergency situations.

I. Background: Theory and Law

A. *Historical Origins and Use*

It is necessary to begin with a brief sketch of the historical origins and use of states of emergency. The legal regime of states of emergency is a relatively modern development with origins in the French Revolution and that gained a place in most national legal systems by the mid-twentieth century.[13] In a general sense, it involves "governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis."[14]

The concept has historical roots that stretch as far back as Roman times in the practice of nominating a "dictator" in exceptional circumstances of external attack or internal rebellion.[15] It was not until the eighteenth and nineteenth centuries that "European constitutions . . . tentatively began to elaborate the idea of a constitutional state of emergency," although they typically left the important details to separate legislation.[16]

The modern concept of the state of emergency began with a 1789 decree of the French Constituent Assembly. This distinguished a "state of peace" from a "state of siege," where under the latter, "all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility."[17] After the French Revolution of 1848, the Constitution of the Second French Republic included a new article that prescribed that the occasions, forms, and effects of the "state of siege" were to be elaborated in law.[18]

13. World War I corresponded with a permanent state of exception in most of the warring states. For a useful overview of the history of states of exception, see Agamben, *supra* note 12, at 11–22; *see also* Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's* State of Exception, 17 Eur. J. Int'l L. 677, 677–78 (2006) (book review). R

14. Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 Am. U. J. Int'l L. & Pol'y 35, 36 (1986).

15. Jaime Oraá, Human Rights in States of Emergency in International Law 7 (1992); Nigel S. Rodley, Book Review, 42 Int'l & Comp. L.Q. 732, 732–33 (1993) (reviewing Oraá, *supra*).

16. Scheppele, *supra* note 12, at 1006–07 (discussing the experiences of France and Germany). R

17. Agamben, *supra* note 12, at 5 (quoting Theodor Reinach, De L'état de siège: Étude historique et juridique 109 (1885)). R

18. *Id.* at 12.

Around the same time, the concept also became relevant in North America, particularly in U.S. constitutional law and practice. During the American Civil War, President Lincoln suspended the writ of habeas corpus guaranteed by Article I of the Constitution where it was deemed necessary; he also imposed censorship of the mail and authorized the arrest and detention of those suspected of "disloyal and treasonable practices."[19] In a speech to Congress in 1861 at the start of the war, the President justified his actions by declaring "[w]hether strictly legal or not" the measures adopted were taken "under what appeared to be a popular demand and a *public necessity*."[20]

The key formative experience for states of emergency prior to the founding of the United Nations and the drafting of the International Bill of Rights was that in Germany. The Weimar Constitution written after World War I "tried harder than most constitutions to ensure that constitutional failure in a time of emergency [would] not occur."[21] Article 48 of that constitution provided the President extraordinary powers to cope with exceptional threats to the system, with "measures necessary to reestablish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights."[22] During the thirteen years that the Weimar Constitution was in effect, Article 48 was invoked no less than two hundred and fifty times.[23] Almost immediately after taking power in Germany, and in the midst of the Great Depression, Adolf Hitler and the Nazi government "proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties."[24] This decree was not repealed, and so, as Agamben notes, "from a juridical standpoint the entire Third Reich can be an exception that lasted twelve years."[25]

During the course of World War II, democratic regimes were also transformed by the expansion of emergency executive powers.[26] A notorious example is the U.S. government's domestic internment during World War II of 110,000 people of Japanese descent, 70,000 of whom were U.S. citizens.[27] The significant impact of emergency situations on U.S. demo-

19. *Id.* at 20.

20. *Id.* at 20 (emphasis added) (quoting Abraham Lincoln).

21. Scheppele, *supra* note 12, at 1007. R

22. *Id.*; *see The Reich Constitution of August 11th 1919 (Weimar Constitution) with Modifications*, PSM DATA, http://www.zum.de/psm/weimar/weimar_vve.php (last visited Apr. 2, 2013).

23. Scheppele, *supra* note 12, at 1008. R

24. AGAMBEN, *supra* note 12, at 3; *see Translation: Decree of the Reich President for the Protection of the People and the State*, U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007889 (last updated May 11, 2012). R

25. AGAMBEN, *supra* note 12, at 3. R

26. *Id.* at 6.

27. *Id.* at 22.

cratic governance was also felt during the Cold War.[28] President Truman first declared a state of emergency in response to the conflict in Korea and 'communist imperialism' in 1950, a state of emergency that lasted nearly a quarter of a century.[29] The declaration of emergency was used over time to justify a number of U.S. actions in the fight against communism.[30] Scheppele notes that "[b]etween the 1930s and 1970s, Congress passed about 470 statutes that empowered the executive branch to act under emergency powers."[31] As this necessarily brief historical sketch demonstrates, declarations of states of emergency have generally taken place in the context of exceptional threats, including situations of war, and where the nation was or was perceived to be fighting for survival.[32]

B. *Conceptual Basis*

The issue of states of emergency has been the subject of significant scholarly work. Not only has it been studied from the IHRL perspective,[33] but also more in-depth from the constitutional law perspective as demonstrated by the respective U.S. studies during the Cold War by Clinton Rossiter and Carl Friedrich.[34] It also has a conceptual foundation in political

28. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 4, 181; Scheppele, *supra* note 12, at 1015. R R

29. Scheppele, *supra* note 12, at 1017; Harry S. Truman, President of the United States, Proclamation 2914—Proclaiming the Existence of a National Emergency (Dec. 16, 1950), *available at* http://www.presidency.ucsb.edu/ws/?pid=13684; *see* National Emergencies Act 1976, Pub. L. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601–1651 (2011)) (terminating the National Emergency of Dec. 16, 1950 on Sept. 14, 1978). R

30. For examples of rights abuses justified by emergency declarations to combat communism, see Scheppele, *supra* note 12, at 1018–19. R

31. *Id.* at 1019; *see also* SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, AT III (1ST SESS. 1973); JULES LOBEL, EMERGENCY POWER and the Decline of Liberalism, 98 YALE L.J. 1385, 1408 (1989).

32. *See* AGAMBEN, *supra* note 12, at 15–19. R

33. *See* U.N. Secretary-General, *supra* note 7, ch. V, ¶¶ 35–47; *id.* ch. VI, ¶ 53; FITZPATRICK, *supra* note 11; ORAÁ, *supra* note 15; ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION: WITH SPECIAL REFERENCE TO THE TRAVAUX PRÉPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS (1998); L.C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y.B. INT'L L. 92 (1978); Oren Gross, *"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L.J. 1, 2 (1981); Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976); Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69, 84–94 (1995); Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380 (2004). R R R

34. C.J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER (1957); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

theory and philosophy, reaching as far back as Aristotle,[35] and has more recently been addressed in the twentieth-century writings of Carl Schmitt in Germany.[36]

The conceptual rationale for states of emergency is relatively clear and is rooted in the nature of the *exceptional*. As Rossiter suggests, in times of crisis a government must "temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions."[37] A major research study of the International Commission of Jurists (ICJ) on states of emergency that involved fifteen international experts and various national studies has suggested that the "state of emergency is the counterpart in international law of self-defence in penal law."[38] This idea of an exceptional situation and a state's need to defend itself is underpinned by an unusual balance between the collective's interests (for example, the life of the nation) and the interests of the individual, in particular, in human rights and civil liberties. The existence of mechanisms such as derogation is often seen as a concession to the inevitability of exceptional state measures in times of emergency, and also as a means to control these measures.[39] Derogations are based on the balancing of human rights with collective goals such as public order and national security, terms that are not easily defined by law.[40]

This balancing is not unique to derogation and emergencies, but rather is a part of the general corpus of IHRL in which limitations are often an inherent feature. As McGoldrick states, the "idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests."[41]

35. *See* Scheppele, *supra* note 12, at 1004–05 (discussing Aristotle, Machiavelli, and Bodin). R

36. The main work on this issue was Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab trans., Univ. Chi. Press 2005) (1922).

37. Rossiter, *supra* note 34, at 5. R

38. Int'l Comm'n of Jurists [ICJ], States of Emergency: Their Impact on Human Rights, at iii, 413 (1983) [hereafter ICJ Study]; *see also* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 84 (2d rev. ed. 2005) ("[I]t offers a State's democratically legitimate, supreme constitutional organs a basis for avoiding exceptional, irreparable damages to the general public . . . .").

39. Hickman, *supra* note 12, at 657; Humphreys, *supra* note 13, at 678. R

40. Eur. Comm'n for Democracy Through Law [Venice Comm'n], *Opinion on the Protection of Human Rights in Emergency Situations*, ¶ 36, 66th Plenary Sess., Opinion No. 359/2005 (Apr. 4, 2006) ("A balance has to be found between national security, public safety and public order, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other hand."); Svensson-McCarthy, *supra* note 33, at 188–91; *see also* Hartman, *supra* note 33, at 2. R R

41. McGoldrick, *supra* note 33, at 383. This is reflected in the structure of the Universal Declaration of Human Rights, which has a general limitations provision in Article 29. *See* Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see also* Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of* R

Derogation of human rights in times of emergency "raises, in an especially acute way, issues of the scope" of IHRL and its "relationship with the concept of state sovereignty."[42] There tends to be an overlap between the limitations and derogations of IHRL, with many of the same principles applicable (for example, proportionality, nondiscrimination).[43] However, inherent in the state of exception concept is the need to restore *normalcy* in which the full range of human rights can be respected.[44] The derogation concept is a product of a key distinction between *normalcy*, which is the general state of affairs, and *emergency* (for example, the French "state of siege"), which is the state of exception.[45] That said, however, a clear distinction in practice between normalcy and exception is obviously recognized as somewhat artificial.[46] As Abi-Saab suggests, we should refute a *clear* dichotomy between ordinary limitations and extraordinary derogations, as they "partake of the same nature and constitute a legal continuum."[47]

C. *Two Schools: Sovereignty and Legality*

Generally speaking, there are two broad schools of thought on legality during a state of exception. At the theoretical level, there is a divide in scholarship between those who favour a *rule-of-law* approach (constitutional or legislative) for the state of exception, and others who "criticize the pretense of regulating by law what by definition" they say cannot be reduced to legal norms.[48] The latter "understands the state of exception to be 'essentially extrajuridical', something prior to or other than law."[49] The supporters of this view—which can be called the *sovereignty* approach—

Human Rights, U.N. Doc. E/CN.4/Sub.2/432/Rev.2 (1983) (by Erica-Irene A. Daes); Higgins, *supra* note 33, at 283. Not all scholars agree with this view. *See, e.g.*, Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MOD. L. REV. 671, 672 (1999) ("There is thus something of a paradox in a legal scheme which is supposed to protect the individual against the collective, itself sanctioning limitations to rights on collective interest grounds."). R

42. McGoldrick, *supra* note 33, at 388. *See generally* A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 847–81 (2001) (discussing the development of Article 15 of the ECHR and early invocations of the article). R

43. McGoldrick, *supra* note 33, at 383–84. R

44. *See, e.g.*, General Comment No. 29, *supra* note 2, ¶¶ 1–2 ("The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."). R

45. Oren Gross & Fionnuala Ní Aoláin, *Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 644 (2001); Gross, *supra* note 33, at 439–40. R

46. Georges Abi-Saab, *Foreword* to SVENSSON-MCCARTHY, *supra* note 33, at v, vi. R

47. *Id.* at vi.

48. AGAMBEN, *supra* note 12, at 10. R

49. Humphreys, *supra* note 13, at 678. R

believe that it is neither possible nor desirable to control executive action in times of emergency using standard juridical accountability mechanisms.[50] Carl Schmitt, writing in the interwar period in Germany, and probably the most well-known proponent of this approach, stated:

> The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.[51]

Underlying Schmitt's thesis is the idea that rule of law constraints may prevent a polity from defending itself in a serious crisis, and that the capacity of a ruler to maintain the existence of the liberal state may depend on not being bound by the law. As Scheppele indicates, the "state of exception is, as a result, the means for restoring the order necessary for legality to exist."[52] Schmitt's thesis has been somewhat supported by various authors in the context of the post-September 11 legal debates on U.S. constitutional law.[53] Giorgio Agamben, a key recent writer in this area, does not accept Schmitt's thesis but still concludes similarly that the state of exception is "a *fictio iuris* par excellence, which claims to maintain the law in its very suspension as force-of-law."[54] Central to this Article is the premise that the sovereignty perspective is informed by a pragmatic view of the law's inability to regulate executive action in a national crisis. Such a pragmatic view is evident in the examples mentioned above, such as when President Lincoln justified the suspension of habeas corpus as necessary to ending the war, "whether strictly legal or not."

For many scholars though, the Schmitt sovereignty thesis and its modern equivalents are unacceptable. The contrary view, dominant in IHRL, is that even in a state of emergency the rule of law must still prevail,[55] or

50. *See* Gross, *supra* note 12, at 1021–24; Hickman, *supra* note 12, at 658. R

51. SCHMITT, *supra* note 36, at 6–7. R

52. Scheppele, *supra* note 12, at 1011. R

53. *See* sources cited *supra* note 12. R

54. AGAMBEN, *supra* note 12, at 59. R

55. This is well reflected in the third paragraph of the preamble of the Universal Declaration of Human Rights: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . ." Universal Declaration of Human Rights, *supra* note 41, pmbl.; *see also* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 47 ("[T]he very fact that it is an extreme legal remedy means that it cannot lie outside the rules and principles of law."). The Inter-American Court of Human Rights, Advisory Opinion OC-8/87, states that the suspension of human rights does not imply "a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard for the principle of legality by which they are bound at all times." Habeas Corpus in Emergency Situations (Arts. 27(2) and R

as some call it "the principle of legality."[56] From a theoretical perspective, commentators such as Agamben hold the view that the state of exception is "an integral part of positive law because the necessity that grounds it acts as an autonomous source of law."[57] As much as Schmitt's and others' similar perspectives are rooted in *realpolitik*, so too are criticisms of their approaches. The recognition that fictitious states of exception provide a vehicle for abusive state action goes back as far as 1885.[58] The risk, as Claudio Grossman puts it, is that "[t]he increased concentration of governmental power, along with the destruction of societal checks and balances, creates and perpetuates entrenched authoritarian systems."[59] Therefore the *legal* supervision of states of emergency becomes of primary importance since the gravest violations of human rights may occur where states use their power unfettered by the rule of law. Furthermore, as Cole argues in the context of the post-September 11 debate on U.S. constitutional law, those who call for suspension of the rule of law in times of emergency have failed to provide support for why this sovereignty approach is more acceptable or more likely to ensure the security of the population in the long term.[60]

Apart from the sovereignty argument offered by Schmitt and others, the rule-of-law approach faces another challenge that is grounded in constitutional and political theory rather than international law: separation of powers. Under this concept, the rule-of-law approach presents a challenge to the balance of powers between the branches and may endanger the domestic legitimacy of the courts. The IHRL scholarship on states of emergency and derogations has referred very little to the separation of powers.[61] Yet as one commentator notes, the balancing of human rights and the public interest is "the area in which the political or value-laden nature of the choices facing [a] court is most obvious, raising questions as to the legitimacy of judicial rather than democratic decision-making."[62] For some, particularly the general public, the comprehensive rule-of-law approach may raise the objection that judges are inappropriately substituting their own views on a state of emergency for those of the democratically elected public representatives. While this argument is a challenge generally for the law, it is naturally more acute in crisis situations where the life of the nation may be at stake.

7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 24 (Jan. 30, 1987).

56. *See id.*; Special Rapporteur's Tenth Report, *supra* note 1, ¶ 50. R

57. AGAMBEN, *supra* note 12, at 23. R

58. *Id.* at 3.

59. Grossman, *supra* note 14, at 36; *see also* ICJ STUDY, *supra* note 38, at 417–24. R

60. Cole, *supra* note 12, at 1757. R

61. Humphreys notes this about Agamben's otherwise instructive book. Humphreys, *supra* note 13, at 684. R

62. One aspect is described as "the legitimacy of allowing unelected judges to decide whether particular policies are justified in the public interest and whether it is necessary for these to defer to individuals rights or *vice versa*." McHarg, *supra* note 41, at 672, 695. R

D. *Democratic and Nondemocratic States*

A somewhat overlooked but underlying issue in this debate is the democratic or nondemocratic nature of the state. Agamben notes that "it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one."[63] It is not surprising therefore that many perspectives on states of emergency are based on an assumption of a democratic state. Rossiter, for example, indicates that "the problem of elaborating systems of crisis government arises *only* within states that have previously achieved some level of democracy and retain at least a symbolic, if not real, attachment to its preservation."[64] Underlying this is a suggestion that the democratic nature of government provides a better foundation for strong executive powers in an emergency and, therefore, for the limitation of human rights. Scheppele argues that "[f]or an executive to seize power and suspend rights under a democratic constitutional government is an entirely different matter, normatively speaking, than for a monarch (even a constitutional monarch) to do so."[65] This view plays into the rationale and legitimacy of government as the people's democratically elected representative to act potentially beyond the strict confines of the rule of law, and it also resonates with the theory of separation of powers. It implicitly suggests that a pluralistic democracy will better safeguard the rights of its citizens in time of emergency, with rights such as freedom of religion, association and assembly, freedom of expression, and a free press.

This issue of democratic and nondemocratic states is seldom referred to as a factor in IHRL scholarship. This is perhaps not surprising as it is not part of the law as positively expressed in the IHRL treaties. However, Anna-Lena Svensson-McCarthy raises it in the historical context of World War II in her major study on states of emergency and human rights:

> There was, on the other hand, a fundamental difference in the way that autocratic methods of government were used by the democracies and the dictatorships [in World War II]: they were used for *entirely different purposes*. The former made *temporary* use of exceptional powers to enable them to defend themselves efficiently and to *return fully* after the war to their democratic constitutional order, wherein their peoples could again enjoy their rights and freedoms. The latter countries did so for *offensive motives*, namely, in order to maintain and expand *permanently* oppressive and racist governments under which individuals would not have been able to be truly free.[66]

63. AGAMBEN, *supra* note 12, at 5. R

64. FITZPATRICK, *supra* note 11, at 23. In Rossiter's view, altering government as necessary to overcome the peril and restore normal conditions during crisis is predicated on "a democratic, constitutional government." *See* ROSSITER, *supra* note 34, at 5. R R

65. Scheppele, *supra* note 12, at 1005; *see also* NOWAK, *supra* note 38, at 84 (justifying a state of emergency based on a democratically legitimate state). R

66. SVENSSON-MCCARTHY, *supra* note 33, at 2–3 (footnote omitted). R

Svensson-McCarthy's general view of states of emergency, which is further elaborated below, not surprisingly relies heavily on democracy.[67] An implicit point is that democratic government and society can be a constraint on exceptional powers in times of emergency, a constraint that is separate from the law and judiciary. This is an important point that will be taken up further below, but whether or not the point is correct, it appears predicated on a *truly* existential threat to the nation (for example, as faced by many Western European democracies in World War II). In more recent times, the idea of democratic governance and society as a constraint on executive power seems to have permeated the European jurisprudence. For example, the European Commission for Democracy Through Law, the Council of Europe's advisory body on constitutional matters (also known as the Venice Commission), provided the following opinion on human rights in emergency situations: "[t]he security of the State and its *democratic institutions*, and the safety of its officials and its population, are vital public and private interests that deserve protection, *if necessary at high costs*."[68] This suggests a balancing of interests between the state and civil and political rights in favor of the former "if necessary."

There are various problems with fully endorsing this "democracy as constraint" perspective for IHRL and states of emergency. It is necessary to acknowledge, as Svensson-McCarthy does, that "excesses and abuses" did and do occur in democracies.[69] As examples above demonstrate, such as U.S. internment of Japanese residents during World War II, democracies are not immune to abuse of states of emergency. It is true that modern practice shows the abuse of states of emergency is most serious in relation to governments that are not truly democratic or responsive to the will of their people. However, while the violations of true democracies may not be of the same magnitude as the violations of nondemocracies, they are human rights violations nonetheless and cannot be easily dismissed or rationalized. Measures put in place in an emergency may also subvert many of the rights that are central to democracy, such as freedom of expression, assembly, and association. Moreover, what is or is not a democracy and whether this distinction may justify differential treatment are difficult questions. The definition of a modern "democracy" is no longer an easy one, and today's international landscape is characterized by great variation of state regimes that possess an equally varied array of human rights challenges. Furthermore, as actors in the international system, no states are immune from self-interested claims and assertions including for states of emergency.

The point of this brief summary is to sketch, rather than elaborate and resolve, some of the underlying themes relating to states of emergency.

67. *Id.* at 4–6. Svensson-McCarthy makes it one of three pillars of her arguments in her book. *See id.* at 4–5. *See generally id.* ch. 4.

68. Venice Comm'n, *supra* note 40, ¶ 5 (emphasis added). Article 15 on derogations in the ECHR also refers to "measures necessary in a democratic society," which is not found in Article 4 of the ICCPR. *Id.* ¶ 7. R

69. SVENSSON-MCCARTHY, *supra* note 33, at 2. R

These general themes are important for placing the international human rights treaty law and practice in its proper context, and for the thesis that is articulated in this Article.

The modern origins of the state of emergency as a legal concept came from nineteenth-century Western Europe and from the liberal democratic tradition. States of emergency are built on the somewhat artificial dichotomy of norm and exception, which endorses a bifurcated approach to balancing the interests of the collective (for example, national security) and the individual (that is, human rights). "State of emergency" is therefore a label that may provide instant legitimacy to the greater limitation of human rights by government. Yet the concept is not conducive to clear definition; as one political theorist notes, it is an "ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political."[70] Many scholars have also predicated their analysis of emergency measures on a democratic form of government. A distinction between democracies and nondemocracies would be difficult to apply in practice, and, in any event, democratic governments are not immune to abuses of states of emergency.

On the question of the two broad schools of thought—*rule of law* and *sovereignty*—and their associated variations, it is not necessary to take a view here on the better approach. This is not an easily resolved issue; as one scholar writing recently on states of emergency has said, "the question of the limits of the rule of law is the central question of jurisprudence."[71] There are various attempts to find an intellectual middle ground, but these may not yet provide a convincing solution.[72] Rather the point is that there are different views, and these different views are important for understanding the nature of the doctrinal law on states of emergency, including its contested interpretation and application in practice, as will be shown below.

E. *Treaty Regimes and Law*

The general shape and development of the treaty regimes provides an interesting comparison to the underlying themes identified above. The first instrument of the International Bill of Rights, the 1948 Universal Declaration of Human Rights (UDHR),[73] did not even include a specific regime for states of emergency. The UDHR reflected the balance of individual rights and public interest in a general clause on the permissible limitations on the exercise of rights.[74] Article 29 recognized the individual's "duties to the community in which alone the free and full development of his personality is possible" and that in exercising rights and freedoms everyone shall be subject only to limitations for the purpose of securing re-

70. AGAMBEN, *supra* note 12, at 1 (quoting Alessandro Fontana, *Du droit de resistance au devoir d' insurrection*, *in* LE DROIT DE RESISTANCE 16 (Jean-Claude Zancarini ed., 1999)). R

71. DYZENHAUS, *supra* note 12, at 7. R

72. *See, e.g.*, AGAMBEN, *supra* note 12; Humphreys, *supra* note 13. R R

73. Universal Declaration of Human Rights, *supra* note 41. R

74. *Id.* art. 29.

spect for the rights of others and "of meeting the just requirements of morality, public order and the general welfare in a democratic society."[75]

In the negotiation of the two international human rights covenants, it was the United Kingdom that proposed in 1947 a specific derogation regime for states of emergency.[76] The British proposal was promoted on the basis that it was necessary to guard against states being forced to suspend human rights *in toto* in time of war.[77] The U.K. argument drew on British wartime experiences, but there was also a view among commentators that the argument was connected to the frequent use of emergency rule in the British colonies during this period.[78] The central debate concerning the British proposal was whether a limitations clause, as was already contained in the UDHR, was preferable to a derogations clause. The United Kingdom and others argued that "time of war" and other "extraordinary peril or crisis" situations would not fall within the scope of the limitations provided for in the various articles of the Covenant, nor could they be adequately covered by a general limitations clause.[79] In the end, Article 4 of the Covenant as agreed to by the Commission was very close to the British draft language. The Commission's final text received only minor amendments in the Third (Human Rights) Committee of the General Assembly, and its final adoption occasioned no great problems.[80] Article 4 provided:

> 1. In time of *public emergency which threatens the life of the nation* and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant *to the extent strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

---

75. *Id.*

76. *See* Rep. of U.K. to the U.N. Human Rights Comm'n, Letter from Lord Dukeston, the United Kingdom Representative on the Human Rights Commission, to the Secretary-General of the United Nations, annex 1, art. 4(1), U.N. Doc. E/CN.4/AC.1/4 (June 5, 1947). For the drafting history, see FITZPATRICK, *supra* note 11, at 38–40; NOWAK, *supra* note 38, at 88. R

77. SVENSSON-MCCARTHY, *supra* note 33, at 202 n.12. R

78. SVENSSON-MCCARTHY, *supra* note 33, at 213; *see, e.g.*, FITZPATRICK, *supra* note 11, at 16. R

79. U.N. Secretary-General, *supra* note 7, ch. 5, ¶ 37; *see also* FITZPATRICK, *supra* note 11, at 52–53 (discussing drafting history). R R

80. *See* Rep. of the Comm'n on Human Rights, 10th Sess., Feb. 23–Apr. 16, 1954, annex I(B), art. 4, U.N. Doc. E/CN.4/705 (Apr. 1954); Higgins, *supra* note 33, at 286. R

> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.[81]

The essence of the derogations regime in Article 4 is a system allowing states parties to adjust their obligations temporarily under the Covenant in times of public emergency threatening the life of the nation. As demonstrated by the text, the key elements of the new derogation regime included: (i) a threshold of severity cause, (ii) the requirement of national proclamation and international notification to the treaty depositary, (iii) the consistency of the derogation with the state's other international obligations; (iv) the proportionality of the measures to the situation, (v) nondiscrimination in applying the measures, and (vi) the protection of nonderogable rights.[82] Article 4 is therefore a mechanism that permits states to temporarily limit and modify the rights and obligations set out in the ICCPR, with the exception of the extent to which those rights are nonderogable.

The Covenant's text thus aimed at striking a balance between the protection of individual rights and the protection of national needs in times of emergency by placing reasonable limits on emergency powers.[83] The 1955 report on the drafting of the two covenants by the U.N. Secretary-General spelled out this rationale:

> It was also important that States parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the covenant. Reference was made to the history of the past epoch during which emergency powers had been invoked to suppress human rights and to set up dictatorial regimes.[84]

The Covenant's drafters believed that the obligation to report publicly any recourse to emergency powers would be an effective deterrent to un-

81. ICCPR, *supra* note 2, art. 4 (emphasis added). R

82. FITZPATRICK, *supra* note 11, at 55. The other international obligations may include law of armed conflict, which begins to apply when the relevant thresholds are met, for example, and noninternational armed conflict within the state. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 38. R R

83. *See* Hartman, *supra* note 33, at 11. R

84. U.N. Secretary-General, *supra* note 7, ch. V, ¶ 37. R

warranted derogation.[85] While the derogation regime won out over a general limitations clause, this obviously did not remove other rights-specific limitations from the scope of the Covenant and the individual rights it protected. A large number of individual articles on specific human rights, such as the freedoms of religion and association and the rights to liberty of movement and peaceful assembly, still included the language of general limitations.[86]

The European Convention on Human Rights and the Inter-American Convention on Human Rights also included derogations articles based on similar, though not identical, principles as Article 4 of the Covenant.[87] While the European Convention was concluded in 1950, sixteen years earlier than the Covenant, the negotiation of the Covenant's article on derogation was well developed by that time, and the European article on derogation was also the result of a British initiative.[88] In contrast, the African Charter on Human and Peoples Rights of 1981 did not regulate states of emergency, nor did it contain a derogations provision. The African Charter relied on a general limitations clause similar in nature to that of the UDHR.[89] The Arab Charter on Human Rights of 2004 included a derogation regime.[90] Accordingly, states may be subject to different emergency derogation regimes depending on the treaties and instruments to which they are party, particularly as the list of nonderogable rights varies from treaty to treaty. The Covenant's derogations article, for example, provides for more nonderogable rights than the correlative article of the European Convention.

As indicated above, there are difficult issues concerning the legal dichotomy between normality and exception, as well as what justifies the derogation as opposed to limitation of human rights. The primary example given of derogation in the Covenant negotiations was the instance of "war."[91] Yet, unlike the European Convention, which refers to "war or

85. For example, see the view of Rene Cassin, representative of France in the Committee charged with drafting the Covenant. Comm'n on Human Rights, Summary Record of the 127th Meeting, 5th Sess., June 14, 1949, 7–8, U.N. Doc E/CN.4/SR.127 (June 17, 1949).

86. *See* ICCPR, *supra* note 2, arts. 18(3), 19(3), 22(2), 12(3), 21. R

87. *See* American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter IACHR]; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. For the drafting history of the IACHR, see FITZPATRICK, *supra* note 11, at 42–43. R

88. FITZPATRICK, *supra* note 11, at 40–41; Higgins, *supra* note 33, at 289. R

89. *Compare* African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 ("The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."), *with* Universal Declaration of Human Rights, *supra* note 41, art. 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."). R

90. Arab Charter on Human Rights, League of Arab States, art. 4, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005).

91. *See* U.N. Secretary-General, *supra* note 7, ch. V, ¶¶ 38–39. R

other public emergency,"[92] or the American Convention, which refers to "war, public danger, or other emergency,"[93]

> the Covenant makes no reference to "war." The [Covenant's] *travaux préparatoires* indicate that the omission was intentional and that it was motivated by an important symbolic concern. "While it was recognized that one of the most important public emergencies was the outbreak of war, it was felt that the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war."[94]

It would seem unlikely though that this was the sole reason for all states negotiating the Covenant. Certainly those seeking a broader interpretation of the right of derogation might have been aided by the exclusion of war from the article. Yet, as Buergenthal pointed out, the omission clearly did not exclude war, as it was the most dramatic public emergency that may "threaten the life of the nation."[95] The scope of public emergency also seemed to include "natural catastrophes as well as . . . internal disturbances and strife."[96] There was thus an overarching thread concerning the magnitude of emergency that Bossuyt, in his work analysing the Covenant's negotiation, described as follows:

> The main concern was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the covenant which would not be open to abuse. The . . . wording is based on the view that *the public emergency should be of such a magnitude as to threaten the life of the nation as a whole*.[97]

This key trigger of Article 4—a public emergency threatening the life of the nation—reflected the idea that a state of emergency only existed *in extremis*, "when the state [faced] a challenge so severe that it [had to] violate its own principles to save itself."[98] The vagueness of this concept of public emergency, however, was criticized in the U.N. Commission on

92. ECHR, *supra* note 87, art. 15. R

93. IACHR, *supra* note 87, art. 27. R

94. Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 79 (Louis Henkin ed., 1981) (quoting U.N. Secretary-General, *supra* note 7, ¶ 39); *see also* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 35. R R

95. Buergenthal, *supra* note 94, at 79. R

96. *Id.*; Special Rapporteur's Tenth Report, *supra* note 1, ¶ 35; NOWAK, *supra* note 38, at 79 (referring to serious natural or environmental catastrophes, such as earthquakes, floods, cyclones, or nuclear accidents). R

97. MARC J. BOSSUYT, GUIDE TO THE "TRAVEAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 85–86 (1987) (emphasis added).

98. Scheppele, *supra* note 12, at 1004. R

Human Rights.[99] There was an awareness of the potential for abuse and the negative experiences prior to drafting of the Covenant, particularly in Germany. Those who supported the wording of draft Article 4 made comments on its interpretation that were underpinned by fine, though perhaps not clear or realistic, distinctions. As one state commented, while "it was difficult to give a precise definition to the life of the nation," it "was significant that the text did not relate to the life of the government or of the state."[100]

This brief review of the background and treaties provides some context to understanding the orientation of the international human rights treaties. The treaties incorporated the artificial dichotomy of norm and exception by introducing a specific derogation regime based on the concept of a public emergency threatening the life of the nation. States of emergency under IHRL are also firmly predicated on the rule-of-law approach (that is, legal and judicial control) for state powers during a time of emergency. There appeared to be no concession in the treaties to the theories of Schmitt and others on the extralegal nature of emergencies and therefore little recognition of the "point of imbalance between public law and political fact"[101] for states of emergency. The Covenant, European Convention, and Inter-American Convention also do not differentiate legally between democracies and nondemocracies. In sum, the treaty law is more reflective of one side of the various debates identified above (for example, the dichotomy of norm and exception, the rule of law rather than extralegal measures, the nonrole of democracy); as will be shown below, this has impacted the application, interpretation, and effectiveness of IHRL.

II. Practice and Problems

A. *Overview of Practice and Problems*

State practice in invoking public emergencies and derogating from human rights obligations has been widespread. A large number of states have been in regular and constant states of emergency.[102] The reasons most often claimed by states for invoking a state of emergency have been civil war and cases of serious internal unrest.[103] As indicated above, over the period of 1985–1997 about half of the states in the world were re-

99. *See* Svensson-McCarthy, *supra* note 33, at 215. R

100. *Id.* at 211 (quoting the representative from Chile).

101. *See infra* note 322. R

102. In a 1983 study of the ICJ, it was estimated that thirty states were in some form of emergency. ICJ Study, *supra* note 38, at 413. By 1986, the number of states estimated to be in an emergency had increased to about seventy. *See* Fitzpatrick, *supra* note 11, at 3–4; *see also* Daniel O'Donnell, *States of Exception*, Int'l Commission Jurists Rev., Dec. 1978, at 52, 53. Over the twelve-year period of 1985 to 1997, the U.N. Special Rapporteur for States of Emergency reported that about ninety-five states were subject to a de jure or de facto state of emergency. Special Rapporteur's Final Report, *supra* note 5, ¶ 6. R R R

103. Nowak, *supra* note 38, at 90. R

ported as subject to a de jure or de facto state of emergency.[104] Even more troubling was that many countries in this period had extended or reintroduced their states of emergencies.[105] At the time of the Special Rapporteur's final report in 1997, for example, his annual list suggested that thirty states were in a situation "in which exceptional measures had been in force for some time."[106]

In addition to this practice, the constitutional and legal provision for states of emergency has become almost universal, with one study indicating that over 145 states had constitutional provisions of this nature by 1996.[107] Yet, there has been a problem concerning the consistency of many such provisions with IHRL.[108] As the U.N. Human Rights Committee has observed, "[o]n a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4."[109]

There unfortunately has been a correlation between emergency situations and grave violations of human rights. Even those human rights from which derogation is not permitted are often affected.[110] This bleak record has included states of emergency frequently accompanied by arbitrary detentions without due process, disappearances, summary executions, torture, and other forms of ill treatment.[111] Freedom from arbitrary

104. Special Rapporteur's Final Report, *supra* note 5. For the typology of the International Law Association, see FITZPATRICK, *supra* note 11, at 3–21 (detailing the types and examples of emergency). R R

105. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 128, 180. *See generally* Special Rapporteur's Final Report, *supra* note 5 (listing the countries that have been in, extended, or reintroduced a state of emergency). R R

106. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 128; *see also* Special Rapporteur's Final Report, *supra* note 5, at 2–16. The Final Report contains the tenth annual list of the Special Rapporteur, which comprised countries and territories that he considered, based on various sources of information, to be: (i) countries and territories in which an emergency is in force and (ii) countries and territories in which emergency regimes in various forms have been in force during the period from January 1985 to May 1997. R R

107. Linda Camp Keith & Steven C. Poe, *Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration*, 26 HUM. RTS. Q. 1071, 1080 tbl.1 (2004); *see also* NOWAK, *supra* note 38, at 84. R

108. The U.N. Human Rights Committee, for example, has not been restrained in telling states their constitutions are not consistent with Article 4. *See* FITZPATRICK, *supra* note 11, at 85–86; McGoldrick, *supra* note 33, at 386–87; *see also* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 184. R R R

109. General Comment No. 29, *supra* note 2, ¶ 3. R

110. A high incidence of grave human rights abuses, particularly of nonderogable rights, will accompany an emergency. Amnesty Int'l, *Torture and Violations of the Right to Life Under States of Emergency*, AI Index POL 30/02/88 (July 1988) (prepared for submission to the U.N. Special Rapporteur for States of Emergency, Leandro Despouy); FITZPATRICK, *supra* note 11, at 35; Special Rapporteur's Tenth Report, *supra* note 1, ¶ 169. R

111. Grossman, *supra* note 14, at 36. U.N. Special Rapporteur Despouy writes that the rights engaged include the right to liberty and security of the person, right to liberty of movement and freedom of residence, right to freedom from interference for home and correspondence, right to freedom of opinion and expression, and the right to strike. *See* Special R

detention and fair trial are human rights particularly affected by emergencies.[112] The U.N. Working Group on Arbitrary Detention, for example, has described states of emergency as a "root cause" of arbitrary detention.[113] States of emergency can impact economic, social, and cultural rights as well as civil and political rights.[114] Vulnerable groups may be the most affected by human rights violations, especially minorities and refugees, as well as journalists and human rights workers.[115] There is a disturbing tendency, observed in the ICJ's study, for states of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal system.[116] Such semipermanent states of emergency lead to risks of *institutionalizing* the limitations on human rights. This is evidenced by the shift of offending laws from emergency legislation to permanent internal security laws.[117] This idea of "institutionalizing the emergency" is well summed up by the U.N. Special Rapporteur for States of Emergency, Mr. Leandro Despouy:

> [T]he normal legal order subsists although, parallel to it, a special, para-constitutional legal order begins to take shape . . . allowing the authorities to invoke, according to the needs of the moment, either the normal legal system or the special system, although in

---

Rapporteur's Tenth Report, *supra* note 1, ¶ 158; *see also* FITZPATRICK, *supra* note 11, at 36–37; NOWAK, *supra* note 38, at 95. R R

112. *See* FITZPATRICK, *supra* note 11, at 38 n.44. R

113. Chairperson-Rapporteur of the Working Group on Arbitrary Detention, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶ 64, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (by Leïla Zerrougui).

114. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 172. The 1983 ICJ study focused on fifteen states and analysed in-depth the human rights issues and violations. The ICJ study revealed the very broad impact on a society of states of emergency that it described as affecting not only freedom from arbitrary detention and the right to a fair trial, but also R

> trade union rights, freedom of opinion, freedom of expression, freedom of association, the right of access to information and ideas, the right to an education, the right to participate in public affairs . . . not only individual rights but also collective rights and rights of peoples, such as the right to development and the right to self-determination.

ICJ STUDY, *supra* note 38, at 417; *see also* Grossman, *supra* note 14, at 36. R

115. Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 173, 175. R

116. *See* ICJ STUDY, *supra* note 38, at 415; Special Rapporteur's Tenth Report, *supra* note 1, ¶ 127. FITZPATRICK, *supra* note 11, refers to Brunei, Egypt, Turkey, Paraguay, the Occupied Palestinian Territory (at 4–5), the United Kingdom (at 6–7), Chile (at 10), and Malaysia (at 17); NOWAK, *supra* note 38, at 91, refers to Paraguay, Haiti, Brazil, Uruguay, Colombia, Cameroon, Zaire, Syria, Thailand, South Korea, Malaysia, Chile, Egypt, Peru, El Salvador, Northern Ireland and the United Kingdom, and Israel. R R R

117. *See, e.g.*, FITZPATRICK, *supra* note 11, at 17–18 (discussing Malaysia); Sri Lankan Introduces New 'Anti-Terror' Legislation, BBC NEWS (Aug. 31, 2001), http://www.bbc.co.uk/news/world-south-asia-14735405 (discussing Sri Lanka); *supra* text accompanying notes 131–137 (discussing Syria). R R

> practice the former is clearly relinquished in favour of the latter.[118]

Israel, for example, has a large volume of legislation that has been developed as a consequence of its state of emergency and has become an inherent part of its ordinary legal system.[119] Israel even stated to the U.N. Human Rights Committee that certain of its fundamental laws, orders, and regulations depend on the existence of a state of emergency and would need to be revised before lifting the emergency so as not to leave crucial matters unregulated.[120]

States of emergency can become a tool to protect a government or leader by limiting freedom of expression, political assembly, and association and other civil and political rights. "[T]he most serious human rights violations tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority" or which they perceive to be a threat.[121] There is a tendency for some governments to regard a challenge to their authority, even if peaceful, as a threat to the life of the nation, and this is particularly so for governments that provide no lawful means for transfer of power.[122] As further discussed below, such governments can be quick to use disproportionate force against peaceful protestors, particularly in nondemocracies, and then utilise the resulting violence as a pretext to justify a state of emergency.

Terrorism has also posed a special problem for the law on states of emergency. States, including democratic ones, have used terrorist threats to justify a number of emergencies lasting decades.[123] States of emer-

---

118. Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 131, 132. R

119. MENACHEM HOFNUNG, DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL 49–50 (1996).

120. Human Rights Comm., *Second Periodic Report of the Government of Israel*, ¶ 72, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001).

121. ICJ STUDY, *supra* note 38, at i, 274–75. One reason for this is the underlying situation, as the ICJ study comments: R

> [I]t is the acute social conflicts that arise and will inevitably continue to arise in societies founded on deep-seated disparities that are at the root of various states of exception. . . .
>
> The civil or military groups that rule in this type of society have a tendency to use states of exception as a means of perpetuating situations that are inherently volatile and explosive.

Id. at 274–75.

122. *Id.* The Special Rapporteur for States of Emergency in his report refers to "legal instrument[s] used by many dictators to suppress the human rights of most of the population and to crush any form of political opposition," Special Rapporteur's Tenth Report, *supra* note 1, ¶ 5. Fitzpatrick refers to excessive use of force against demonstrators, clandestine murders by security or others, summary execution and torture, and secret trial. FITZPATRICK, *supra* note 11, at 35. R R

123. *See, e.g.*, ICJ STUDY, *supra* note 38, at 83; *supra* text accompanying notes 131–137 (discussing Syria); *supra* text accompanying notes 138–146 (discussing Egypt); *supra* text accompanying notes 223–230, 239–245 (discussing the United Kingdom and Ireland). R R R

gency, coupled with broad-reaching and vague antiterrorism laws, can provide extraordinary powers for governance above the law. Antiterrorism legislation is also a key vehicle for shifting human rights limitations from emergency to ordinary legal systems.[124] Furthermore, as terrorism often is perceived by a state's population as an external threat (for example, from foreigners or minorities), the democratic majority may also support a government's crisis mentality for further-reaching but less human rights-compliant measures against the perceived threat.[125]

In a state of emergency, separation of powers is impacted as executive control can become more dominant, often leading to human rights violations.[126] The judiciary and its work can suffer in the conditions that surround these emergencies. A state of emergency can also lead to mass dismissal of judges, to special or military courts, and to the restriction or suspension of judicial review.[127] As former U.N. Special Rapporteur Despouy stated, emergencies and their impact on institutions can "replace the concept of the separation and independence of powers with that of a hierarchy of powers."[128]

The problems in the practice of states of emergency are many and varied and combine to create a powerful and severe impact on human rights protection. These problems include the inconsistency of constitutional provisions and IHRL on derogations; the broad range of human rights that are negatively affected, including the rights of minorities; the fact that governments use self-preservation as a pretext for violent repression of peaceful opposition; the institutionalizing of emergency provisions in the normal legal system; terrorism as an ongoing emergency; and distorted separation of powers, which leads to the undermining of judicial review.

124. There are also examples where states of emergency have ended and the emergency laws in question have simply shifted or blurred into antiterrorism legislation. For example, the Terrorism Act 2000 rolled back some long-standing emergency powers in Northern Ireland but consolidated many of the measures as permanent features of British antiterrorism law. *See* Terrorism Act 2000, c. 11 (U.K.).

125. As Gross and Ní Aoláin comment, violent crises, of which September 11 is a good example, often precipitate a reaction that "legal niceties may be cast aside as luxuries to be enjoyed only in times of peace and tranquility" and a consequent "tranquilizing effect on the public's critical approach toward emergency regimes." *See* GROSS & NÍ AOLÁIN, *supra* note 12, at 7, 236. Gross and Ní Aoláin also note the surprise that gripped the United Kingdom when the 7/7 bombers were identified as British born and therefore not "outsiders." *Id.* at 224. Israel has reported to the U.N. Human Rights Committee that police searches and other invasions of privacy were accepted by the public itself. *See* H.R. Comm., Summary Record of the 1675th Meeting, 63d Sess., July 15, 1998, ¶ 50, U.N. Doc. CCPR/C/SR.1675 (July 21, 1998). R

126. FITZPATRICK, *supra* note 11, at 30–31. R

127. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 149. R

128. *Id.* ¶ 150.

B. *The Arab Spring—Syria and Egypt*

It is easy to underestimate how problematic states of emergency have been in countries with serious and continuing violations of human rights. The states most central to the Arab Spring—Tunisia, Egypt, Libya, Syria, Bahrain, and Yemen—have all invoked states of emergency to justify repressive actions.[129] International human rights treaty–monitoring bodies have repeatedly questioned Algeria, Egypt, and Syria, for example, about the need to maintain their emergency laws.[130] As these states' respective emergency laws have been inextricably entwined with repressive political regimes, the repeal of the state of emergency has been a central demand of the popular Arab citizen uprisings. In this regard, the integral role of states of emergency in institutionalizing human rights violations is well illustrated by a closer examination of the cases of Syria and Egypt respectively.

Syria has been subject to forty-eight years of emergency governance under the Ba'thist regime currently led by President Assad. A 1963 emergency decree vested almost total power in the President and the state's military-security apparatus.[131] The Constitution of Syria adopted in 1973 states that "laws enacted prior to the declaration of the Constitution remain in force until they undergo amendments which conform to the Constitution."[132] The emergency laws accordingly remain valid while being prima facie unconstitutional and therefore in a sense override the constitution. The U.N. Human Rights Committee criticized Syria in 1978 for failing to provide notification of its state of emergency,[133] and subsequently the Committee noted that the Syrian government's laws and actions had put Syria under a "quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4 of the Covenant."[134] The Committee also noted that the public emergency was continued "without any convincing explanations being given as to the relevance of these derogations to the

129. *See, e.g.*, Noura Erakat, *Emergency Laws, the Arab Spring, and the Struggle Against "Human Rights,"* JADALIYYA (Aug. 10, 2011), http://www.jadaliyya.com/pages/index/2051/emergency-laws-the-arab-spring-and-the-struggle-ag. In Bahrain, for example, it has been estimated that the government's emergency response to predominantly peaceful demonstrators led to forty killed, 1600 arrested and detained and many of those held incommunicado for weeks and even months, and more than 300 convicted and sentenced including some instances of the death penalty. *See* Human Rights Watch, World Report (2011), Bahrain, *available at* http://www.hrw.org/world-report-2012/world-report-2012-bahrain.

130. *See* H.R. Comm., *Concluding Observations of the Human Rights Committee: Egypt*, ¶ 6, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002) [hereinafter H.R. Comm., *Egypt*] (questioning Egypt); H.R. Comm., *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, ¶ 6, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001) [hereinafter H.R. Comm., *Syria 2001*] (questioning Syria).

131. H.R. Comm., *Syria 2001*, *supra* note 130, ¶ 6. R

132. ALKARAMA, THE PERMANENT STATE OF EMERGENCY—A BREEDING GROUND FOR TORTURE 1, 5 (2010) (report submitted to the Committee Against Torture in the context of the review of the Initial Periodic Report of the Syrian Arab Republic).

133. Rep. of the H.R. Comm., 7th Sess., July 30–Aug. 17, 1979, ¶ 293, U.N. Doc. A/34/40 (Sept. 27, 1979); GAOR, 34th Sess., Supp. No. 40 (1979).

134. H.R. Comm., *Syria 2001*, *supra* note 130, ¶ 6. R

conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict."[135]

Syria well illustrates the institutionalization of emergency by the transfer of emergency laws into mainstream security laws. The government lifted the state of emergency laws in April 2011 but little seemed to change in practice.[136] This is partly due to general laws having been passed to "entrench the state of emergency," such as "criminalizing expression of opposition to 'the aims of the revolution'"; legally "establish[ing] the State Security apparatus, granting it sweeping powers of arrest and detention, as well as effective impunity for human rights abuses"; and providing officials immunity from prosecution for offenses committed in carrying out their duties.[137]

Egypt demonstrates many of the same issues and problems as Syria. Egypt has been under a state of emergency for most of its modern existence in both its colonial and independence periods. The U.N. Human Rights Committee has criticized Egypt's state of emergency as "semi-permanent."[138] The Egyptian Emergency Law of 1958 was invoked after the assassination of President Anwar Sadat in 1981. The law summarily abrogated provisions of the constitution, drastically curbed freedom of expression and association, and institutionalized a parallel justice system comprising specially constituted emergency courts and the trial of civilians by military courts.[139] Decree 1/1981, as amended in 2004, was adopted based on the Emergency Law of 1958 and referred a variety of ordinary crimes to state security courts, including "crimes" concerning state security, public incitement (including by newspapers), and public demonstrations and gatherings.[140] The Egyptian state of emergency has been used inter alia to detain people administratively without charge or trial; try people before emergency or military courts (the procedures of which do not satisfy international standards of due process); prosecute journalists and

135. H.R. Comm., *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, ¶ 6, U.N. Doc. CCPR/CO/84/SYR (Aug. 9, 2005).

136. *See Syria Protests: Assad to Lift State of Emergency*, BBC NEWS (Apr. 20, 2011), http://www.bbc.co.uk/news/world-middle-east-13134322; *see also* HUMAN RIGHTS WATCH, WE'VE NEVER SEEN SUCH HORROR: CRIMES AGAINST HUMANITY BY SYRIAN SECURITY FORCES 1–11 (2011).

137. AMNESTY INT'L, END HUMAN RIGHTS VIOLATIONS IN SYRIA 1, 3–4 (2011) (prepared for submission to the U.N. Universal Periodic Review, Oct. 2011).

138. H.R. Comm., *Egypt*, *supra* note 130, ¶ 6. It has also been referred to as "endless" and "permanent." Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. REV 532, 534–35, 543 (2007); *see also* HUMAN RIGHTS WATCH, ELECTIONS IN EGYPT: STATE OF PERMANENT EMERGENCY INCOMPATIBLE WITH FREE AND FAIR VOTE 28 (2010). R

139. Martial law was first declared by the British rule in 1914 and martial law or emergency rule, as it was later called, was declared periodically until 1981. *See* ICJ, ICJ SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF EGYPT 1 n.1, 2, 4 (2009).

140. *See* ICJ, *supra* note 139, at 1–4. R

other government critics under criminal defamation legislation; and strictly control freedom of expression, association, and assembly.[141]

Egypt also evidences an *institutionalization* of the state of emergency. The state of emergency was subject to periodic review and renewal by the Egyptian People's Assembly, but this in practice was little more than a pro forma exercise.[142] The Emergency Law was renewed every two years with the result that Egypt was under a state of emergency for the past thirty years.[143] In 2007, amendments were made to the constitution that effectively rendered certain aspects of the emergency laws immune from judicial review.[144] Amnesty International described these amendments as the "most serious undermining of human rights safeguards in Egypt since the state of emergency was re-imposed in 1981."[145] The amendments also provided the government with permanent emergency-style powers in national security laws so that "when it then bows at last to international criticism and lifts the state of emergency the impact will be no more than cosmetic."[146]

The Egyptian government has long asserted that its emergency laws are required to combat terrorist threats.[147] While Egypt faced high levels of terrorist attacks between the 1970s and the 2000s,[148] more recently this level of terrorism has declined. The Egyptian authorities are still involved in policies aimed at combating the resurgence of terrorism and dismantling alleged terrorist cells. However, the relevant Egyptian law does not limit acts of terrorism to political armed violence; it broadly concerns "any threat or intimidation" used in order to "disturb . . . peace or jeopardiz[e] the safety and security of society."[149] After the overthrow of President Mubarak in 2011, the Supreme Council of the Armed Forces indicated

141. *See* HUMAN RIGHTS WATCH, *supra* note 138, at 1. R

142. *See* INT'L FED'N FOR HUMAN RIGHTS, EGYPT: COUNTER-TERRORISM AGAINST THE BACKGROUND OF AN ENDLESS STATE OF EMERGENCY 5 (2010); Reza, *supra* note 138, at 536–38. R

143. INT'L FED'N FOR HUMAN RIGHTS, *supra* note 142, at 5. R

144. *See, e.g.*, NATHAN J. BROWN ET AL., CARNEGIE ENDOWMENT FOR INT'L PEACE, EGYPT'S CONTROVERSIAL CONSTITUTIONAL AMENDMENTS 2 (2007), *available at* http://www.constitutionnet.org/files/Egypt%20Constitution.pdf.

145. Press Release, Amnesty Int'l, Egypt: Proposed Constitutional Amendments Greatest Erosion of Human Rights in Twenty-Six Years (Mar. 18, 2007) [hereinafter 2007 Egypt Press Release], *available at* http://www.amnesty.org/en/library/asset/MDE12/008/2007/en/c74b5428-d3a5-11dd-a329-2f46302a8cc6/mde120082007en.pdf.

146. Reza, *supra* note 138, at 543; 2007 Egypt Press Release, *supra* note 145. R

147. *See* Michael Slackman, *Egyptian Emergency Law is Extended for Two Years*, N.Y. TIMES (May 11, 2010), http://www.nytimes.com/2010/05/12/world/middleeast/12egypt.html.

148. *See* CARYLE MURPHY, PASSION FOR ISLAM: SHAPING THE MODERN MIDDLE EAST: THE EGYPTIAN EXPERIENCE 4, 57, 82–83 (2002).

149. *See* Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. on Mission to Egypt*, ¶ 11, U.N. Doc. A/HRC/13/37/Add.2 (Oct. 14, 2009) (by Martin Scheinin) (discussing Article 86 of the Law Amending Some Provisions of the Penal Code, the Criminal Procedure Code, the Law Establishing State Security Courts, the Law on Secrecy of Bank Accounts, and the Law on Weapons and Ammunition adopted in 1992).

that it would repeal the emergency laws.[150] The Supreme Council initially approved an additional emergency law, prompting fears over the intractability of a mechanism so entrenched in the Egyptian legal and political systems.[151] In May 2012, when the emergency laws were up for biannual renewal, the Supreme Council permitted them to expire.[152] This expiry, however, has been accompanied by new draft legislation from the Interior Ministry for "safeguarding the gains of the revolution."[153] The draft legislation includes emergency-type measures relating to "protect[ing] state supplies," "criminaliz[ing] hindering of work flow and attacking public and private buildings," "protect[ing] places of worship," and "regulat[ing] protests in public streets," as well as a "proposal for a legal authority to help the president pass laws."[154] As the Cairo Institute for Human Rights Studies points out, the proposed laws "seek to codify repression by law and enshrine exceptional measures . . . into the ordinary legal code" and suggest that the government may be trying "to find a permanent alternative to the infamous emergency law."[155]

C. *Implementation, Monitoring, and Enforcement*

As recognized above, the legal supervision of states of emergency is of primary importance, as grave human rights violations often occur in this context and states may use the power of derogation as a pretext or to a larger extent than is justified.[156] In this regard, the Covenant's drafters

150. *Egypt Army in Emergency Law Pledge*, AL JAZEERA (Aug. 10, 2011), http://www.aljazeera.com/news/middleeast/2011/02/201121161511674298.html.

151. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, REPORT OF THE OHCHR MISSION TO EGYPT: 27 MARCH – 4 APRIL 2011, ¶¶ 7, 12, 13, 26, 42 (2011), *available at* http://www.ohchr.org/Documents/Countries/EG/OHCHR_MissiontoEgypt27March_4April.pdf; Press Release, Amnesty Int'l, Egypt: Emergency Law Biggest Threat to Rights Since '25 January Revolution' (Sept. 16, 2011), *available at* https://www.amnesty.org/en/for-media/press-releases/egypt-emergency-law-biggest-threat-rights-%E2%80%9825-january-revolution%E2%80%99-2011-09-1.

152. *See Egypt State of Emergency Lifted After Thirty-Seven Years,* BBC NEWS (May 31, 2012), http://www.bbc.co.uk/news/world-middle-east-18283635; *Egypt's Infamous Emergency Law Expires*, AL JAZEERA (May 31, 2012), http://www.aljazeera.com/news/middleeast/2012/05/2012531134021732460.html.

153. *See* Heba Afify, *The New Faces of the Emergency Law*, EGYPT INDEP. (Oct. 22, 2012), http://www.egyptindependent.com/news/new-faces-emergency-law; *see also* MOHAMED EL ANSARI & MOHAMED AHMED ZAREE, CAIRO INST. FOR HUMAN RIGHTS STUD., SUMMARY OF THE REPORT: CRIMINALIZING THE EGYPTIAN REVOLUTION 3–4 (2012), *available at* http://www.cihrs.org/wp-content/uploads/2012/11/Report-Summary-commentary-on-5-draft-laws-egypt-oct2012-final.pdf; Lina El-Wardani, *Interior Ministry Aims to Recreate Mubarak-Era Emergency Law: Rights Activists*, AHRAM ONLINE (Oct. 22, 2012), http://english.ahram.org.eg/NewsContent/1/64/56117/Egypt/Politics-/Interior-ministry-aims-to-recreate-Mubarak-era-emer.aspx.

154. El-Wardani, *supra* note 153. R

155. EL ANSARI & ZAREE, *supra* note 153, at 5. R

156. VENICE COMM'N, SCI. AND TECHNIQUE OF DEMOCRACY, NO. 12: EMERGENCY POWERS (1995); VENICE COMM'N, SCIENCE AND TECHNIQUE OF DEMOCRACY, NO. 17: HUMAN RIGHTS AND THE FUNCTIONING OF THE DEMOCRATIC INSTITUTIONS IN EMERGENCY SITUATIONS (1996).

devoted as much time to discussing measures of implementation as to the substantive provisions on derogations.[157] Where states of emergency are abused and subvert the rule of law and human rights, the recourse to international review and comment may be the only remedy available. It is therefore worthwhile to reflect a little on the general nature of international monitoring and enforcement for states of emergency.

The ICJ's study, which focused in-depth on around fifteen countries, noted that the efforts to apply international norms "met with a degree of success" in five of those countries.[158] As will be discussed below, it is clear that in practice international human rights law can have a positive impact, though that impact may sometimes be quite limited. Within the current architecture of the international system, there are four main ways in which obligations concerning states of emergency and derogation are monitored and enforced: (a) through general supervisory powers of bodies entrusted with reviewing the implementation of treaty obligations; (b) individual complaints to the treaty bodies, where a state's consent has been provided for this jurisdiction; (c) interstate complaints to treaty bodies where jurisdiction is consented to; and (d) through what may be best described as political processes in bodies of more general human rights and other competence.[159]

The treaty bodies perform the central role in reviewing the implementation of states of emergency by state parties to the relevant treaties. Early on, the U.N. Human Rights Committee asserted its competence to review notifications under Article 4(3); while this was initially controversial, it is now well established.[160] The treaty bodies can help stimulate international pressure through national and international publicity, and their reports carry more weight than human rights NGOs. The state parties to the Covenant are required under Article 40 to submit periodic written reports on the implementation of all their obligations under the ICCPR, and the Committee has provided detailed periodic reporting guidelines in respect of Article 4.[161] The periodicity of this reporting process may be every five

157. FITZPATRICK, *supra* note 11, at 82. R

158. ICJ STUDY, *supra* note 38, at 442. The country studies focused on Argentina, Canada, Colombia, Eastern Europe, Ghana, Greece, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay, and Zaire. For review of the five positive case studies, see *id.* at 442–53. R

159. *Id.* at 441–42 (referring to the articles on page 442).

160. *See* NOWAK, *supra* note 38, at 101–02; Buergenthal, *supra* note 94, at 85; Hartman, *supra* note 33, at 29. R R

161. The reporting guidelines state the following requirement: "In the light of article 4 and general comment No. 29 (2001), provide information on the date, extent of, effect of, and procedures for imposing and for lifting any derogation under article 4. Full explanations should be provided in relation to every article of the Covenant affected by the derogation." H.R. Comm., *Guidelines for the Treaty-Specific Document to Be Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. CCPR/C/2009/1 (Nov. 22, 2010) [hereinafter *Revised Reporting Guidelines*]. The guidelines go on to request information about national arrangements and institutional procedures for states of emergency, as well as specific and detailed information on any states of emergency that are declared. *See id.* ¶¶ 40–44. The reporting guidelines have not always included refer-

years or more.[162] The U.N. Human Rights Committee has adopted two general comments[163] on the interpretation and implementation of Article 4 on states of emergency; the most recent in 2001 provided a detailed review of the article's requirements.[164] The Committee has often identified derogations as a matter of concern in its concluding observations on national reports.[165] The European treaty body system, by contrast, has neither a periodic reporting function nor a mechanism such as general comments.

The periodic reporting by states to the U.N. Human Rights Committee allows the Committee to comment on specific states of emergency. However, there are serious weaknesses in periodic reporting on states of emergency under the Covenant. The Committee places the duty to provide information on the state resorting to Article 4,[166] a duty not spelled out in the Covenant and that the Committee has few means to enforce. Despite the reporting guidelines, many states' notices of derogation simply do not provide the necessary information.[167] Uruguay, for example, provided a notification to the Covenant's depositary effectively three years after it was obligated to do so, and when questioned by the Committee concerning the lack of information provided (such as from which articles the state sought to derogate), the government stated that the emergency was "a matter of universal knowledge" and any substantive justification

ence to derogations. *See* Buergenthal, *supra* note 94, at 84–85; McGoldrick, *supra* note 33, at 390. R

162. *See, e.g.*, *Revised Reporting Guidelines*, *supra* note 161, ¶ 12. There is not a set periodicity per se, but the Committee adopts a practice of stating at the end of its concluding observations a date by which the following periodic report should be submitted. The Committee requires the periodic reports usually every five years. This is a matter of practice that can be changed. *See* H.R. Comm., *Consolidated Guidelines for State Reports Under the International Covenant on Civil and Political Rights*, ¶ B, U.N. Doc. CCPR/C/66/GUI/Rev.2 (Feb. 26, 2001). R

163. General comments are a practice developed primarily by U.N. human rights treaty bodies. While not a formally binding interpretation of the treaty law, in practice they are often influential. Philip Alston has described the General Comment as the "means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement." Philip Alston, *The Historical Origins of 'General Comments' in Human Rights Law*, *in* THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 763, 764 (Laurence Boisson de Chazournes & Vera Gowland-Debbas eds., 2001).

164. *See generally* Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUM. RTS. L. REV. 81 (2002); McGoldrick, *supra* note 33, at 425 n.271. R

165. *See, e.g.*, H.R. Comm., *Concluding Observations of the Human Rights Committee: Israel*, ¶ 12, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (concerning the "sweeping nature of measures" for Israel's state of emergency in 2003). Other examples include Ecuador in respect of an economic emergency and Guatemala in respect of a prison escape. With respect to the Covenant, the Committee has referred generally in its reporting to a large number of states in connection with states of emergency. *See* McGoldrick, *supra* note 33, at 393–94 (providing examples of Committee reporting). R

166. *See id.* at 399.

167. FITZPATRICK, *supra* note 11, at 92; *see also infra* note 281 and accompanying text. R

would be "superfluous."[168] For this reason, the Committee has made clear in General Comment 29 that the "duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification."[169]

Moreover, the process of a state's periodic reporting before the Committee on implementation of its ICCPR obligations may also occur a year or two or more after the actual state of emergency has finished.[170] While the Committee has a general power under its rules of procedure to request a supplementary Article 40 report "at any other time the Committee may deem appropriate," states may challenge the legal authority of the Committee to do this, and the power has not been utilized in cases of states of emergency.[171] States would naturally argue that their reporting obligations, at least in the short to medium term, do not extend beyond the notification requirements of Article 4. The Committee records in its annual reports those states that have formally reported a derogation, but this is merely a formality, as the Committee provides no substantive comments on the actual or purported derogation.[172]

Although not designed with states of emergency in mind, the ability of individuals to file complaints against states with the relevant treaty bodies has become an important mechanism for reviewing the implementation of treaty provisions on states of emergency.[173] This is the case, for example, for state parties to the First Optional Protocol to the ICCPR, which provides consent to the individual-complaints mechanism of the U.N. Human Rights Committee.[174]

A number of complaints have concerned state action in not only de jure but also de facto states of emergency. This reflects that, as discussed below concerning de facto emergencies, on many occasions the relevant state party has not formally derogated under Article 4. While the Commit-

168. NOWAK, *supra* note 38, at 103 n.119. R

169. General Comment No. 29, *supra* note 2, ¶ 17; *see also* Joseph, *supra* note 164, at 96 (stating that this means notification is not a substantive requirement). R

170. Poland's declaration of a state of emergency is such an example. *See* McGoldrick, *supra* note 33, at 391. R

171. H.R. Comm., Rules of Procedure of the Human Rights Committee, r. 66(2), U.N. Doc. CCPR/C/3/Rev.9 (Jan. 13, 2011). U.N. Special Rapporteur Despouy in his report noted that the Committee's Rules of Procedure may permit a request report from a government on a state of emergency. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 186. This authority appears to be found in Article 40(1)(b) of the Covenant on further requests for information, and the Committee has discussed the idea of additional or supplementary reports for this purpose. *See* FITZPATRICK, *supra* note 11, at 92–95. R R

172. *See, e.g.*, Rep. of the H.R. Comm., 97th–99th Sess., Oct. 12–30, 2009, Mar. 8–26, 2010, July 12–30, 2010, ¶¶ 20–27, U.N. Doc. A/65/40; GAOR, 65th Sess., Supp. No. 40 (2010).

173. The system of individual petitions under the Optional Protocol to the Covenant has been used to address issues under Article 4. *See* McGoldrick, *supra* note 33, at 382. As McGoldrick notes, the Committee has determined that notwithstanding the derogation, the state party has violated its obligations. *Id.* at 382. R

174. OPTIONAL PROTOCOL to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302.

tee has little ability to enforce its decisions, the European system and its review of decisions by the Committee of Ministers provide a stronger enforcement mechanism.[175] Again, however, there is a real problem of timeliness and immediacy, as an ex post facto review several years afterward often may do little to actually protect human rights during the emergency situation. Furthermore, even if there is access to an individual complaints mechanism, the consideration by the treaty body relies on a case being brought, rather than on an automatic review of the derogation and state of emergency and its compliance with the treaty law.

Interstate complaints concerning states of emergency are permissible under both the Covenant and European system but are exceptionally rare.[176] The few cases in the European system of interstate complaints have been instances of complaints against Greece by various countries during the Greek military dictatorship in the 1960s, against Turkey in the 1980s, and complaints by the Irish to the European Court of Human Rights concerning U.K. emergency measures in Northern Ireland.[177] It is not expected that such processes will be used very much in future, mostly due to the political disincentives and diplomatic ramifications of one state putting another one "in the dock" for human rights issues.

There are also a wide range of relevant political processes and general bodies with a role in reviewing implementation of the relevant treaties. The Universal Periodic Review of the U.N. Human Rights Council is a process that has included a focus on the implementation of Article 4 of the Covenant.[178] The Special Procedures of the U.N. Human Rights Council, which include human rights' special rapporteurs and working groups, have addressed states of emergency.[179] Various other bodies and commissions

175. The Committee of Ministers oversees the states' changes to domestic law to achieve compatibility with the Convention or individual measures taken by the contracting state to redress violations. The European Court's decisions are usually complied with by the states. For general information on the Committee, see *About the Committee of Ministers*, COUNCIL EUR., http://www.coe.int/t/cm/aboutcm_en.asp (last visited Apr. 2, 2013). For an academic discussion, see generally Philip Leach, *The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights*, 3 PUB. L. 443 (2006).

176. For provisions on interstate complaints, see, for example, ICCPR, *supra* note 2, art. 41; ECHR, *supra* note 87, art. 33. R R

177. The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

178. The U.N. General Assembly in resolution 60/251 (2006) mandated the Council to "[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State *of its human rights obligations and commitments* in a manner which ensures universality of coverage and equal treatment with respect to all States." G.A. Res. 60/251, ¶ 5, U.N. Doc. A/RES/60/251 (Mar. 15, 2006) (emphasis added). References to concerns about states of emergencies have already featured in a number of Universal Periodic Review reports.

179. Special Rapporteur Despouy, in his annual report, suggested that other special rapporteurs and the Working Group on Arbitrary Detention pay attention to the issue. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 192. For references to states of emergency in the Working Group on Arbitrary Detention's reports, see Chairperson-Rapporteur of the Working Grp. on Arbitrary Det., *Rep. of the Working Group on Arbitrary Detention*, R

of inquiry, both connected to the United Nations and otherwise, have referred to derogations and states of emergency.[180]

From 1985 to 1997 there was a Special Rapporteur for States of Emergency mandated by the U.N. Human Rights Commission.[181] The details of the mandate are worth explaining, as it had a significant impact on the implementation of Article 4 of the Covenant.[182] The mandate in practice included inter alia drawing up an annual list of countries under a state of emergency, examining issues of compliance in an annual report, drawing up guidelines for development of legislation on the issue, and providing technical assistance.[183] The Special Rapporteur began an annual practice of publishing a list of the countries subject to a state of emergency, which was not limited to parties to the Covenant.[184] The publication of an annual list was a very important tool for transparency under the auspices of the United Nations. The Special Rapporteur was also active in approaching states and requesting information on actual or potential derogations and

¶ 72, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010) (by El Hadji Malick Sow) [hereinafter *Rep. of the Working Group on Arbitrary Detention*]; Chairperson-Rapporteur of the Working Grp. on Arbitrary Det., *supra* note 113, ¶ 64; Chairperson-Rapporteur of the Working Grp. on Arbitrary Det., *Civil and Political Rights, Including the Questions of Torture and Detention*, ¶ 59, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) (by Leïla Zerrougui); Working Grp. on Arbitrary Det., *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 38, U.N. Doc. E/CN.4/1995/31 (Dec. 21, 1994). There is also currently a U.N. Special Rapporteur for Human Rights in Counter-Terrorism. *See* Human Rights Res. 2005/80, ¶ 14, U.N. Doc. E/CN.4/RES/2005/80 (Apr. 21, 2005). R

180. Office of the U.N. High Comm'r for Human Rights, *Rep. of the International Commission of Inquiry on Libya*, ¶ 16, U.N. Doc. A/HRC/19/68 (Mar. 2, 2012); OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 151; Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, ¶¶ 186–187 (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf; *UN Human Rights Chief Welcomes Sri Lanka Report, Urges Further Investigation into Conduct of Final Stages of the War*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS. (Apr. 26, 2011), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10962&LangID=E. The U.N. Committee Against Torture, the Committee on Freedom of Association of the International Labour Organization, the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union, and the International Court of Justice have all dealt with these issues. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 23. R

181. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 13. R

182. The genesis for the special rapporteurship was a request of the now defunct expert body the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities. *See id.* ¶ 12.

183. *Id.* ¶¶ 13, 14; *see also* Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, annex I, U.N. Doc. E/CN.4/Sub.2/1991/28 (June 24, 1991) (by Leandro Despouy).

184. The first list of states was presented to the U.N. Sub-Commission in 1987. U.N. Special Rapporteur, *The Administration of Justice and the Human Rights of Detainees*, ¶¶ 7–8, U.N. Doc. E/CN.4/Sub.2/1987/19/Rev.1 (Jan. 5, 1988) (by Leandro Despouy). The fourth annual list, presented to the U.N. Sub-Commission in 1991, included sixty-one states in formal and de facto emergencies since 1985. Special Rapporteur for States of Emergency, *supra* note 183, ¶ 11. Even this list was likely to be incomplete. *See* FITZPATRICK, *supra* note 11, at 170–71. R R

met with a good level of cooperation, perhaps not surprisingly in light of the annual list.[185] This role naturally suffered like many U.N. special rapporteurs, however, from a lack of resources that inhibited the mandate holder's ability to gather and analyze information.[186]

The Special Rapporteur's thematic annual reports were important for setting out issues and making recommendations. The Special Rapporteur's final report in 1997, at the mandate's conclusion, highlighted the serious problems and need to prioritize the issue of human rights and states of emergency. It is regrettable that this mandate has not since been renewed.[187] The final report in 1997 included a recommendation for an updated General Comment, which was taken up and adopted by the Committee in 2001.[188] It is fair to say that the Special Rapporteurs' collective research and work on states of emergency moved the conceptual debate forward and provided significant foundations for the updated U.N. Human Rights Committee general comment.

There are a few key problems with monitoring and enforcement that exist both because of and despite the current implementation architecture. The implementation of the Article 4 obligation to declare a state of emergency and notify the Secretary-General as treaty depositary has been seriously deficient. The ICJ's study posits that this is for two main reasons.[189] First, there is no effective or permanent procedural mechanism established to deal specifically and systematically with derogations as they arise.[190] None of the human rights treaty bodies provide for any substantive action once a notice of derogation is received. In this regard, the U.N. Special Rapporteurs for States of Emergency recommended there be permanent monitoring of states of emergencies and derogations, including a mechanism enabling the Committee to maintain under consideration those countries of relevance.[191]

185. In preparing reports, the Special Rapporteur made requests of states for information, which to some extent reflected an "adversary procedure" that may develop into public debate. The practice was to send a note verbale to states requesting the fullest possible information and, generally speaking, governments responded positively to the requests. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 18, 64–66. R

186. The Special Rapporteur noted the substantial resources required for the thorough discharge of his mandate in his third annual list of states provided to the U.N. Sub-Commission. *See* Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, ¶¶ 24–26, U.N. Doc. E/CN.4/Sub.2/1989/30 (Aug. 16, 1989) (by Leandro Despouy).

187. The Special Rapporteur's work concluded in a final report in 1997. He proposed to the Sub-Commission that it "[m]aintain the study of the question of human rights and states of emergency as one of the highest priority items on its agenda." Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 16, 190. R

188. *Id.* ¶ 187.

189. ICJ STUDY, *supra* note 38, at 454. R

190. *Id.*; *see also* Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 263 (2003).

191. Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 12, 187. R

In 1982, the Dutch delegation to the Covenant's meetings of state parties suggested inter alia empowering the Human Rights Committee to institute special proceedings in the event of a state of emergency.[192] The Dutch suggestion was met with a procedural objection from the Soviet Union delegate, and the suggestion was not taken any further.[193] In 1982 and 1983, Human Rights Committee member Torkel Opsahl of Norway proposed an Article 40(1)(b) special report for states that would be triggered by a state of emergency's declaration.[194]. This proposal was rejected in the Committee on the basis of differing views on the Committee's authority and competence.[195] The first Special Rapporteur, Mrs. Nicole Questiaux, also proposed that the powers of the U.N. Secretary-General as the Covenant's depositary be extended to "seek[ing] additional information and explanations which would be transmitted to the States Parties and to the specialist bodies so that the international surveillance authorities have sufficient material on which to reach a decision."[196] This would, however, require a substantive monitoring role for the Secretary-General, who would need to make a judgment that the information provided by the derogating state was insufficient and more was required. This proposal is a large political step forward from current practice that would be strongly resisted by many states.

Second, the notice-of-derogation requirement is often disregarded by states without any real consequences. De facto states of emergency, essentially where states fail to notify at the international level, are a common problem to which the treaty bodies have drawn attention.[197] It has been suggested that from 1985 to 1997 at least twenty countries were in a de facto state of emergency.[198] The United States, for example, did not submit a notification of derogation under the Covenant after 9/11 "despite the official national proclamation of an emergency and the imposition of a wide range of legislative and executive policies derogating in practice from the rights protected under the Covenant."[199] The general problem of

192. NOWAK, *supra* note 38, at 86. R

193. *Id.*

194. *See* FITZPATRICK, *supra* note 11, at 93 (citing Torkel Opsahl, *Emergency Derogation from Human Rights*, 5 NORD. J. HUM. RTS. at 4 (1987)).

195. Opsahl, *supra* note 194, at 4. R

196. ICJ STUDY, *supra* note 38, at 454. The U.N. Working Group on Arbitrary Detention, for example, has recommended that as soon as it is informed of such a declaration, or a state invokes an emergency situation, an emergency mission by one of the U.N. special procedures should take place to verify on the ground whether the state of emergency meets the criteria. *See Rep. of the Working Group on Arbitrary Detention*, *supra* note 179, ¶ 98. R R

197. For a significant list of U.N. Human Rights Committee reports noting the nonreporting of states of emergency, see FITZPATRICK, *supra* note 11, at 91. The Special Rapporteur has also noted this. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 118. R R

198. *Id.* ¶ 119.

199. *See* Fitzpatrick, *supra* note 190, at 263; Frederic L. Kirgis, *Alleged Secret Detentions of Terrorism Suspects*, 10 AM. SOC'Y INT'L L. INSIGHTS (2006), *available at* http://www.asil.org/insights060214.cfm. The United States denies that Article 4 was applicable. *See Second and Third Periodic Report of the United States of American to the UN Committee on Human* R

states failing to provide the required notification makes it very difficult at the international level to obtain the information necessary to complete a meaningful review of the lawfulness of states of emergency and derogations. The lack of information, or any international institutional *trigger*, seriously weakens the efforts to address states of emergency in international fora and bodies.[200]

In summary, this review of practice demonstrates that the use and abuse of states of emergency is widespread and incongruent with its "exceptional" nature. States of emergency are central to serious human rights violations as illustrated by the cases of Syria and Egypt. States of emergency not only lead to violations of human rights during emergencies, but also can be a tool to institutionalize illegitimate measures to protect a state or government against dissent. As the Special Rapporteur has suggested, "in many cases states of emergency merely became the legal means of 'legalizing' the worst abuses."[201] Further, in a democracy, emergency measures that violate the human rights of minorities, for example antiterrorism measures, are often tolerated in part because they enjoy the support of the democratic majority.

There are serious limits to the enforcement of international human rights obligations concerning states of emergency. The power to derogate is recognized in the international human rights treaties, but that power is not easily protected against abuse. The usual challenges for enforcement of IHRL are compounded by the intensity of emergency situations and the lack of timeliness for international monitoring and review. For the treaty bodies, there is no automatic reaction consequent to a state's formal notification of derogation, which may be based on specious assertions and insufficient information. It can be years before the situation is properly scrutinized for its consistency with the treaty obligations. This deficiency is compounded by the fact that many states do not even bother to formally derogate as they are required to do. Dubious assertions of states of emergency therefore are often not seriously challenged, other than by human rights NGOs, despite the fact that they are often closely connected to serious human rights violations.

III. Problems with Bifurcating the Legal Question: Public Emergency and Proportional Measures

It is a foundational principle, accepted at least since 1955, that there are two key legal questions for a state of emergency.[202] The first asks

Rights Concerning the International Covenant on Civil and Political Rights, U.S. Dep't St. (Oct. 21, 2005), http://www.state.gov/j/drl/rls/55504.htm. The U.S. position, though, is partly driven by its refusal to accept that the Covenant's obligations may apply extraterritorially. *See id.* ¶¶ 468–469.

200. *See* ICJ Study, *supra* note 38, at 455. R

201. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 3. R

202. The U.N. Human Rights Committee confirmed this in its General Comment 29. General Comment No. 29, *supra* note 2, ¶¶ 2, 4; *see also* Gross & Ní Aoláin, *supra* note 45, at 630; Colin Warbrick, *States of Emergency—Their Impact on Human Rights: A Comparative* R

whether the emergency is of sufficient intensity to justify a derogation of human rights; and the second examines the proportionality of the measures of derogation in response to the threat posed by the emergency situation. These foundations have not been questioned in the literature, and it is also widely accepted that there is a conditional and temporal relationship between these two basic legal questions. As McGoldrick states, the "existence of a situation amounting to a public emergency that threatens the life of the nation is a fundamental condition *that must be met before* a state can invoke article 4."[203]

A. *Overview of Jurisprudential Interpretation*

The U.N. Human Rights Committee has dealt with only a limited number of complaints under the Optional Protocol that concerned Article 4 of the Covenant (complaints to the Committee are also known as communications). A high proportion of those complaints came from South America, in particular Uruguay during the 1970s and 1980s. While acknowledging a state's sovereign right to declare a state of emergency, the U.N. Human Rights Committee is generally said to assert "a measure of international supervision over that national determination."[204] In practice, it is more accurate to suggest that in communications before it, the Committee will rarely undertake an assessment of whether the emergency situation exists but will instead focus on the measures and alleged violations of the Covenant regardless of any derogation.[205]

Landinelli Silva v. Uruguay is one of the key communications that arose from the time of Uruguay's military dictatorship and state of emergency.[206] The complainants had been effectively banned by an emergency law from running for political office for fifteen years, in contravention of Article 25 of the ICCPR. The Uruguayan government had provided no significant information in its derogation notice on the nature of the public emergency or measures taken to address the emergency. The Committee did not find it necessary to clearly determine the existence of a state of emergency. It found that, even based on "*the assumption* that there exists a situation of emergency in Uruguay," the measures in question were not

Study by the International Commission of Jurists, 33 INT'L & COMP. L.Q. 233, 234 (1984) (book review) ("It has long been accepted there are two major kinds of decision involved. One is the existence of a situation of sufficient intensity to justify derogation at all; the other is the proportionality of the extent of the derogation made by a government in response to the measure of the threat posed by the emergency.").

203. McGoldrick, *supra* note 33, at 392 (emphasis added); *see also* Special Rapporteur's Tenth Report, *supra* note 1, ¶ 34. R R

204. McGoldrick, *supra* note 33, at 399–400, 400 n.128. To support this, McGoldrick refers to a number of communications concerning balancing of rights with national security, but none that focused on Article 4. *Id.* R

205. FITZPATRICK, *supra* note 11, at 101. R

206. Silva v. Uruguay, Commc'n No. 34/1978, H.R. Comm., ¶¶ 2, 3.1, U.N. Doc. CCPR/C/12/D/34/1978 (Apr. 8, 1981).

"necessary."[207] In essence, the legal assessment of the public emergency's existence was replaced by an assumption in favor of the state's assertion. Furthermore, in its relatively short decision, the Committee, while saying that Uruguay could not evade the obligations of the ICCPR, further implied its deference on the public emergency by emphasizing that "the sovereign right of a State to declare a state of emergency is not questioned."[208]

In the *Consuelo Salgar de Montejo v. Colombia* communication, the Colombian government submitted a notice of derogation to the treaty depositary in 1980 that made reference to the existence of a state of emergency in place since 1976.[209] The government asserted that this emergency "decree was issued because of the social situation created by the activities of subversive organizations which were disturbing public order with a view to undermining the democratic system in force in Colombia."[210] In reaching a decision, the Committee again did not determine whether or not there was a public emergency, but instead focused primarily on the government having notified derogation of the incorrect ICCPR articles and substantive rights affected by the derogation.[211] While the government had referred to "temporary measures" that limited Articles 19(2) and 21 of the Covenant (freedom of expression, right of peaceful assembly), the Committee found in substance a violation of Article 14(5) on the right of appeal "because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal."[212] The Committee therefore failed again to address the existence of a state of emergency.

A similar approach to *Landinelli Silva* and *Consuelo Salgar de Montejo* has been employed in other communications before the Commit-

207. *See id.* ¶ 8.4 (emphasis added). The Committee found that there was "no attempt . . . to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary." *Id.* ¶ 8.2. Rather, it found that the measures against the authors "unreasonably restricted their rights under article 25 of the Covenant." *Id.* ¶ 9. This case has been seen by some, such as Fitzpatrick and Ghandi, as asserting the "principle of objective reviewability," *See* FITZPATRICK, *supra* note 11, at 98–100. She notes the Committee's avoidance of the emergency question, and refers to the Uruguay communications as a "missed opportunity" by the Commission. *Id.*

208. *Silva*, U.N. Doc. CCPR/C/12/D/34/1978, ¶ 8.3.

209. de Montejo v. Colombia, Commc'n No. R.15/64, H.R. Comm., ¶ 1.2 (Dec. 18, 1979), *in* Rep. of the H.R. Comm., 14th–16th Sess., Oct. 19–30, 1981, Mar. 22–Apr. 9, 1982, July 12–30, 1982, annex XV, U.N. Doc A/37/40 (Sept. 22, 1982); GAOR, 37th Sess., Supp. No. 40 (1982).

210. *Id.* ¶ 7.2.

211. *See id.* ¶ 10.3. General Comment 29 does not provide that notification of the substantive articles derogated is a requirement of notification. However, the U.N. Human Rights Committee's guidelines for Article 40 periodic reports provide that for Article 4, "[f]ull explanations should be provided in relation to every article of the Covenant affected by the derogation." H.R. Comm., *Guidelines for the Treaty-Specific Document to Be Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. CCPR/C/2009/1 (Oct. 4, 2010).

212. *de Montejo*, U.N. Doc. A/37/40, annex XV, ¶¶ 10.2, 11.

R

tee.[213] Additionally, states of emergency have been used by states to engage in violations of rights that are nonderogable under the ICCPR (such as Article 7's prohibition against torture), meaning that the purported derogation itself is irrelevant.[214] In some instances, individual Committee members have expressed concerns as to the justification for a particular public emergency, while in other instances some members have "suggested that Article 4 allows states considerable latitude in deciding when a public emergency justifie[s] derogation and that the determination concerning the emergency situation [is] a sovereign act."[215] While the Committee has formally preserved its ability to engage in reviewing states of emergency, in actual fact has been reluctant to do so and has dealt with decisions in other ways.

The main general statement on the Committee's interpretation of Article 4 is found in its General Comment 29 of 2001.[216] This superseded an earlier and more limited general comment that was adopted in 1981 in the context of state reports and communications from Chile, Syria, Colombia, and Uruguay.[217] The more recent General Comment addresses a wide range of issues, which for present purposes are not central to this Article. In terms of what constitutes a public emergency, the Committee tried to grapple with this issue but struggled to go much beyond the general principles already articulated in Article 4. The Committee did not attempt to provide a comprehensive definition for a public emergency (unlike in the *Greek Case* in European Convention jurisprudence, which is described below). However, some of the characteristics of a public emergency that threatens the life of the nation were described, including "armed conflict," "a natural catastrophe, a mass demonstration including instances of violence [and] a major industrial accident."[218] The Committee restated that

213. *See, e.g.*, Motta v. Uruguay, Commc'n No. R.2/11, H.R. Comm., ¶ 15 (Apr. 25, 1977), *in* Rep. of the H.R. Comm., 8th–10th Sess., Oct. 15–26, 1979, Mar. 17–Apr. 3, 1980, Aug. 1–July 14, 1980, annex X, U.N. Doc. A/35/40 (Sept. 18, 1980); GAOR, 35th Sess., Supp. No. 40 (1980) (stating that the government had not "made any submissions of fact or law to [j]ustify" derogations under Article 4); *see also* de Guerrero v. Columbia, Commc'n No. 45/1979, H.R. Comm., ¶ 3.2, U.N. Doc. CCPR/C/15/D/45/1979 (Mar. 31, 1982); Touron v. Uruguay, Commc'n No. 32/1978, H.R. Comm., ¶ 10 (Mar. 31, 1981), *reprinted in* H.R. Comm., Selected Decisions Under the Optional Protocol, at 61, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985); de Bouton v. Uruguay, Commc'n No. 37/1978, H.R. Comm., ¶ 7 (Mar. 27, 1981), *reprinted in* H.R. Comm., *supra*, at 72.

214. *de Guerrero*, U.N. Doc. CCPR/C/15/D/45/1979, ¶ 12.2; Silva v. Uruguay, Commc'n No. 34/1978, H.R. Comm., ¶ 17, U.N. Doc. CCPR/C/12/D/34/1978 (Apr. 8, 1981). The Colombian cases of state-of-emergency decrees often involved nonderogable rights, so the Committee saw no need to analyze Article 4.

215. *See* McGoldrick, *supra* note 33, at 401. R

216. *See generally* Joseph, *supra* note 164 (providing a detailed review of General Comment 29). R

217. H.R. Comm., General Comment 5: Article 4 (Derogations) (1981), *reprinted in* United Nations, *International Human Rights Instruments*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008); Nowak, *supra* note 38, at 86, 88. R

218. General Comment No. 29, *supra* note 2, ¶¶ 3–5. R

the emergency must threaten "the life of the nation" but did not elaborate further on the meaning of this central phrase.

The Committee's key statement on the proportionality test was that "the extent strictly required by the exigencies of the situation" concerns the "*duration, geographical coverage and material scope of the state of emergency* and any measures of derogation resorted to because of the emergency."[219] Importantly, this statement clarifies that the question of proportionality includes an assessment of the nature of the public-emergency situation.

The General Comment's overall effect in elaborating the public-emergency question is more modest than is at first apparent, especially compared to the rest of the General Comment, which is quite progressive. The Committee's general statements also reflected much of what had been developed in the various codification and progressive development projects in IHRL. However, the Committee's limited further elaboration of public emergency has not featured centrally in any subsequent communications. In the absence of a well-developed interpretation of the exact definition of a public emergency, the General Comment's restatement of general principles on public emergency provided little further clarity and left significant discretion.

In contrast, the jurisprudence of the European system is more developed as a result of a number of cases on derogations under Article 15 of the European Convention. As indicated above, the Convention text is quite similar to the Covenant. The first derogations issues before the European Commission of Human Rights were the *Cyprus* cases, which concerned two interstate applications by Greece brought against the United Kingdom in 1956 that alleged mistreatment of prisoners.[220] The Commission declared itself competent to review the derogation and found in favor of the United Kingdom, holding that "the Government should be able to exercise *a certain measure of discretion* in assessing the extent [of measures] strictly required by the exigencies of the situation."[221] The Commission's measure of discretion, which was not argued by the parties, applied only to the secondary legal question concerning proportionality, *not* to the existence of the public emergency.[222]

Lawless v. Ireland was the next Article 15 case, and it concerned the government's extrajudicial detention of Irish Republican Army members

219. *Id.* ¶ 4 (emphasis added). The impact of the emergency can clearly be geographically contained, which is implicit in the Committee's indication that emergency measures can be limited in geographic coverage. *See* Joseph, *supra* note 164, at 83. R

220. Greece argued that the alleged mistreatment of prisoners in Cyprus related to obligations that could not be derogated from under Article 15. Greece v. United Kingdom (*First Cyprus*), App. No. 176/56, 1958–1959 Y.B. Eur. Conv. on H.R. 174, 174 (Eur. Comm'n on H.R.).

221. *Id.* at 176 (emphasis added); *see also* Higgins, *supra* note 33, at 296–97. R

222. Gross & Ní Aoláin, *supra* note 45, at 631. R

in Ireland (and not in Northern Ireland, a part of the United Kingdom).[223] The majority of the Commission members in the report had accepted that a "certain discretion—*a certain margin of appreciation*—must be left to the [Irish] Government" in determining a public emergency that threatens the life of the nation (that is, an extension of the measure of discretion from the *Cyprus* cases to the public-emergency question).[224] The minority of members, however, did not support this new "margin of appreciation" concept, and argued either that the situation in Ireland did not reach the threshold of a public emergency, or that there was no need legally for such a determination.[225]

After it was heard by the Commission, the *Lawless* case was then considered in the European Court of Human Rights. The Court's decision in *Lawless* made clear that "it is for the Court to determine" if a government has complied with Article 15.[226] It indicated that the "natural and customary meaning" of the words of Article 15(1) were sufficiently clear as "they refer to *an exceptional situation of crisis or emergency* which affects the *whole population* and constitutes *a threat to the organised life of the community* of which the State is composed."[227] The Court did not refer specifically to the margin of appreciation, although it upheld the Irish government's position even though its emergency measures would have otherwise violated the Convention. The Court's reasoning was that terrorist activity in Northern Ireland (that is, in the United Kingdom) was an exceptional crisis threatening the life of Ireland as a nation.[228] There are

223. Both the Commission and Court found a violation of Article 5 of the right to liberty and security, which therefore raised the question of applicability of Article 15 on derogations. *See* Lawless v. Ireland (No. 3), App. No. 332/57, 1961 Y.B. Eur. Conv. on H.R. 438, ¶¶ 15, 20 (Eur. Ct. H.R.); Lawless v. Ireland, App. No. 332/57, Eur. Ct. H.R. (ser. B) at 66 (Eur. Comm'n on H.R. 1960–1961).

224. *Lawless*, Eur. Ct. H.R. (ser. B) at 82, 90 (emphasis added).

225. *Id.* at 93–94, 98,99, 101–02.

226. *Lawless*, 1961 Y.B. Eur. Conv. on H.R. ¶ 22.

227. *Id.* ¶ 28 (emphasis added). The Commission's President also raised the margin of appreciation with the Court in the hearing. *See Lawless*, Eur. Ct. H.R. (ser. B) at 408. The French version of this statement, which was the authoritative judgment, included the word that corresponded with "imminence." *Lawless*, 1961 Y.B. Eur. Conv. on H.R. ¶ 28.

228. The Court found the emergency was

> reasonably deduced by the Irish government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957 . . . .

Id. ¶ 28. In terms of the measures' proportionality, the Court concluded that the administrative detention "of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances" for five key reasons: (i) the ordinary law was unable to check the "growing danger," (ii) ordinary courts did not "suffice to restore peace and order," (iii) the gathering of evidence was meeting with

various commentators who argue (quite reasonably) that terrorism in Northern Ireland did not constitute an actual or imminent serious threat to Ireland.[229] As one commentator noted, despite not referring to the margin of appreciation the Court's "whole approach to the matter was consistent with that of the Commission."[230]

The *Greek Case* followed and were concerned with the suspension of aspects of the Greek Constitution and rule by martial law after a military coup in 1967.[231] The Commission was faced with the unusual situation that a military government had seized power by force. The Commission expressly acknowledged the margin of appreciation concept under Article 15 after it was pleaded by Greece.[232] This was before Greece eventually withdrew from the Convention's jurisdiction, and the case was able to be heard by the European Court. In a key statement of principle from the *Greek Case*, the Commission, after quoting the *Lawless* definition of public emergency, declared that a public emergency must have the following characteristics:

> (1) It must be actual or imminent.
>
> (2) Its effects must involve the whole nation.
>
> (3) The continuance of the organised life of the community must be threatened.
>
> (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[233]

The Greek military government argued that the "revolution" (that is, the military coup) was necessary to protect the state from communists and their allies, and that the threat from these groups had brought about the state of emergency and the need for derogation. While the Commission found "it established beyond dispute" that Greece had experienced political instability, tension, and public disorder,[234] it rejected the military gov-

great difficulties, (iv) the raids were carried out in Northern Ireland but prepared in Ireland, and (v) sealing the border would have serious and disproportionate consequences. *See id.* ¶ 36.

229. *See, e.g.*, FITZPATRICK, *supra* note 11, at 197; SVENSSON-MCCARTHY, *supra* note 33, at 293–94.

230. A.H. Robertson, Lawless *v.* the Government of Ireland *(*Second Phase*)*, 37 BRIT. Y.B. INT'L L. 536, 544 (1961). The weakness of the Court's reasoning becomes clearer reviewing the votes of the Commission, in which five out of fourteen members concluded the special powers were not justified by Article 15(1). *Lawless*, Eur. Ct. H.R. (ser. B) at 81.

231. The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

232. *Id.* ¶ 152 (quoting *Lawless*, 1961 Y.B. Eur. Conv. on H.R. ¶ 28).

233. *Id.* ¶ 153.

234. *Id.* ¶¶ 59, 156.

R
R

ernment's arguments.[235] The conclusion adopted by ten of fifteen Commission members was that there was no public emergency.[236] Therefore, the Commission applied similar principles as it and the Court applied in the *Lawless* case, although it reached the opposite result. As Svensson-McCarthy points out, though, as "compared to the *Lawless* case, the Greek situation was . . . marked by much more violence and unrest within the national borders."[237] In addressing the "public emergency" in Greece, the Commission effectively "lifted the veil" by considering the *causation* of the public emergency. This point was recognized by the dissenting opinion of Judge Ermacora, who observed that there was a public emergency as defined by the Convention, but that it seemed "incompatible" for the government to have resort to Article 15 since it was the government itself that was responsible for the situation.[238]

There have been various European cases since the *Lawless* and *Greek* cases that have built on the jurisprudential foundations of these early cases.[239] *Ireland v. United Kingdom* is one worth explaining, as it sheds some further light on the test of proportionality. This was an interstate case concerning various measures adopted in Northern Ireland by the British government. The two state parties had agreed there was a state of emergency, and the Court found that the "degree of violence, with bombing, shooting and rioting was on a scale far beyond what could be called minor civil disorder."[240] In this case, the Commission and Court modified one aspect of their prior reasoning by accepting that the emergency was limited to Northern Ireland and therefore did not need to affect the entire nation (as set out in the *Greek Case*).

The Court in *Ireland* then developed the discussion on proportionality in such a way as to demonstrate the close connection between the public-emergency situation and the emergency measures. It stated that in view of the "massive wave of violence and intimidation," the government was "reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for."[241] At the same time as considering the measures in light of the public emergency, the Court stated that it was not its "function to substitute for the British Government's assessment any

235. The Commission did not find that there was a real risk of a creation of a communist government at the pending elections, nor that there would be public disorder beyond the capability of the powers of police to control. *See id.* ¶¶ 159, 164.

236. *Id.* ¶ 165 n.290.

237. SVENSSON-MCCARTHY, *supra* note 33, at 305. R

238. *The Greek Case*, 1969 Y.B. Eur. Conv. on H.R. ¶¶ 213–215 (dissenting opinion of Mr. Ermacora).

239. *E.g.*, Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260; Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) at 30 (1993); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

240. Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 117 (1976).

241. *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 81.

other assessment of what might be the most prudent or most expedient policy to combat terrorism."[242] The Court concluded that "the limits of the margin of appreciation left to the Contracting States by Article 15 § I were not overstepped by the United Kingdom when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975."[243] The Court accordingly left no doubt concerning the degree of its deference to the derogating state.[244] In subsequent cases, the Court has continued to provide only cursory analysis of the factual basis for the state of emergency and has not overruled any government's assertion of a public emergency.[245]

The Court's decision in 2009 in *A & Others v. United Kingdom,* the Belmarsh Detainees case, was therefore eagerly awaited as an opportunity to settle the jurisprudence. It was the Court's first pronouncement for some time on Article 15, including after the September 11 terrorist attacks, and also ultimately resulted in a unanimous decision of the Grand Chamber (the highest level within the Court). The case concerned legislation providing for indefinite detention without trial of foreign nationals suspected of terrorism that the United Kingdom was unable to deport. The detention framework had been established pursuant to an Article 15 derogation by the United Kingdom. In the House of Lord's decision of 2004, it was held that the existence of the public emergency was a "political question" not for the court, but that the proposed measures would not

242. *Id.* at 82.

243. *Id.*

244. The Court stated:

> It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 . . . leaves those authorities a wide margin of appreciation.

Id. at 78–79. Yet as a claw back, although perhaps not a convincing one, the Court added that states "do not enjoy an unlimited power in this respect," and the "domestic margin of appreciation is . . . accompanied by a European supervision." *See id.* For discussion, see FITZPATRICK, *supra* note 11, at 198. R

245. For example, the full treatment of the situation of emergency issues was as follows in the Aksoy case: "The Court considers, in light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a 'public emergency threatening the life of the nation.'" *See* Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, ¶ 70. In other cases such as *Brannigan*, the Court has noted generally that it "must give appropriate weight to such relevant factors as the nature of the rights affected by the emergency derogation, the circumstances leading to, and the duration of, the emergency situation." Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) at 50, ¶ 43 (1993). This is applied questionably in practice. *See* SVENSSON-MCCARTHY, *supra* note 33, at 591. R

be proportionate and therefore were a violation.[246] There was a vocal dissenting judgment by Lord Hoffman asserting that the terrorist threat was indeed a question for the court and did not amount to a threat to the life of the nation. In Hoffman's view, "[t]errorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community."[247]

The European Court of Human Rights dealt with the case in a quite different way from the House of Lords. It endorsed a general position for a wide *margin of appreciation*, both on existence of the emergency *and* the proportionality of measures. It stated:

> The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the *presence of such an emergency* and on the *nature and scope of the derogations necessary* to avert it. Accordingly, in this matter a *wide* margin of appreciation should be left to the national authorities.[248]

The European Court was deferential to, rather than concerned by, the fact that the United Kingdom was the only European government that felt it necessary to derogate under the Convention post-9/11.[249] The Court dismissed the dissenting opinion of Lord Hoffman, relied on by the applicant, by stating that Hoffman had "interpreted the words as requiring a threat

246. *See* A & Others v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68, ¶¶ 29, 43 (appeal taken from Eng.).

247. *Id.* ¶ 96. Lord Hoffman stated:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. . . . The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

Id. ¶¶ 96, 97.

248. A & Others v. United Kingdom, App. No. 3455/05, ¶ 173 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403 (emphasis added); *see also id.* ¶ 184.

249. *Id.* ¶ 180. The Court said:

> While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them.

to the organised life of the community which went beyond *a threat of serious physical damage and loss of life*."[250] The Court said it had in the past concluded emergency situations existed even though "the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman."[251] However, the Court said little regarding the interpretation of its own threshold (that is, "a threat of serious physical damage and loss of life") and merely referred to taking into account a "broader range of factors" than Hoffman.[252]

This acceptance of a state of emergency in the United Kingdom before any actual terrorist attack by Al Qaeda or its sympathizers provided a broad precedent for the applicable threshold in many other situations. The public emergency did not threaten the United Kingdom's institutions, but rather it seemed (judging from Hoffman's dissent and the fact that the court did not reject this point) based in substance on a threat to the safety of the British people. Most concerning, however, was the Court's conclusion that it "accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation."[253] This assessment was simply incorrect. The House of Lords had made it clear that it deferred to the British executive and legislature as the public emergency was a political question of "relative institutional competence," rather than applying a margin of appreciation and retaining the ultimate power to judicially review (as the European Court did).[254]

The European Court agreed with the House of Lords (accurately this time) that "the question of proportionality is ultimately a judicial decision,"[255] though for the Court this was complemented by a professed *wide* margin of appreciation.[256] This is reflected in the threshold the Court erected for interfering with the national determination of the public emergency: "the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had *misinterpreted or misapplied* Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was *manifestly unreasonable*."[257]

Id. The Court also indicated that the House of Lords is part of the "national authorities" for the purposes of the margin of appreciation and takes the position of being deferential to the House of Lord's decision. *Id.* ¶ 174.

250. *Id.* ¶ 179 (emphasis added).

251. *Id.*

252. *Id.*

253. *Id.* ¶ 181.

254. A & Others v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 29 (appeal taken from Eng.); *see also infra* note 330 (quoting Lord Bingham of Cornwall).

255. *A & Others*, App. No. 3455/05, ¶ 184.

256. *Id.*

257. *Id.* ¶ 174 (emphasis added). To add to the conceptual confusion, the Court states that for a "fundamental right," such as the right to liberty, the Court will consider whether it is a "genuine response to the emergency situation," to ensure is the measures are "*fully justified* by the special circumstances of the emergency," and whether "adequate safeguards were provided against abuse." *Id.* ¶ 184 (emphasis added). The right to liberty has been engaged in

This regrettably suggested that misinterpretation, misapplication, or manifest abuse were the real standards by which the Grand Chamber would set aside the deferential margin of appreciation, rather than measures that cannot be shown as "strictly required by the exigencies of the situation" (that is, the wording of Article 15). Finally, the Court also rejected the U.N. Human Rights Committee's view that measures must be exceptional and temporary in nature. The Court stated that it "has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the questions of proportionality of the response may be linked to the duration of the emergency."[258]

The unanimous decision by the Grand Chamber of the European Court in *A & Others* served only to consolidate the problems in the European jurisprudence on Article 15. The case stands for general principles that simply do not work, are not able to protect human rights during an emergency, and are internally inconsistent. It provided a weak threshold for both the emergency situation and proportionality of measures, including by expressly endorsing a wide margin of appreciation on both legal questions—public emergency and proportionality of measures. However, the foundations of the Grand Chamber's reasoning in *A & Others,* including on margin of appreciation, are not rock solid, due to a feeling that perhaps the Court would have reasoned differently if there had been no House of Lords decision to rely on. Even if so, the judicial reasoning is hardly satisfying.

In summation, a review of the European jurisprudence evidences a pattern of caution and deference in which the Court has failed to impose strict and objective standards for derogations.[259] Since *Lawless,* the margin of appreciation has featured in all cases before the Commission and the Court on derogations, and more recently it has usually been a *wide* margin of appreciation. Aside from the *Greek Case*, the Commission and Court have consistently adopted a deferential approach to governments' assertions of a public emergency.[260] The European judiciary "chose to defer to the 'better position' of the national authorities both to determine the

---

nearly all the Article 15 cases, and these tests and principles if applied would be inconsistent with any margin of appreciation.

258. *Id.* ¶ 178. The U.N. Human Rights Committee by contrast states that the "[m]easures derogating from the provisions of the Covenant must be exceptional and *temporary* in nature." *See* General Comment No. 29, *supra* note 2, ¶ 2 (emphasis added). R

259. As Svensson-McCarthy comments on the European jurisprudence, "[c]onsiderable uncertainty also surrounds the question of the burden of proof and the level of evidence required to show the existence of a public emergency." SVENSSON-MCCARTHY, *supra* note 33, at 324, 618. The ostensibly robust standards discussed above—that is, "strictly required by the exigencies of the situation," *see* ECHR, *supra* note 87, art. 15, "the crisis or danger must be exceptional," The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1, ¶ 153 (Eur. Comm'n on H.R.)—have fallen by the wayside. Hartman states that the use of the margin of appreciation has "prevented interpretation of 'strictly required' meaning essential or indispensable." Hartman, *supra* note 33, at 31, 32, 35. R R R

260. *See* FITZPATRICK, *supra* note 11, at 197. R

existence of an emergency and to select measures."[261] This makes it difficult to see how the Convention can protect human rights in an emergency in Europe, or more importantly to see how people may be protected from abuse by governments in a state of emergency. Furthermore, with the Grand Chamber decision in *A & Others*, it is now settled case law that a *wide* margin of appreciation applies to *both* the determination of an emergency *and* proportionality of measures.

B. *Conceptual Challenges in the Jurisprudence*

The U.N. and European jurisprudence on states of emergency and derogations reveal a number of key themes and issues that challenge the effective interpretation and application of IHRL. There are three particular issues that engage conceptual problems and that may also concern the underlying theoretical debates mentioned above in Part I. These issues will each be discussed in turn below: (a) the margin of appreciation, (b) terrorism as a public emergency, and (c) causation and protection of the government from opposition.

1. Margin of Appreciation

The margin of appreciation is commonly explained as the idea that each European society is "entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or different moral convictions."[262] The margin of appreciation is the central conceptual problem of the European jurisprudence on states of emergency. While not mentioned in the *travaux préparatoires* of the European Convention,[263] it has become integral to the cases and has also been endorsed in the Venice Commission opinion concerning the protection of

261. *Id.* at 201 (referring to the *Lawless* and *Ireland* cases).

262. Benvenisti, *supra* note 8, at 843–44; *see also* Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115–16 (2005); Lord Lester, *The European Convention on Human Rights in the New Architecture of Europe: General Report*, *in* 8th International Colloquy on the European Convention on Human Rights, Budapest, Hung., Sept. 20–23, 1995, at 227, 237. Its supporters "endors[e] the doctrine as a realistic and appropriate tool by which an international court facilities its dialogue concerning sensitive matters with national legal and political systems and with their unique values and particular needs, . . . reflect[ing] the twin aspects of subsidiarity and cultural diversity." Gross & Ní Aoláin, *supra* note 45, at 627. It has been seen as balancing the *sovereignty* of states with the need to ensure the observance of the human rights obligations in the Convention. *See* R. St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 123 (R. St. J. Macdonald et al. eds., 1993).

263. *See, e.g.*, HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 14 (1996); *see also* Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L.Q. 638, 639 (1999); Nicholas Lavender, *The Problem of the Margin of Appreciation*, 4 EUR. HUM. RTS. L. REV. 380, 381 (1997); McHarg, *supra* note 41.

human rights in emergency situations.[264] By contrast, the U.N. Human Rights Committee has rejected the margin of appreciation for interpretation of the Covenant.[265] While the concept is used now in a range of ways in European Convention cases,[266] its genesis was the *Cyprus*, *Lawless*, and *Greek* cases concerning states of emergency. A key second and subsequent use of the concept has been to apply a margin of appreciation to the different social values in Europe in cases on freedom of expression and religion. This use may be seen as advancing judicial self-restraint on difficult issues.[267] It is also said to be closely connected to the *democratic* nature and processes of the states parties to the Convention.[268] This rationale engages some of the more theoretical debates in Part I above, such as separation of powers and democracy as a check on emergency powers.

While the margin of appreciation is now a well-established part of European jurisprudence, its "exact ambit and role are far from being fully developed."[269] As evidenced above, in the *A & Others* case, the margin of appreciation and Article 15's requirements are prima facie not easily reconciled despite the desire for them to be perceived as such. The Venice Commission unfortunately succumbed to these inherent contradictions when it stated that "[a]lthough the state authorities enjoy a margin of appreciation, *they must not go beyond* what is necessary or proportionate."[270] There is strong inconsistency in the application of this concept,

264. Venice Comm'n, *supra* note 40, ¶ 19 ("Nonetheless, Contracting States are allowed a '*margin of appreciation*' being the latitude or discretion allowed to a State in its laws and how it enforces them. This margin of appreciation extends to the choice of means to be used by the authorities to ensure that lawful demonstrations take place peacefully and to what extent interference is necessary."). R

265. This is the case even though express reference to this doctrine was made during the early discussions the Third (Human Rights) Committee in 1963. *See* Rep. of the 3d Comm., *Draft International Covenants on Human Rights*, ¶ 49, U.N. Doc. A/5655 (Dec. 10, 1963) (by Refslund Thomsen); YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE EHCR 17 (2002).

266. Examples include for the protection of public morals and children's literature. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 28 (1976). For an extensive list of the cases, issues, and articles, see *The Margin of Appreciation*, COUNCIL EUR., http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (last visited Apr. 2, 2013).

267. *See* Higgins, *supra* note 33, at 313. *But see* Gross & Ní Aoláin, *supra* note 45, at 628. R

268. Gross & Ní Aoláin, *supra* note 45, at 628. "James Fawcett has suggested that the margin of appreciation occupies a middle position between what a democratic State considers necessary and what is objectively necessary to attain a permitted end." Higgins, *supra* note 33, at 313; *see also* SVENSSON-MCCARTHY, *supra* note 33, at 305. R R

269. SVENSSON-MCCARTHY, *supra* note 33, at 318. It has also frustrated attempts at universal standards. *See* Benvenisti, *supra* note 8, at 845; *see also* Gross & Ní Aoláin, *supra* note 45, at 635 ("There are few cases, relatively speaking, in which the Court has made any real effort to delineate the criteria and parameters that are taken into consideration when deciding the actual use of the doctrine in a given case."). R R R

270. Venice Comm'n, *supra* note 40, ¶ 39 (emphasis added) (speaking in the context of freedom of assembly). R

and the results range from an objective examination of the limitations of the margin to a total abdication by the courts and tribunals of their role in assessing states' compliance. The heart of the problem is the subjectivity and elasticity of the margin of appreciation concept, which is further compounded by invoking either a *wide* or *narrow* margin.

The margin of appreciation concept has become a tool that provides an easy way out for the European Court when faced with difficult state-of-emergency cases. As Svensson-McCarthy accurately sums it up:

> [W]hen the Court emphasises the limits of its powers of review under Art. 15 at the same time as it grants a "wide" margin of discretion to the High Contracting Parties, it inevitably conveys the impression of wanting to avoid having to make rulings against governments except in manifestly abusive cases.[271]

In this regard, the Court "essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses."[272] The margin of appreciation's inherent deference to states to resolve difficult political and moral decisions is in part justified by the liberal democratic nature of the states, and thus an inherent faith by the courts in the legitimacy and lawfulness of their decisions rooted in liberal democratic theory. Yet the context in which the margin is most frequently applied illustrates an inherent contradiction between this rationale and another inherent aspect of liberal democracy: the role of the judicial branch and the law in safeguarding the minority against a "tyranny of the majority." Thus, as Eyal Benvenisti points out, a doctrine grounded in the legitimacy of democratic decision making is inappropriate where the conflict concerns treatment of the minority by the majority—a province of the judiciary in liberal democratic theory.[273] Nearly all the European cases on states of emergency can be cast as involving treatment of minorities by majorities (for example, Northern Ireland and Catholics, Turkey and the Kurds, the United Kingdom and foreigners of Arab origins).

271. Svensson-McCarthy, *supra* note 33, at 314–15; *see also* Benvenisti, *supra* note 8, at 844 ("Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards."). As the ICJ report states, there is potential for a "'double standard' or a reluctance to scrutinize closely the actions of a country enjoying a generally positive image with regard to human rights practices." *See* ICJ Study, *supra* note 38, at 455. Gross and Ní Aoláin in their major study suggested that the "deep reasons for the [European jurisprudence] according the widest margin of appreciation . . . are not explicitly stated in the Court's judgments." Gross & Ní Aoláin, *supra* note 45, at 637. These seem to include the difficulty in replicating the conditions for the decision that the government faced at the time, the "considerations of the Court's own legitimacy particularly as a supranational body seeming to intervene in matters so close to 'raw' nerves of national sovereignty," and the "realization that proper functioning of the Convention system depends on the cooperation of states in the absence of meaningful enforcement mechanisms." *Id.* R R R

272. Benvenisti, *supra* note 8, at 853. R

273. *See id.* at 853–54.

Despite the problems with the margin of appreciation, even some of its strongest critics do not advocate that it be done away with entirely, but rather applied restrictively.[274] Higgins, for example, criticizes the concept but suggests that the margin of appreciation applies to the existence of the state of emergency *only* and not to the proportionality of measures.[275] The challenge to this suggestion is determining whether the two questions—public emergency and proportionality of measures—are sufficiently mutually exclusive to apply the margin of appreciation to one and not the other. As demonstrated above, the judicial assessment of proportionality requires the "exigencies of the situation" to be the yardstick against which the proportionality of any measures are considered. Where there is judicial deference (that is, through the margin of appreciation) or avoidance in assessing the emergency situation, there is a risk that the proportionality assessment takes place in the context of a government's inaccurate and unsubstantiated assertion of a public emergency. In other words, a court may need to consider the proportionality of measures that might be justified by a legitimate public emergency, but in a context where the court has already deferred to a government's unjustified assertion of public emergency. This can lead to a substantive deference to the government's assessment, which in turn corrupts the juridical assessment of proportionality since in reality the threshold of public emergency has not even been met.

Svensson-McCarthy is the sole commentator of IHRL who has begun to grapple with this complex issue and recognizes the symbiotic relationship between the two legal questions. She notes in the *Ireland v. United Kingdom* context that the reasoning "contains a fundamental contradiction, which follows from the fact that the Court expressly declined to make its own assessment of the strict necessity of the emergency measures on the ground that its task was limited to reviewing the 'lawfulness' of the derogatory measures under the Convention."[276] The problem with Higgins's and others' suggestion is that it does provide some logical support for the *A & Others* finding by the European Court that the margin of appreciation is applied to both questions, since it is not really possible to apply it only to the public-emergency question.

2. Terrorism: Threat, Duration, and Imminence

Terrorism poses a significant conceptual challenge to avoiding the abuse of states of emergency. In interpreting the ICCPR, the U.N. Human Rights Committee's General Comment 29 does not even mention terrorism as one of the frequent bases invoked for a state of emergency. However, while not discussed at the time of the negotiations of the Covenant

274. *See, e.g.*, Gross & Ní Aoláin, *supra* note 45, at 648–49 ("Only the narrowest of margins should be accorded the derogating government."). R

275. *See* Higgins, *supra* note 33, at 299–300 ("This writer believes that there are good reasons for not embracing the notion of margin of appreciation in regard to the existence of a public emergency, if that phrase amounts to anymore more than a mere reminder to the Commission that it may be difficult for it to verify all its facts."). R

276. Svensson-McCarthy, *supra* note 33, at 600. R

and European Convention, terrorism has become frequently invoked by states as the basis of an emergency and is the mainstay of the relevant cases in the European system. As is well known, the meaning of terrorism is controversial and it is not a clearly defined term under international law.[277] The distinction between "terrorists" and "freedom fighters" was contentious in the context of colonial oppression and states of emergency and still is today in situations such as the Occupied Palestinian Territories, the Kurds in Turkey, and the Tamils in Sri Lanka.

While opposing views exist,[278] it is not controversial to accept that terrorism may form the basis of a state of emergency. Terrorism may be viewed as a threat to the life of the nation, where "life of the nation" may refer to the physical population, the state's territorial integrity, or the function of the organs of the state.[279] It is very likely there are points in the history of Northern Ireland and Israel, for example, where terrorism has provided sufficient justification for the derogation of human rights under the relevant treaties. The robust focus of states on combating terrorism is well justified, but it has become mixed up with other issues, and whether or not it forms a justified basis of derogation in any particular situation is often problematic. The heart of the problem is that most terrorism is targeted at creating ongoing fear in the civilian population, and, as such, it often may not threaten the institutions of state and governance, nor be exceptional or temporary in nature. The point at which the threat of terrorism reaches the threshold necessary to satisfy a public emergency that requires derogation of human rights obligations is unclear.

In *A & Others*, the European Court of Human Rights drew a parallel between Northern Ireland and the British situation post-9/11 to justify the argument that terrorism may constitute a state of emergency. In making the comparison, the Court, quoting from *Ireland v. United Kingdom*, referred to "a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom."[280] The British notice of derogation post-9/11 used the terminology of a "terrorist threat" and "national security" to describe the public emergency but did not go beyond this to identify the nature or impact of the threat. Additionally, the derogation was at a time prior to any attacks on the United Kingdom.[281] As mentioned above, Lord Hoffman provided a dissenting opinion and focused on the lack of threat to "our institutions of government or our existence as a civil

277. *See, e.g.*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176bis, at 3 (Special Trib. for Leb. Feb. 16, 2011).

278. *See, e.g.*, Sub-Comm'n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-terrorism*, ¶ 37, U.N. Doc. A/HRC/Sub.1/58/30 (Aug. 3, 2006) (by Kalliopi K. Koufa) ("In general, only certain mercenary groups, not terrorist groups, have the capacity to threaten the existence of a State, and then only a small or poorly defended one.").

279. *See* Siracusa Principles, *supra* note 11, princ. 39(b). R

280. A & Others v. United Kingdom, App. No. 3455/05, ¶ 184 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403.

281. The U.K. government states in its derogation order that

community."[282] The European Court in *A & Others* rejected his argument and indicated that there was an "urgent need to protect the population of the United Kingdom from terrorist attack."[283] While there were similarities in the *Ireland* and *A & Others* cases, there were also great differences, particularly in the material impact that the Irish Republican Army had on the U.K. nation and its people as compared to the nascent Al Qaeda threat at that time.

The *level* of threat also needs to be considered alongside the *nature* of the threat in the context of proportionality of measures directed at that threat. The *A & Others* case, for example, illustrates a misconception by the United Kingdom of the threat forming the basis of its derogation. The British derogation identified "foreign nationals" in particular as the threat, and they were the target of the measures complained of and ultimately found in violation of the Convention. The Grand Chamber in *A & Others* referred to the 2005 London bombings, four years after the British derogation, to demonstrate that the public emergency was real and justified.[284] What the Chamber did not acknowledge was that the bombers were all British nationals and therefore not subject to the derogation actually in question (as the derogation addressed foreigners only). These finer but important points tend to get lost in the rhetoric of the "war on terror," which is used to justify extensive recourse by government to emergency powers.[285]

The principle that proportionality in part relies on the imminence of the threat posed by the public emergency, which has its origins in the *Greek Case*, has been repeatedly endorsed by commentators, including in scholarly IHRL projects. The Siracusa Principles ON THE LIMITATION AND

> [t]here exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being member of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

Human Rights Act 1998 (Designated Derogation) Order 2001, S.I. 2001/3644 (U.K.), *available at* http://www.legislation.gov.uk/uksi/2001/3644/made. The United Kingdom also justified its state of emergency by referring to U.N. Security Council resolutions 1368 and 1373, where the attacks were explicitly recognized as a "threat to international peace and security" and a "serious challenge and threat to international security." *Id.* art. 2, ¶ 2 (referring to S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2012) and S.C. Res 1373, ¶ 4, U.N. Doc. S/RES/1373 (Sept. 28, 2001)).

282. A & Others v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 96 (appeal taken from Eng.).

283. *A & Others,* App. No. 3455/05, ¶ 216.

284. *See id.* ¶ 177.

285. This point has been the subject of significant literature. *See, e.g.*, AGAMBEN, *supra* note 12, at 15–19; Fitzpatrick, *supra* note 190, at 252; Humphreys, *supra* note 13, at 679–80. R

DEROGATION OF PROVISIONS IN THE ICCPR,[286] for example, provide that "[e]ach measure shall be directed to an actual, clear, present or *imminent* danger and may not be imposed merely because of an apprehension of *potential* danger."[287] The juridical application of this principle and the precise and somewhat arbitrary distinction between imminence and potentiality is fraught. There is no example of a case involving terrorism where a treaty body has dealt seriously with this imminence issue, although it has featured in dissenting opinions. In the *Lawless* case, for example, five European Commission on Human Rights members dissented against the finding that the terrorist threat was a public emergency. Four of the members effectively suggested that the situation had not reached the threshold of public emergency, as it had persisted in a virtually unchanged form for years, and that the Commission had been overly deferential to the Irish Government's assertion.[288] The other Commission member adopted a similar position, but also indicated that he was not convinced it was necessary as a general matter to even make a legal determination of a public emergency.[289]

The essentially temporary nature of a state of emergency is part of its philosophical heritage and is also a confirmed principle in the literature.[290] The U.N. Human Rights Committee stated in General Comment 29 that "[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the *predominant objective* of a State party derogating from the Covenant."[291] As discussed above in Part II

286. Siracusa Principles, *supra* note 11, ¶ (i). The Siracusa Principles were the output of a group of thirty-one experts in international law, convened in 1984 by the ICJ, the International Association of Penal Law, the American Association for the ICJ, and the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. *Id.*

287. *Id.* ¶ 54 (emphasis added). Svensson-McCarthy, for example, defines an imminent threat as one "on the verge of breaking out at any moment." SVENSSON-MCCARTHY, *supra* note 33, at 299 (emphasis omitted); *see also id.* at 3, 292. Grossman states: "[T]he cause must be a real or imminent event. Mere potential dangers, latent or speculative in nature, do not warrant the proclamation of emergency conditions." Grossman, *supra* note 14, at 42. Oraá, for example, considers "imminent" to exclude any crisis situations that, however dangerous, are still only *potentially* so serious as to actually threaten the life of the nation. ORAÁ, *supra* note 15, at 27.

288. Lawless v. Ireland, App. No. 332/57, Eur. Ct. H.R. (ser. B) at 94–102 (Eur. Comm'n on H.R. 1960–1961).

289. *Id.* at 93.

290. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 69; Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 69, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) (by N. Questiaux); SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY 5 (1989); PARIS MINIMUM STANDARDS, *supra* note 11, ¶ 3(a); ORAÁ, *supra* note 15, at 30.

291. General Comment No. 29, *supra* note 2, ¶ 1 (emphasis added). Special Rapporteur Questiaux had stated something similar: "After this analysis, one clear fact emerges: above and beyond the rules which have just been enunciated, one principle, namely, the principle of provisional status, dominates all others. The right of derogation can be justified solely by the

concerning practice and problems, this suggestion has been honored in the breach, particularly for public emergencies based on terrorist threats. The European jurisprudence, for example, has focused mostly on the United Kingdom and Turkey and their respective terrorist emergencies.[292] Northern Ireland was subject to an entrenched terrorist emergency for nearly thirty years, and Turkey was engaged in a similar conflict for most of the time between 1970 and 1987, including almost the entirety of the seven years from 1980 to 1987.

More recently, the temporality issue has become important since 9/11, Al Qaeda, and the "war on terror."[293] The war against terrorism has risked becoming an entrenched state of emergency or "the permanent emergency."[294] As Fitzpatrick commented, "[n]o territory is contested; no peace talks are conceivable; progress is measured by the absence of attacks, and success in applying control measures (arrests, intercepted communications, interrogations, and asset seizures). The duration of 'hostilities' is measured by the persistence of fear that the enemy retains the capacity to strike."[295] In this regard, with a semiperpetual nature and the difficulty of threat assessment, terrorism poses a great problem for juridical assessment based on the agreed principles for states of emergency. Terrorism can become a form of entrenched public emergency that breaks down the theoretical distinction between the normal and the exceptional or even stretches the exceptional to become the norm.[296] The justification offered to the U.N. Human Rights Committee by Israel in 1998 on its state of emergency demonstrates the point well:

> [O]n the one hand, the State and its citizens have been subjected without cease to a grimly real existential threat, to an ongoing state of war with some of its neighbours whose policies still aim at Israel's destabilization or destruction, to campaigns of political violence which continue to exact a dreadful toll, and to full-scale armed conflict six times in nearly 50 years. On the other hand, aside from those periods of all-out war, Israel's civil and governmental institutions generally function uninterruptedly in normal fashion in the midst of the continuing conflict. As a matter of political reality, Israel's needs for a formal state of emergency will

concern to return to normality." Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *supra* note 290, ¶ 69. R

292. See the examples provided by Gross & Ní Aoláin, *supra* note 45, at 645–46. R

293. As pointed out, 9/11 and the "war on terror" were not new for issues of state emergency; rather, as Dyzenhaus says, "all that is new is the prevalence of the claim that this emergency has no foreseeable end and so is permanent." DYZENHAUS, *supra* note 12, at 2. R

294. Fitzpatrick, *supra* note 190, at 251. R

295. *Id.*

296. *See* Gross & Ní Aoláin, *supra* note 45, at 645. R

abate when it succeeds in concluding and implementing formal peace arrangements in the region.[297]

For entrenched states of emergency, in particular ones founded on threats of terrorism, time limits are often mentioned as a tool of mitigation. The U.N. Sub-Commission's updated *Preliminary Framework Draft of Principles and Guidelines on Human Rights and Terrorism* provided that "[g]reat care should be taken to ensure that exceptions and derogations that might have been justified because of an act of terrorism meet strict time limits and do not become perpetual features of national law or action."[298] This conflicts obviously with the Israeli government's arguments set out above. The idea of limited duration for states of emergency is reflected in many states' legal systems,[299] but as has been the case in Egypt, the United Kingdom, Sri Lanka, and other states, this is not an effective constraint, as often the emergency measures continue to be periodically renewed without much difficulty. The slippery slope from exception to norm illustrated by the use of terrorism to justify a state of emergency has also provided many states with a strong pretext for entrenched, institutionalized, and unjustified states of emergency. While it is a comfort that normal laws can address new terrorist threats, it has also meant that antiterrorism laws have in some cases become a safe haven for de facto emergency laws.[300]

3. Causation and Protection of the Government

The literature and jurisprudence on states of emergency does not focus on the issue of causation of the state of emergency. To the extent that a government is responsible for a violent crackdown on generally peaceful protests, triggering a state of emergency, there may be an inherent problem with causation of the public emergency. The U.N. Commission on Human Rights' debates in the 1950s recognized that it was difficult to give a precise definition to "the life of the nation" but it "was significant that

297. H.R. Comm., *Initial Report of States Parties Due in 1993: Israel*, ¶ 123, U.N. Doc. CCPR/C/81/Add.13 (June 2, 1998).

298. *See* Sub-Comm'n on the Promotion and Protection of Human Rights, *supra* note 278, ¶¶ 24, 37(b), 42. R

299. *See, e.g.*, 1958 CONST. art. 16 (Fr.) (permitting referral of the emergency after thirty days to the Constitutional Council, the President of the Senate, sixty Members of the National Assembly, or sixty Senators, and requiring a decision by them after sixty days on the continuance of the state of emergency); Emergencies Act, R.S.C. 1985, c. 22 (Can.) (referring to "special temporary measures"); Emergency Act 67 of 1977 § 2(1)(a) (S. Afr.) ("The President may . . . make such regulations as are necessary or expedient to restore peace and order and to make adequate provision for terminating the state of emergency.").

300. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 213, 115 Stat. 272, 285–86 (2001) (outlining the Act's "sneak and peak" provisions); Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 24–31 (Eng.) (prescribing special immigration procedures for suspected terrorists), considered in case cited *supra* note 246. R

the text did not relate to the life of the government or of the state."[301] This feeds into the point made by some commentators that a state of emergency cannot be invoked merely to defend a government against its political opponents.[302] While the *Greek Case* is a key example, the causation issue (that is, the military coup or revolution) was only raised in a few of the dissenting opinions of the European Commission members.[303] Similarly, the U.N. Human Rights Committee has only once recognized the causation issue, and then only impliedly, when in 1979 it examined Chile's continuing state of emergency and implied that the cause of the emergency was the military junta itself.[304]

In practice, the suppression of political dissent is unfortunately a rather common use of emergency measures, as demonstrated to varying degrees by Arab Spring countries such as Syria and Egypt. A government can use force to create a situation of violence that it utilizes as a pretext for derogating human rights. An even broader issue is that a government may use states of emergency to entrench control over a population that does not support its leaders. U.N. Special Rapporteur for States of Emergency Despouy, in his final report and after reviewing twelve years of practice on states of emergency, referred to "a growing tendency [by governments] to invoke ethnic issues and/or internal disturbances caused by social tensions due to economic factors linked to poverty, impoverishment or the loss of social benefits by significant sectors of the population."[305] The extensive report of the recent Bahrain Independent Commission of Inquiry also well demonstrates the nexus between longer-term social problems, government repression, and the existence of a state of emergency.[306]

C. *Enlarging the Scope of States of Emergency*

There is clearly a disconnect between the principles cited by international treaty bodies in the relevant international cases, periodic reviews, and general comments and those same bodies' actual practice in determin-

301. Comm'n on H.R., Summary Record of the 330th Meeting, 8th Sess., June 10, 1952, at 4, U.N. Doc. E/CN.4/SR.330 (July 1, 1952).

302. Svensson-McCarthy states that "the concept of public emergency cannot be invoked merely to defend the government in power at the price of muzzling political opponents." Svensson-McCarthy, *supra* note 33, at 240. Nowak refers to "dictatorships" that "misuse the tool of emergencies to maintain their own positions of power." Nowak, *supra* note 38, at 84. R R

303. *E.g.*, The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1, ¶ 214 (Eur. Comm'n on H.R.) (dissenting opinion of Mr. Ermacora) (observing that there was a public emergency as defined by the ECHR, but that it seemed "incompatible" for the Greek government to have resort to Article 15 since it was the government itself that was responsible for the situation).

304. Rep. of the H.R. Comm., *supra* note 133, ¶ 78. R

305. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 36. R

306. *See generally* Bahr. Indep. Comm'n of Inquiry, Report of the Bahrain Independent Commission of Inquiry ch. II (2011), *available at* http://www.bici.org.bh/BICIreportEN.pdf (discussing the historical background).

ing a state of emergency and assessing the proportionality of emergency measures. Almost every complaint and case of the international treaty bodies has implicitly accepted the government assertion of a state of emergency. This cannot reflect reality. As Green comments, "a critical onlooker would be justified in concluding that the chances of a state being found guilty of wrongly declaring an emergency are somewhat remote."[307] The fine distinctions in the law—for example, imminence versus potentiality, temporality versus normality—are not upheld in practice. The problem is well summed up by Svensson-McCarthy, who notes that "[a]lthough the notion of a public emergency might be defined in the abstract with relative ease, the application *in concreto* of such definition gives rise to numerous legal problems to which, so far, either only partial solutions have been found, or none at all."[308]

The judicial reluctance or indifference to assess de novo the state of emergency, while retaining the formal legal authority to do so, has contributed to a dilution of the law's normativity.[309] Each time a court or treaty body only enters into an assessment on proportionality, even if it comments very little on the state of emergency, it often implicitly concedes the government's position and contributes to the enlargement of the scope of what may be deemed a public emergency. As demonstrated above, this is reflected in state practice and arguments. It leads to a body of jurisprudence under which probably a significant portion of the world's states at any given time could plausibly, but unjustifiably, assert a state of emergency—in relation to terrorist threats, for example—and derogate from their human rights obligations. Moreover, this approach also opens itself to deeper criticisms concerning the role of law in an emergency, which is linked to the theoretical debates in Part I. As Dyzenhaus comments after analysing the case law, "[t]he judicial record largely support's Schmitt's claims, albeit not through the idea that the rule of law has no place in an emergency, but through the idea that only a formal or wholly procedural conception of the rule of law is appropriate for emergencies."[310]

IV. Reconceptualizing the Legal Doctrine

It is clear that the current state of the jurisprudence and practice is not acceptable from the standpoint of a defensible articulation of international treaty obligations and the protection of human rights. There is a need to reduce the normative expansionism and abuse of states of emergency. As discussed above, there are ideas for improving the implementation mechanisms, but there is little immediate prospect of significant change in this

307. Green, *supra* note 33, at 100. R

308. Svensson-McCarthy, *supra* note 33, at 195. R

309. Fitzpatrick, *supra* note 11, at 197 (recognizing that the tendency of courts to shrink from assessing government emergency is a key factor in the violations). R

310. Dyzenhaus, *supra* note 12, at 35. The latter, according to Dyzenhaus, allow a government "to have its cake and eat it too" and are "worse than grey holes," as they give official lawlessness "the facade of legality," and in substance they are black holes. *Id.* at 42; *see also id.* at 59. R

area. The majority of commentators state that the treaty bodies should apply a more restrictive approach. They should be "critical," not "deferential," should adopt a "scrupulous judicial attitude," and should subject state governments' claims to "rigorous analysis."[311] The calls for a stricter approach overarch many commentators' proposals for progress and reform, including those such as clarifying the threshold of severity for an emergency,[312] eliminating the margin of appreciation,[313] clarifying the "temporal element" (that is, imminence),[314] and "developing phases" within the emergency, each with differentiated measures,[315] and so on.

However, where the existing norms are not being respected or implemented in practice, the question arises what might be the effect of adopting additional norms of specificity. Fitzpatrick at least recognizes that this higher standard setting for states of emergencies will reach a "threshold of counterproductivity."[316] To strengthen and clarify the standards and international supervision is appealing in its simplicity, but it ignores the underlying factors that have driven the jurisprudence to its current parlous state. Other commentators in IHRL scholarship try to develop broader theses. For example, Svensson-McCarthy in her study argues that a state of emergency must be guided by key principles, including the principle of legality and the balance of the notions of national security and public order.[317] These are the general principles that underpin the jurisprudence, but they do little to resolve the current problems faced. There is a need for a new and broader approach at the level of theory, legal doctrine, and politics that has both prescriptive and descriptive value. The ICJ's study notes in the context of improving implementation that "[t]his question must be approached with *realism*."[318]

311. *E.g.*, McGoldrick, *supra* note 33, at 425 ("It was crucially important for the [Human Rights Committee] to take a critical and restrictive approach to the implementation of article 4 . . . in view of its very limited powers both under the reporting and individual communications procedures, '[t]he most the implementation bodies can do is to adopt a scrupulous judicial attitude that will influence world opinion by its objectivity and thoroughness.'" (quoting Hartman, *supra* note 33, at 49)); *see also* Fitzpatrick, *supra* note 190, at 263; Joseph, *supra* note 163. There is support for the opposite view, that is, that the Court is best placed to make the decisions on both the existence of an emergency and on the nature and scope of the derogations, being detached from the turmoil and making decisions ex post facto. *See* Gross & Ní Aoláin, *supra* note 45, at 639, 643.

312. FITZPATRICK, *supra* note 11, at 224.

313. *E.g.*, SVENSSON-MCCARTHY, *supra* note 33, at 319.

314. Fitzpatrick, *supra* note 190, at 252.

315. In terms of duration of a state of emergency, there is no specific case law, but one commentator suggests that "if the intensity of the danger is of various developing phases or degrees, the measures taken during each phase must vary accordingly." Aly Mokhtar, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, 8 INT'L J. HUM. RTS. 65, 71 (2004).

316. FITZPATRICK, *supra* note 11, at 73.

317. SVENSSON-MCCARTHY, *supra* note 33, at 93.

318. ICJ STUDY, *supra* note 38, at 439 (emphasis added). Grossman states that "it must be acknowledged that because the problem is not solely juridical, neither is its solution." Grossman, *supra* note 14, at 38.

On review of the preceding Parts and analysis, this Article proposes that the traditional *substantive* question of a public emergency should be reconceived and subsumed into the *procedural* questions of declaration and notification, both of which are clear requirements of Article 4. The substantive assessment and threshold for a public emergency are not eliminated, however, as they will always form an essential part of the proportionality assessment of the emergency measures vis-à-vis the public emergency. There are a number of reasons that this proposal is sound from theoretical, legal, doctrinal, and political perspectives, each of which are set out below.

The bifurcation of the two traditional legal questions is based on a false assumption that the existence of a state of emergency is an objective and stand-alone legal question. Instruments such as the Paris Minimum Standards perpetuate this assumption: "The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, *will justify* the declaration of the state of emergency."[319] In the international human rights treaties, however, the concept of declaring a state of emergency has no independent legal meaning or effect unless it is accompanied by lawful measures of derogation. In other words, the point of declaring a state of emergency is to justify lawful derogations from the human rights treaties, and thus the *real* question is whether a particular derogation is itself justified and thus lawful under the relevant treaty. It therefore may not mean anything to have a lawful state of emergency if the measures are unlawful, and there cannot be an unlawful declaration of a state of emergency in a situation where in substance there is no derogation of human rights obligations. It is also difficult to conceive of an objective and stand-alone threshold (that is, for public emergency) that would justify derogation and could exist entirely independent of any reference to the emergency measures themselves. The emergency measures provide the necessary *context* to the existence and justification for the state of emergency. Furthermore, the borderline between exception and normality is far more complex than suggested by the general and abstract principles articulated by the treaty bodies. While the European jurisprudence tried to develop general standards on a public emergency in the *Greek Case*, these have been honored in the breach. As the analysis of General Comment 29 demonstrated above, the U.N. Human Rights Committee has largely steered clear of articulating any comparable and useful standards. U.N. Special Rapporteur Despouy, who studied such situations closely for many years and engaged in extensive dialogue with states, noted that the arguments provided by governments for their respective emergencies were "highly dissimilar."[320] The idea of some kind of concrete abstract threshold for establishing a state of emergency is alluring but ultimately misleading.

319. PARIS MINIMUM STANDARDS, *supra* note 11, ¶ 1(a) (emphasis added). R

320. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 36. R

It has to be acknowledged also that the subject matter of a threat to the life of a nation is highly politically charged. As suggested by Schmitt and others, such an assessment can be seen as a value judgment that goes to the very heart of a state's decision-making autonomy and sovereignty. In promoting the margin of appreciation in the *Lawless* case, Sir Humphrey Waldock emphasized the "context of the rather special subject-matter with which it deals: the responsibilities of a Government for maintaining law and order in a time of war or any other public emergency threatening the life of the nation."[321] This subject matter has been without doubt difficult for the treaty bodies. Assessment of factual questions as to whether there are emergency conditions that threaten the life of the nation is difficult for international and transnational human rights courts and lawyers. Such issues, for example in the context of war powers and foreign policy, are not typically highly judicialized in most states' national legal systems and also stretch the fact-finding capacities of treaty bodies. It is a reality that governments will have access to entirely different sources of information, including some that are arguably unsuitable for judicial consideration such as classified intelligence information.

While not often mentioned expressly, the concept of separation of powers has a role to play in states of emergency under IHRL. The margin of appreciation, for example, is partly geared toward promoting this separation of powers and avoiding damaging confrontations between the Court and states party to the Convention. It is difficult for judicial or legal review, at least within current IHRL architecture, to make and implement determinations that distinguish between real and fictitious states of emergency. As one author put it, the state of emergency or exception constitutes a "point of imbalance between public law and political fact."[322] As much as this author would prefer not to acknowledge the point, the current situation demonstrates a mismatch of law and politics and of principle and reality, a mismatch that undermines the law's normativity and promotion of human rights. This is reflected in the stronger implementation context of national laws, where the executives and legislatures are usually given the power to declare a state of emergency and judicial review usually pertains to the emergency measures rather than the assessment of the public emergency.[323] To the extent that the IHRL mechanisms appropriate the right to determine a public emergency, this does not actually replicate the typical allocation of powers at the national level. This is well demon-

321. Gross & Ní Aoláin, *supra* note 45, at 632 (quoting Sir Humphrey Waldock). R

322. *E.g.*, Higgins, *supra* note 33, at 299 ("There is a constant counterpoising of two elements, and the balance is not easy. On the one hand, the Commission must not, in the exercise of its functions under Article 15, set itself up as a super-State; on the other hand, it does not suffice that a State acted reasonably in finding that a public emergency exists. The emergency must exist in fact."). R

323. The work of the U.N. Special Rapporteur for States of Emergency found that it is often the legislature that declares the emergency, the executive that carries it out, and judiciary that is able to decide the legality of the measures. Only in some countries is the judiciary empowered to review the state of emergency. *See* Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 145, 148. R

strated by the *A & Others v. Secretary of State for the Home Department* decision of the House of Lords, in which Lord Bingham for the majority wrote on the question of the existence of a state of emergency:

> It is perhaps preferable to approach this question as one of demarcation of functions or . . . "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. . . . *It is the function of the political and not judicial bodies to resolve political questions*. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum.[324]

It is notable that the European Court's Grand Chamber refused to recognize this position—essentially the political-question doctrine—or to endorse the House of Lords' reasoning.[325] The European Court associated (incorrectly) the House of Lords' decision with the margin of appreciation under which the judiciary retains the authority to legally determine the public emergency. With respect to the *A & Others case*, although some commentators sought a more stringent burden on the British government to provide "clear and convincing evidence" of the need for derogation, few questioned the basic principle articulated by the House of Lords of a division of legal responsibility based on separation of powers.[326]

The interaction and conflict of governments and treaty bodies is not dissimilar to the constitutionalist dynamic and its constant dialogue of law and power, and of authority and legitimacy.[327] This general dynamic is both relevant to, and perhaps more pronounced for, states of emergency under international human rights law. As the ICJ's study recognizes, there is a need to evaluate states of emergency with the limitations of international law in mind, including recognition of the lack of adjudicative juris-

---

324. A & Others v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 29 (appeal taken from Eng.) (emphasis added) (citing Lord Hoffman in Sec'y of State for the Home Dep't v. Rehman, [2001] UKHL 47, [2003] 1 A.C. 153, ¶ 62). Lord Bingham also said: "I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment." *Id.* ¶ 29.

325. A discussion of this doctrine is a large subject, both in cases and commentary, and is beyond the scope of this present Article.

326. *See* Hickman, *supra* note 12, at 622–66; Humphreys, *supra* note 13, at 685. R

327. This is a very large subject beyond the scope of this Article, but in the U.S. constitutional law context, it is discussed in writings such as Erwin Chemerinsky, Constitutional Law: Principles and Policies (1997); Louis Henkin, Foreign Affairs and the U.S. Constitution (2nd ed., 1972); Alpheus T. Mason & Donald G. Stephenson, Jr., American Constitutional Law (8th ed., 1987); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987).

diction, enforcement mechanisms, and resources.[328] This constitutional-type dialogue takes place against the risk that states will withdraw their effective support from the system.[329] States are also able to leverage a narrative that international lawyers and human rights experts in distant lands try to overrule a government's assessment of whether there is an emergency in their country in order to compel treaty bodies to accept their assessments of internal emergency situations. There is no shortage of states under scrutiny that would wish to discredit and undermine the U.N. Human Rights Committee and its views on human rights in their state.

As indicated above, by insisting on the substantive legal determination of a public emergency, the treaty bodies have inadvertently enlarged the permissible scope of the exception. One way to deal with this is to remove the public-emergency determination from the sphere of legal review. This is an unfortunate but necessary concession addressing a dichotomy of scope and normativity at the very heart of states of emergency. This dichotomy is illustrated by Aileen McHarg's comment in the context of derogations and balancing human rights and national security that "[m]ore pragmatically, courts have to choose between giving strong protection to rights, but with a relatively narrow jurisdiction to hear disputes, or alternatively, a more extensive jurisdiction, but one where rights have to give way in persistent conflicts with public interest goals."[330] The latter could be an apt description of the margin of appreciation and states of emergency. The "extensive jurisdiction" choice can be dangerous, as demonstrated in the European system's desire to defer but ultimately retain the legal review of the public emergency. It is better for courts and treaty bodies to avoid this slippery slope, as the House of Lords did in the *A & Others v. Secretary of State for the Home Department* case, by identifying the public-emergency question as a political one, therefore providing for a clearer separation of powers.

The suggestion that there is no separate legal determination of the existence of a state of emergency should not be taken to indicate that the substantive threshold of public emergency is no longer relevant. This is a very important point. Rather, this threshold is incorporated and protected in the assessment of the emergency measures through the prisms of notification and proportionality. The national declaration and international no-

328. ICJ STUDY, *supra* note 38, at 439. R

329. *See* Higgins, *supra* note 33, at 315. R

> One is also aware of the fact that, beyond the real difficulties . . . in making judgments on certain issues (difficulties that are probably more real in the national security area than under normal '*ordre public*' clauses), the [treaty body] is exposed to the power of member States to renew or not to renew their recognition of [its] competence . . . .

Id. at 313.

330. McHarg, *supra* note 41, at 683. As Humphreys also points out, a key criticism is that "[a]ttempts to impose legal controls will merely infect ordinary rights protections with extraordinary elasticity." Humphreys, *supra* note 13, at 679. R R

tification of a public emergency is still a procedural requirement to be satisfied under the relevant treaties. As identified above, many juridical determinations of proportionality of measures include an assessment, express or implied, of the nature of the public emergency. Despite the questionable ability to actually define by legal means the difference between "normality" and "exception," there is logic to the concept of a threshold and differentiation. Norm and exception are difficult principles that will always be hard to assess in the absence of the concrete measures. In practice, this Article's proposal would lead to an implied and contextual definition of a public emergency. A state of emergency would be a situation in which measures of derogation in accordance with the human rights treaty may be justified by that situation. For example, where the treaty body determined that derogations were lawful, there obviously would be a public emergency. Where it ruled that all of the state's purported derogations were unlawful, the treaty body might provide guidance as to whether the measures could be made lawful and in doing so would implicitly indicate that the situation had reached the level of a public emergency. In essence, this means conceding the (losing) battle of whether or not a public emergency exists and focusing on ensuring that the measures taken to combat the threat are proportionate to any emergency.

This new approach is more defensible and may help to reverse the creeping normative expansion of what justifies a state of emergency. It would help break the cycle of judicial deference in relation to public-emergency questions—or rather the deference to government assertions—which has also led to dilution of the proportionality assessment (for example, as evidenced by the European Court applying a wide margin to both legal questions). Proportionality will also provide better "legal cover" to the judicial function from which to dissect the dubious but highly politically charged assertions of governments. The importance and appeal of this methodology is recognized by McHarg: "As the very stuff of politics, such decisions are bound to be hotly contested. Accordingly, judges need to find a method for resolving conflicts between rights and the public interest which is conceptually defensible and hence allows them to preserve their claim to neutrality."[331] It becomes easier for judges and treaty body members to deal with the lack of information and unclear burdens of proof if there is no stand-alone *legal* determination of the emergency situation, as rather it is incorporated within the proportionality assessment. The pressure on courts to reach precise and factually founded legal determinations whether or not there is a public emergency will simply no longer exist. In reality, as well demonstrated in many of the cases and situations discussed above, treaty bodies have strongly avoided the determination of public emergency anyway but are quite willing to find measures disproportionate.[332] It is probably the case that many findings of emergency mea-

331. McHarg, *supra* note 41, at 672 (emphasis omitted). R

332. It should also be noted that, in the case of individual complaints, the proportionality of the measures *in toto* may be assessed, rather than just how they applied to the individual. This approach was spelled out and endorsed by the European Court in *A & Others*. A &

sures that are disproportionate are also underpinned by unstated concerns about the public emergency. This might also change the incentives for states to provide better information at the international level on the nature of the public emergency.

Other commentators have not previously suggested redefining the bifurcation of the legal question as proposed in this Article. Yet there are signs, in trying to grapple with the issues, that others have taken steps down this pathway. The 1990 Copenhagen Document on Human Rights, the product of an interstate process, restated basic principles of IHRL including detailed standards on states of emergency.[333] The Copenhagen Document provided a description of states of emergency and derogations that included a *procedural* but not *substantive* assessment of the state of emergency.[334] The Paris Minimum Standards, prepared by a group of scholars, provided in significant detail the power and jurisdiction of the judicial function but did not provide within this framework for any assessment of the existence of the state of emergency.[335] This Article's "implied and contextual definition" approach, in which the state of emergency is effectively defined in relation to the proportionality assessment, has also been taken up implicitly by the U.N. Special Rapporteur Despouy:

> [T]he competent authority may declare a state of emergency . . . [i]n the event of severe disturbances that endanger the vital interests of the population and constitute a threat to the organized life of the community, *in the face of which* the restrictive measures permitted by the Constitution and laws in ordinary circumstances are clearly inadequate . . . .[336]

In the context of the cases and specific situations, many courts and treaty bodies' majority judgments or views have skirted the legal determination of the existence of a public emergency, and the dissenting opinions have taken issue with the government assertions. The House of Lords judgment in *A & Others* is consistent with this approach. The most striking recent example supportive of this Article's thesis is the highly substantive, detailed, and focused review by the Bahrain Independent Commission on Inquiry of Bahrain's unrest and state of emergency from March to April 2011. The Commission's otherwise very thorough 513-page report essentially avoids analyzing the legal question of the public emergency and re-

Others v. United Kingdom, App. No. 3455/05, ¶¶ 175–181, 185 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403.

333. Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* ¶ 25.1–.4 (1990), *available at* http://www.osce.org/odihr/19394.

334. *Id.* ¶ 25.1, 25.3.

335. *See* PARIS MINIMUM STANDARDS, *supra* note 11, ¶ 7. R

336. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 82 (emphasis added). R

markably did not even provide or analyze the text of Bahrain's derogation under the Covenant.[337]

This Article's proposed reconceptualization of the legal doctrine could help to reverse the trend of enlarging the scope of states of emergency. It would do so by minimizing the number of cases in which there is acceptance, implicit or express, of states' broad or specious assertions of a public emergency threatening the life of the nation. Unlike some of the other suggestions in the literature, it need not cause major implementation problems for courts, treaty bodies, or states. As discussed above, the *substantive* determination of a public emergency cannot have a stand-alone legal effect or consequence in isolation of the emergency measures. The qualitative change in the legal determinations would be that the public emergency must be seen in the context and through the prism of the proportionality of the measures.

The general effect of this reconceptualization is well illustrated by reference to the *A & Others* decision of the European Court. That case currently stands for the idea that there was a state of emergency and so derogations in principle were permitted, but that the actual measures adopted were not proportionate. The British government, after losing in the House of Lords, had legislated to remove the offending measures from its emergency-powers regime.[338] The British government found a way to deal with the issue without invoking Article 15 of the Convention at all. Under the proposed approach in this Article, the ratio decidendi of the European Court decision in *A & Others* would be different; most importantly, it would not have been legally affirmed that there was a state of emergency that was fully justified by the circumstance of a nascent terrorist threat. This was because there was no legal justification under Article 15 for the measures taken in response to the state of emergency that the United Kingdom had declared. This Article's proposed approach would thus also support the general logic that "if possible, states should limit rights rather than derogate from them."[339] A number of countries have not derogated in arguable instances of states of emergency on the basis that limitations, rather than derogations, gave them sufficient scope to deal with the situation.[340]

337. BAHR. INDEP. COMM'N OF INQUIRY, *supra* note 306, ¶ 105. Other than recanting Article 4, the report's main substantive reference is to state that the violations of the rights of arbitrary detention go beyond what could ever be derogated. *Id.* R

338. Sangeeta Shah, *From Westminster to Strasbourg:* A and Others v United Kingdom, 9 HUM. RTS. L. REV. 473, 476 (2009).

339. McGoldrick, *supra* note 33, at 384. R

340. *See, e.g.*, H.R. Comm, Rep. of the H.R. Comm., 66th Sess., July 12–30, 1999, ¶ 324, U.N. Doc. A/54/40; GAOR, 54th Sess., Supp. No. 40 (1999); H.R. Comm., Rep. of the H.R. Comm., 42nd Sess., July 8–26, 1991, ¶¶ 618–656, U.N. Doc. A/46/40; GAOR, 46th Sess., Supp. No. 40 (1991); H.R. Comm., Rep. of the H.R. Comm., 10th Sess., July 14–Aug. 11, 1980, ¶ 297, U.N. Doc A/35/40; GAOR, 35th Sess., Supp. No. 40 (1980); H.R. Comm, *supra* note 133, ¶ 383. R

Conclusion

This Article has offered an enriched account and reinterpretation of the international human rights law on states of emergency and the derogation of human rights. The need for this account is driven by the serious human rights violations often connected with states of emergency, the significant gap between human rights law and practice, and inconsistent and divergent jurisprudence. A key problem for courts and treaty bodies is that they continue to affirm, either directly or indirectly, unfounded government assertions of a state of emergency, thereby diluting the law's normativity and its positive influence. The analysis of the underlying theory of states of emergency, coupled with the practical limits of implementation under IHRL, provides the context and foundation for a new approach. This Article's more holistic analysis brings to light key themes that act as undercurrents to the treaty law—the legal dichotomy of normality and exception, the role of separation of powers, the rule of law as compared to extralegal measures, democracy as a check on emergency powers, emergencies based on continued terrorist threats, and government causation of emergencies. These key legal themes illustrate that there needs to be a middle course for IHRL that better balances the legitimate position of sovereign states to defend their constitutional order *with* preventing misuse and abuse of emergency powers.[341]

This Article argues the most effective solution is to understand that the traditional *substantive* question of the existence of a public emergency should be reconceived and subsumed into the *procedural* question of declaration and notification. There is no need for an artificial stand-alone legal determination of whether or not there is a public emergency. With this reinterpretation, the substantive concept of a public-emergency precondition and threshold is still preserved, as the proportionality-of-measures assessment will always include the nature and scope of the public emergency. This leads in effect to an implied and contextual definition for public emergency and one that avoids the constant legal reification of states' dubious claims. Finally, this reconceptualization of the legal doctrine for state of emergencies in IHRL, which can be reconciled with both theory and practice, is one important opportunity for tackling the serious problem of human rights abuses in times of emergency.

341. *See* Nowak, *supra* note 38, at 85. R

33599-mil_34-3 Sheet No. 37 Side B 06/19/2013 08:32:46

"SHE MAKES ME ASHAMED TO BE A WOMAN": THE GENOCIDE CONVICTION OF PAULINE NYIRAMASUHUKO, 2011

*Mark A. Drumbl**

INTRODUCTION

In 1994, 500,000 to 800,000 Rwandans were massacred in genocidal pogroms.[1] At least 250,000 women were raped.[2] Orchestrated by an ex-

* Class of 1975 Alumni Professor, Law Alumni Faculty Fellow, and Director, Transnational Law Institute, Washington and Lee University, School of Law. Many thanks to Karima Bennoune and participants in the Gendering Conflict and Post-Conflict Terrains Conference (Univ. of Minn. School of Law, Minneapolis, Minn., May 18–19, 2012) for helpful insights and feedback; my gratitude to the Frances Lewis Law Center for its support of this project; and hearty appreciations to Lisa Markman and Ron Fuller for research and library assistance. The titular quote is attributed to Angelina Muganza, a Rwandan Minister in a government that came into power after the genocide. *See* Elizabeth Barad, *Never Go Back*, Ms. MAG., Summer 2005, at 24; Elizabeth Barad, *Mother and Son Genocidaires*, ARUSHA TIMES (Sept. 24–30, 2011), http://www.arushatimes.co.tz/2011/36/Tribunal_1.html.

1. Joe Stumpe, *Kansas Trial Will Recall Genocide in Rwanda*, N.Y. TIMES, Apr. 27, 2011, at A18.

2. Princeton N. Lyman, *Preface* to THE FOUND. FOR AIDS RESEARCH, WOMEN, SEXUAL VIOLENCE, AND HIV 2 (2005), *available at* http://www.amfar.org/uploadedFiles/In_the_Community/Publications/Women%20Sexual%20Violence%20and%20HIV.pdf. Mass rape was central to the genocidal strategy to demoralize, terrorize, and destroy entire communities. *Id.* Women were often raped before being killed. Agnès Binagwaho, *HIV Risk Related to Sexual Violence During War and Conflict: Rwanda's Solutions*, *in* WOMEN, SEXUAL VIOLENCE AND HIV, *supra*, at 13, 13. The violence was pervasively sadistic. *See, e.g.*, Carrie

tremist Hutu government, the genocide intended the extirpation of the country's ethnic Tutsi minority population.

The genocide began in the month of April. Its trigger event was the downing (on April 6, 1994) of an airplane carrying Rwandan President Juvénal Habyarimana, among others, outside the country's capital of Kigali.[3] Habyarimana's death enabled a more radical political faction to assume control.[4] The genocide ended in July of that year, when the military arm of an extraterritorially based Tutsi political party, the Rwandese Patriotic Front (RPF), ousted the genocidal regime and installed itself as the new government.[5] The RPF remains in power today.[6] Rwanda's President, Paul Kagame, retains a firm grip on public life throughout the country.[7]

In the nearly twenty years since 1994, the international community and the Rwandan government have pushed to hold individual perpetrators accountable for the genocide. Judicialization has occurred at multiple levels. Over ninety persons—those deemed most responsible—have been indicted by the International Criminal Tribunal for Rwanda (ICTR), an ad hoc institution established by the U.N. Security Council in November 1994.[8] Approximately ten thousand individuals have been prosecuted in specialized chambers of national courts in Rwanda.[9] According to the Rwandan government, nearly two million people have faced neo-traditional *gacaca* proceedings conducted by elected lay judges throughout the

---

Sperling, *Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide*, 33 FORDHAM URB. L.J. 637, 644–45 (2006) ("Victims of rape were often sexually mutilated including the pouring of boiling water or acid into women's vaginas; mutilating their vaginas with machetes, spears, and sharp banana leaves; cutting off women's breasts; and cutting open pregnant women's wombs and killing the fetus before killing the mother." (footnotes omitted)).

3. Alexandra A. Miller, Comment, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN ST. L. REV. 349, 350 (2003); *Rwanda Genocide: Kagame 'Cleared of Habyarimana Crash*,' BBC NEWS (Jan. 10, 2012, 2:38 PM), http://www.bbc.co.uk/news/world-africa-16472013 [hereinafter *Kagame Cleared*].

4. It is believed that Habyarimana was assassinated by Hutu extremists who were opposed to power sharing. *See Kagame Cleared*, *supra* note 3. R

5. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 72 (2007).

6. *Rwanda*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html (last updated Mar. 15, 2013).

7. Matteo Fagotto, *Wary Rwandans Choose Strongman Paul Kagame—and Peace—over Democracy*, OBSERVER, (July 31, 2010), http://www.guardian.co.uk/world/2010/aug/01/dispatch-rwanda-election-peace-takes-priority.

8. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994); Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 Nw. J. HUM. RTS. 403, 404 (2011).

9. *See* DRUMBL, *supra* note 5. R

country.[10] *Gacaca* proceedings concluded in 2012.[11] A handful of Rwandan defendants have been prosecuted by foreign national courts, including through assertions of universal jurisdiction.[12]

On June 24, 2011, ICTR Trial Chamber II convicted Pauline Nyiramasuhuko, formerly Rwanda's Minister of Family and Women's Development, of conspiracy to commit genocide and of genocide; of the crimes against humanity of extermination, rape, and persecution; and of the war crimes of violence to life and outrages upon personal dignity.[13] She was sentenced to the harshest punishment possible, namely, life imprisonment.[14] At the time of her conviction, she was sixty-five years old.[15]

Although much of the literature on gender and conflict focuses, appropriately, on women as victims of violence, women also act as agents of violence, including mass atrocity, during conflict situations. The Nyiramasuhuko case offers an opportunity to more carefully examine this textured, and largely underappreciated, aspect of the metastasis of atrocity. This is the central preoccupation of this Article.

The proceedings that implicated Nyiramasuhuko were among the most complex ever undertaken by the ICTR. She was prosecuted jointly with five other defendants, including her son, Arsène Shalom Ntahobali (who was also given a life sentence).[16] All the defendants were from Butare, a *préfecture* in southern Rwanda.[17] The defendants became colloquially known as the "Butare Group" or the "Butare Six."[18] The other four members were Sylvain Nsabimana and Alphonse Nteziryayo, both former (and successive) *préfets* of Butare, and Joseph Kanyabashi and Elie Ndayambaje, two former local *bourgmestres* (mayors).[19] All were charged with acting in concert to massacre the Tutsi population and moderate Hutus in Butare.[20] All six were found guilty, albeit the specific charges and convictions varied inter se.[21] The other four defendants received

10. Edwin Musoni, *The Legacy of Gacaca*, New Times (Apr. 10, 2012), http://www.newtimes.co.rw/news/index.php?i=14958&a=52323. This number is contested, however. *See* E-mail from Phil Clark, SOAS, University of London, to Mark A. Drumbl (June 21, 2012) (on file with author). In any event, officially, over 1.2 million of the nearly two million in total were prosecuted only for property offenses. *See* Musoni, *supra*.

11. Gerd Hankel, Book Review, 23 Eur. J. Int'l L. 1192, 1192 (2012) (reviewing Paul Christoph Bornkamm, Rwanda's Gacaca Courts: Between Retribution and Reparation (2012)).

12. *See, e.g.*, Luc Reydams, *Belgium's First Application of Universal Jurisdiction: The* Butare Four *Case*, 1 J. Int'l Crim. Just. 428 (2003).

13. Prosecutor v. Nyiramasuhuko (*Nyiramasuhuko Judgement*), Case No. ICTR-98-42-T, Judgement and Sentence, ¶ 6186 (June 24, 2011).

14. *Id.* ¶ 6271.

15. *Id.* ¶ 8.

16. *Id.*

17. *Id.* ¶ 1.

18. Miller, *supra* note 3, at 366. R

19. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 8–72.

20. *Id.* ¶ 1.

21. *Id.* ¶ 6186.

sentences of twenty-five years, thirty years, thirty-five years, and life imprisonment, respectively.[22]

Nyiramasuhuko is the ICTR's only female accused.[23] She is, moreover, the only woman tried and convicted by an international criminal tribunal for genocide and the only woman tried and convicted by an international criminal tribunal for rape as a crime against humanity.[24] The only other woman convicted by an international criminal tribunal (in that case, the International Criminal Tribunal for the Former Yugoslavia) is Biljana Plavšiæ.[25] A leading Bosnian Serb politician with de facto control and authority over members of the Bosnian Serb armed forces, Plavšiæ pleaded guilty in 2002 to one count of persecutions on political, racial, and religious grounds as crimes against humanity.[26] She was sentenced in 2003 to eleven years' imprisonment,[27] which she served in Sweden.[28] Plavšiæ was released in 2009, pursuant to early release guidelines, after completing two-thirds of her term.[29]

The outsize attention showered upon *Prosecutor v. Nyiramasuhuko* is animated neither by its jurisprudential novelty nor by its progressive de-

22. *Id.* ¶ 6271.

23. *Rwanda: Ex-women's Minister Guilty of Genocide, Rape*, BBC NEWS (June 24, 2011, 11:07 AM), http://www.bbc.co.uk/news/world-africa-13507474.

24. Marlise Simons, *Official Gets Life Sentence for Genocide in Rwanda*, N.Y. TIMES, June 25, 2011, at A4.

25. Marlise Simons, *Bosnian Ex-leader Sentenced to 11 Years for Her War Role*, N.Y. TIMES, Feb. 28, 2003, at A4. On April 30, 2012, Rasema Handanoviæ, a Bosnian Muslim woman and naturalized U.S. citizen, was convicted (after a plea bargain) by a Bosnian court for killing six Bosnian Croats in April 1993. Maja Zuvela, *Bosnian War Crimes Court Jails First Woman*, REUTERS, Apr. 30, 2012, *available at* http://www.reuters.com/article/2012/04/30/us-bosnia-warcrimes-idUSBRE83T0KK20120430. Handanoviæ was the first woman convicted by Bosnian courts for crimes committed during the 1992-1995 armed conflict in Bosnia and, according to media reports, only the second woman (other than Plavšiæ) to be convicted for atrocity crimes perpetrated during that conflict. *Id.* Handanoviæ was a victim of wartime rape before committing the crimes for which she was convicted. *Id.* She was sentenced to 5.5 years' imprisonment. *Id.* In late 2012, the International Criminal Court unsealed an arrest warrant for Simone Gbagbo, wife of former Côte d'Ivoire President and International Criminal Court detainee Laurent Gbagbo, alleging her to be an indirect coperpetrator of crimes against humanity. Prosecutor v. Simone Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest, ¶¶ 2, 9 (Feb. 29, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf. The Extraordinary Chambers in the Courts of Cambodia prosecuted another woman, Ieng Thirith, but these proceedings were discontinued owing to her dementia. Paul Armstrong, *'First Lady' of Khmer Rouge Ruled Unfit for Genocide Trial*, CNN (Sept. 13, 2012), http://articles.cnn.com/2012-09-13/asia/world_asia_cambodia-khmer-rouge-ieng-thirith.

26. Prosecutor v. Plavšiæ, Case No. IT-00-39 & 40/1-ES, Decision on the Application for Pardon or Commutation of Sentence, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009), http://www.icty.org/x/cases/plavsic/presdec/en/090914.pdf. Plavšiæ had initially been charged with genocide, but these charges later were dropped as part of a plea bargain she concluded with the ICTY Prosecutor. *Id.*

27. *Id.* ¶ 6. For a discussion of the role that gender apparently played in Plavšiæ's sentencing, see LAURA SJOBERG & CARON E. GENTRY, MOTHERS, MONSTERS, WHORES: WOMEN'S VIOLENCE IN GLOBAL POLITICS 154, 156 (2007).

28. *Plavšiæ*, Case No. IT-00-39 & 40/1-ES, ¶ 6.

29. *Id.* ¶ 14.

velopment of the law. This attention, rather, is fueled by the fact that the case concerns a purportedly novel kind of subject—a so-called "new kind of criminal,"[30] according to a 2002 cover story in the *New York Times Magazine*—to wit, the female atrocity perpetrator. Much of this media buzz belies the fact that other Rwandan women—thousands, in fact—have been convicted for genocide or crimes against humanity.[31] These convictions have arisen, overwhelmingly, from legal proceedings in Rwandan national courts and in *gacaca* proceedings held throughout Rwanda.[32] This carnivalesque media novelty also belies the fact that other women served powerful leadership roles in the genocide—such as Agnès Ntamabyaliro, the Minister of Justice in the genocidal regime, who is currently imprisoned in Rwanda.[33] Nyiramasuhuko may reflect a new kind of international convict, but she is far from a new kind of perpetrator, whether in Rwanda or wherever episodes of mass atrocity erupt.

Motherhood also suffuses broadcasted perceptions of Nyiramasuhuko. She is not just a woman who ordered rape, after all, but she is a mother—and grandmother—who ordered women to be raped in front of their own children. And among the rapists was her son, and codefendant, Shalom. The relationship between "mother and son *génocidaires*"[34] has attracted greater media fascination than the relationship between another parent-child duo convicted for genocide at the ICTR, namely, Elizaphan Ntakirutimana (father) and Gérard Ntakirutimana (son), who were sentenced to ten and twenty-five years' imprisonment respectively in 2003[35] and whose sentences were affirmed on appeal in 2004.[36]

Part I of this Article sets out Nyiramasuhuko's background. Part II carefully examines the trial judgment, including the bases for conviction and the specific factual allegations. The judgment itself, at 1500 pages in

30. Peter Landesman, *A Woman's Work*, N.Y. TIMES, Sept. 15, 2002, (Magazine), at 82, 87.

31. News Release, Amnesty Int'l, *Gacaca* Tribunals Must Conform with International Fair Trial Standards (Dec. 17, 2002), *available at* http://www.amnestyusa.org/news/2002/rwandal2172002.html.

32. *Id.* In 1998, when I worked in the Kigali prison, I represented some women detainees who were housed in a separate unit (at times with their children).

33. Nicole Hogg, *Women's Participation in the Rwandan Genocide: Mothers or Monsters?*, 92 INT'L REV. RED CROSS 69, 75 (2010).

34. Elizabeth Barad, *Mother and Son Genocidaires*, ARUSHA TIMES (Sept. 24–30, 2011), http://www.arushatimes.co.tz/2011/36/Tribunal_1.html ("I was able to speak to Nyiramasuhuko alone which no other journalist or lawyer, other than her own, has been able to do. She was incarcerated at the Detention Center of the [International Criminal Tribunal for Rwanda (ICTR)] . . . . She complained that she was lonely, being the only woman there. 'It's very difficult for me. I don't have my own doctor. I do get to see Shalom, but only once a week,' she said. It was reported that Nyiramasuhuko's main concern was for Shalom.").

35. Prosecutor v. Elizaphan & Gerard Ntakirutimana, Case Nos. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, ¶¶ 919, 922 (Feb. 21, 2003).

36. Prosecutor v. Elizaphan & Gerard Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, ¶¶ 554, 565 (Dec. 13, 2004).

length, is gender neutral in terms of its depiction of Nyiramasuhuko. She is presented as a perpetrator indifferently from her male coperpetrators.

Part III explores, in contrast, how public portrayals of Nyiramasuhuko exude problematic essentialisms, stereotypes, and imagery of women and mothers. These caricatures emerge at two distinct levels. First, they are invoked by the media to sensationalize and spectacularize the trial itself—in short, to titillate. Second, they are instrumentally invoked to favor strategic operational outcomes. For example, those stakeholders who condemn Nyiramasuhuko's conduct turn to her status as woman and mother to accentuate her personal culpability and individual deviance (that is, she is a worse perpetrator, a greater disappointment, and a more shocking offender because she is a woman, mother, and grandmother). Those who defend her conduct, including Nyiramasuhuko herself, pretextually invoke tropes rooted in imagery of womanhood and motherhood to emphasize the impossibility of her culpability (that is, she can't be a perpetrator, in particular of rape, because she is a woman, mother, and grandmother). In this end, this Part critically discusses these disabling gender-based stereotypes that trail the proceedings.

Part IV identifies several valuable insights that Nyiramasuhuko's trial and conviction offer for the development and effectiveness of international law's interventions in post-conflict spaces. These proceedings, therefore, can be read didactically. The adulation heaped on her case belies a shadow side, to wit, that the veneration of international justice can lead to neglect of national justice. The proceedings against Nyiramasuhuko also demonstrate the need to rethink the role of femininities and masculinities in the propagation of atrocity. Recognizing women as agents of violence, as bystanders to violence, as resisters of violence, and as victims of violence informs a more nuanced understanding of atrocity and, thereby, solidifies preventative and deterrent efforts. In this vein, this Article advocates for a more nuanced, grounded, and sublime approach to victims and victimizers, at times the two being one, in mass atrocity. The proceedings against Nyiramasuhuko also reveal the limits to criminalization in the process of transitional justice more generally, and important components thereof such as emboldening the status of women in post-conflict societies. The Article then concludes by connecting Nyiramasuhuko's trial to the social, economic, and political challenges faced by women in Rwanda today.

I. Pauline Nyiramasuhuko: Background, Ascent, Descent

Nyiramasuhuko was born "in humble circumstances" in 1946 in Rugara *cellule*, Ndora *secteur* and *commune*, Butare *préfecture*.[37] She com-

37. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, Judgement and Sentence, ¶ 8 (June 24, 2011) (regarding date, time and location). Her father was a subsistence farmer. Sperling, *supra* note 2, at 647. Nyiramasuhuko is frequently referred to by her given name, Pauline, both inside and outside of Rwanda. The judgment itself refers to her by her surname Nyiramasuhuko; the male coaccused also are referred to by their surnames. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T. This is the approach I take in this Article. It has been

pleted her studies in 1964.[38] A social worker, she was employed in various capacities (including as a trainer) in a number of locations throughout Rwanda until 1973.[39]

In 1968, she married Maurice Ntahobali.[40] During the genocide, Ntahobali was Rector of the National University in Butare.[41] Formerly, he had served as President of the Rwandan National Assembly and as Minister of Higher Education. Maurice Ntahobali moved to Antwerp, Belgium, following the genocide. He testified as a defense witness at his wife's trial.[42] A BBC report published at the time of her conviction characterized Nyiramasuhuko as exercising the upper hand in the marriage: she "was the complete opposite of the man she married," who, in turn, was described as "quiet and humble."[43]

Nyiramasuhuko worked with the Ministry of Health from 1973 to 1981, until her husband was appointed as a Minister in Kigali.[44] In 1986, she returned to Butare, enrolled in university, and in two years obtained a law degree.[45]

Nyiramasuhuko has four children—Denise, Shalom, Clarisse, and Brigitte—and several grandchildren.[46] Denise, Shalom, and Clarisse were present in Rwanda during the genocide.[47] Brigitte, who was in Europe at that time pursuing her education, has never returned to Rwanda.[48] Ny-

---

suggested that the popular tendency to refer to Nyiramasuhuko by her given name reflects gender-based differential treatment since male accused are referred to by their full names. *See, e.g.*, SJOBERG & GENTRY, *supra* note 27, at 163. R

38. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 9.

39. *Id.* ¶ 10.

40. *Id.*

41. *Id.* ¶ 753.

42. *Nyiramasuhuko's Husband Takes the Witness Stand in Defence of His Wife*, ARUSHA TIMES (Sept. 17–23, 2005), http://www.arushatimes.co.tz/2005/36/un_tribunal_2.htm.

43. Josephine Hazeley, *Profile: Female Rwandan Killer Pauline Nyiramasuhuko*, BBC NEWS (June 24, 2011, 3:58 PM), http://www.bbc.co.uk/news/world-africa-13907693; *see also* Landesman, *supra* note 30, at 87 (">'Maurice was like the woman; he didn't say anything,' said Jean-Baptist [sic] Sebukangaga, a professor of art at National University who has known Pauline since her childhood. 'Pauline directed everything. She got Maurice his job as rector at the university.' A friend and neighbor told me that she once saw Pauline screaming at Maurice for not being more committed to the politics of the MRND . . . ."). R

44. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 10.

45. *Id.* ¶ 11.

46. SJOBERG & GENTRY, *supra* note 27, at 165–66. R

47. Clarisse and Denise testified at the trial as defense witnesses; Shalom also testified in his own defense. As an aside, Denise's husband, presumably Nyiramasuhuko's son-in-law, worked as an investigator for the Nyiramasuhuko defense team from August 1999 to the beginning of 2005. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 2503. Céline Nyiraneza, Nyiramasuhuko's sister, also testified in her defense. At one point the Trial Chamber noted that because "many of the Nyiramasuhuko and Ntahobali Defence witnesses are related to or have close ties with Nyiramasuhuko and Ntahobali . . . . appropriate caution must be exercised when evaluating the Defence evidence." *Id.* ¶ 3101. Notwithstanding this caveat, at times the Trial Chamber found this evidence to be credible. *See, e.g.*, *id.*

48. *Id.* ¶ 3054.

iramasuhuko gave birth to Shalom (hereinafter referred to as Ntahobali) while in Israel on an exchange in 1970.[49] During the genocide, Ntahobali was a university student and part-time hotel manager.[50] In Butare, he exercised control over a local group of the *Interahamwe*, the national youth militia.[51] The *Interahamwe* operated in tandem with the Rwandan armed forces and were notorious for their extreme cruelty in committing acts of genocide and crimes against humanity.[52] At the time of the genocide, Ntahobali had a baby and his wife was pregnant.[53]

Nyiramasuhuko advanced within the most influential Hutu political party, the *Mouvement révolutionnaire national pour la démocratie et le développement* (MRND). Nicknamed "Butare's favorite daughter," she became a prominent political figure.[54] Drawing from a close high school friendship with Agathe Kanziga, who would later become the wife of President Juvénal Habyarimana and serve an influential role in extremist Hutu politics, Nyiramasuhuko gradually wove her way into the highest echelons of power.[55] She served as Minister of Family and Women's Development in Prime Minister Jean Kambanda's genocidal government (also known as the Interim Government, which constituted itself immediately after Habyarimana's death).[56] Nyiramasuhuko had been appointed to that ministerial portfolio on April 16, 1992, so had served in the previous government (a multiparty arrangement) as well.[57] Interim Prime Minister Kambanda pled guilty at the ICTR to charges of genocide and crimes against humanity.[58] In his confession, he named Nyiramasuhuko as among the five members of his inner sanctum "where the blueprint of the genocide was first drawn up."[59]

---

49. *Id.* ¶ 10.

50. *Id.* ¶ 18.

51. *Id.* ¶ 2150.

52. *RIC Query—Rwanda*, U.S. CITIZENSHIP & IMMIGR. SERVS., (Aug. 14, 2001), http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d35653bc46d8d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=d2d1e89390b5d010VgnVCM10000048f3d6a1RCRD.

53. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 21.

54. Landesman, *supra* note 30, at 82; *see also* Danna Harman, *A Woman on Trial for Rwanda's Massacre*, CHRISTIAN SCI. MONITOR (Mar. 7, 2003), http://www.csmonitor.com/2003/0307/p09s01-woaf.html ("Nyiramasuhuko was, once, the pride of Butare."). R

55. Ephrem Rugiririza, *Pauline Nyiramasuhuko: From Women's Rights to Rape*, AGENCE FRANCE PRESSE, June 24, 2011 (on file with author); Hazeley, *supra* note 43. R

56. The Interim Government was officially sworn in on April 9, 1994. Nyiramasuhuko was among the nineteen cabinet members. Prosecutor v. Pauline Nyiramasuhuko & Shalom Ntahobali, Case No. ICTR-97-21-1, Amended Indictment, ¶ 6.7 (Aug. 10, 1999).

57. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 8.

58. On appeal, he unsuccessfully challenged the validity of the guilty plea. *See* Jean Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgement (Oct. 19, 2000).

59. Landesman, *supra* note 30, at 88. Kambanda is serving a life sentence in prison in Mali. Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, 115 n.231 (2006). R

Butare *préfecture* lies in southern Rwanda. At the time of the genocide, it "was one of the most populated *préfectures* in Rwanda."[60] Butare city (*Butare-ville*), reputed to be the intellectual heart of Rwanda, is its largest center.[61] A progressive and integrated place, with a moderate Hutu population, Butare housed the National University of Rwanda. Butare *préfecture* was also among the regions of the country with the largest Tutsi population.[62] Twenty-five percent of Rwanda's Tutsi population lived there; in two of the *préfecture*'s *communes*, Tutsis comprised forty to forty-five percent of the total population (in contrast to approximately fourteen percent nationally).[63] The MRND was relatively weak in Butare.

At the start of the genocide, in fact, Butare *préfecture* was the only *préfecture* in Rwanda to be led by a Tutsi, Jean-Baptiste Habyalimana, a politician who openly opposed massacres.[64] While genocide raged elsewhere, Butare remained relatively calm and even welcomed refugees.[65] This aberration caught the attention of the Interim Government, which sacked *préfet* Habyalimana on April 17.[66] Nyiramasuhuko played a key role in this process.[67] Habyalimana then was disappeared. His replacement, Sylvain Nsabimana (who eventually became another of Nyiramasuhuko's codefendants), initiated vigorous anti-Tutsi public campaigns in which Nyiramasuhuko played a supportive role.[68] On April 19, at Nsabimana's swearing-in ceremony, senior Rwandan leaders, including Interim President Théodore Sindikubwabo and Interim Prime Minister Kambanda, made incendiary speeches exhorting violence against the local Tutsi population.[69] Nyiramasuhuko, who was present, did not dissociate herself from this inflammatory invective.[70] She remained silent. Although she was found to tacitly approve of the policies delineated in the speeches,[71] Trial Chamber II held that this tacit approval did not substan-

60. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 226.

61. *Id.* ¶ 2.

62. *Id.*

63. *Id.* ¶¶ 226.

64. *Id.* ¶¶ 2, 636.

65. *Id.* ¶ 587.

66. *Id.* ¶¶ 539, 584.

67. *Id.* ¶ 638.

68. *Id.* ¶ 585.

69. *Id.* ¶¶ 584–585.

70. Prosecutor v. Pauline Nyiramasuhuko & Shalom Ntahobali, Case No. ICTR-97-21-1, Amended Indictment, ¶¶ 6.21–.22 (Aug. 10, 1999).

71. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 920–921 ("The Chamber finds that Nyiramasuhuko ascribed to and supported the policies of the Government of which she was a member, as set forth in Sindikubwabo's speech. Accordingly, her silence constituted tacit approval of those policies. . . . [T]he Chamber finds that Nyiramasuhuko's presence at the swearing-in ceremony and her failure to dissociate herself from the statements made by the President and Prime Minister, constituted tacit approval of their inflammatory statements.").

tially contribute to the genocide.[72] Hence, Nyiramasuhuko did not bear criminal responsibility for her actions at the swearing-in ceremony.

In any event, on April 20, Nyiramasuhuko asked Nsabimana for military assistance in undertaking massacres in her home *commune*, Ngoma.[73] That same day, widespread killings began in Butare.[74] Nyiramasuhuko was a centrifugal force in the unfolding terror. On April 27, the Interim Government issued a directive encouraging the public to establish and maintain roadblocks.[75] A barricade was established near the Hotel Ihuliro. This hotel was owned by Maurice Ntahobali and served as a family residence of sorts during the genocide.[76]

Nyiramasuhuko was disturbed by the many Tutsi refugees huddled at the Butare *préfecture* office (BPO). She ordered the Tutsi women at the BPO to be raped and then killed—this specific conduct comprised a linchpin of her ultimate criminal convictions.[77] At trial, one witness, QBP, testified that Nyiramasuhuko

> told the soldiers and *Interahamwe* "these are the accomplices who are here . . . there's still a lot of dirt at the BPO, such as these Tutsi women, who previously were arrogant and did not want to marry Hutu men. Now it's up to you [the Hutus] to do whatever you want with them.[78]

Metaphoric phrases, such as "there's a lot of dirt here," have since been exposed as balefully doubling as code words for eliminationism.[79]

Following the ouster of the genocidal regime in July 1994, Nyiramasuhuko promptly left Rwanda.[80] RPF forces razed the Hotel Ihuliro. Nyiramasuhuko traveled and worked "undisturbed in the region for three years" until she was arrested in Nairobi, Kenya, on July 18, 1997.[81] She

72. *Id.* ¶ 6034.

73. *Id.* ¶ 588.

74. *Id.* ¶ 692.

75. *Id.* ¶ 1457.

76. *Id.* ¶ 3107.

77. *See, e.g.*, *id.* ¶ 2605 n.7301 (reporting Witness FAP as testifying that "Nyiramasuhuko stood by the vehicle and told the *Interahamwe* to take the young girls and the women who are not old, to rape them before killing them because they had refused to marry Hutus"). Witness FAP's testimony was found credible. *Id.* ¶ 5101.

78. *Id.* ¶ 2268. This witness's testimony was found to be credible. *Id.* ¶¶ 2304, 2773.

79. Recurrent testimony notes Nyiramasuhuko's plea that the "dirt should be removed," a euphemism for the Tutsi refugees at the Butare *préfecture* office (BPO). *See, e.g.*, *id.* ¶ 2177. Testimony also suggested that Nyiramasuhuko often wore military fatigues in public during the genocide. *See id.* ¶ 2696.

80. *Id.* ¶ 12.

81. Stephanie K. Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape As a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 288 (2004); Barad, *supra* note 34; *see also Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 14, 6295. Nyiramasuhuko left Rwanda on July 18, 1994. *Id.* ¶ 12.

R

never hid or assumed a different identity.[82] She worked in a refugee camp in Zaïre (now the Democratic Republic of the Congo) run by the Catholic charity Caritas, where she helped trace refugee children who had become separated from their families.[83] Transferred to the ICTR, she made her initial appearance on September 3, 1997.[84] She pleaded not guilty to the five charges initially brought against her in an indictment submitted May 26, 1997.[85] On August 12, 1999, prosecutors added more counts—raising the total to eleven—to which she also pled not guilty.[86] These indictments charged her as well as Ntahobali.[87] During the many years between her initial capture and eventual conviction, she spent her time at a U.N. detention facility in Arusha, Tanzania, "tending a flower bed and sometimes singing to herself and concerned mainly, according to sources, about her beloved son Shalom."[88]

In the 2002 *New York Times Magazine* cover story, the author, Peter Landesman, interviewed Nyiramasuhuko's mother, who informed him that Nyiramasuhuko's great-grandfather was a Tutsi but had been redesignated as a Hutu because he had become poor.[89] Owing to patrilineal kinship in Rwanda, this meant that Nyiramasuhuko descended from Tutsi roots and, arguably, was Tutsi herself.[90] The judgment itself does not touch upon this aspect, though it explicitly—albeit briefly—refers to her husband Maurice as Hutu and her daughters Denise and Clarisse as Hutu.[91] The ethnic aspect of Nyiramasuhuko as a defendant, whether factually plausible or not, has not galvanized public attention the way her gender has. On a broader note, other than the Landesman article, few media or academic reports endeavor to grapple with—or even explore—what fueled Nyiramasuhuko's violence in the first place: was it opportunism, ethnic hatred, a quest for self-purification, or fear of being exposed as being of Tutsi descent? Also unexplored is the role, if any, that gender may have played in her own socialization into and leadership over collective violence.

The rape accusations against Nyiramasuhuko have proven to be particularly attention grabbing.[92] On the one hand, this might suggest that

82. Wood, *supra* note 81, at 288. R

83. Helen Vespirini, *'Matron' Told Killers to Rape Tutsis*, SUNDAY TIMES (Oct. 6, 2002), http://allafrica.com/stories/200210060176.html.

84. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 14.

85. *Id.* ¶¶ 13–14.

86. *Id.* ¶ 15.

87. Ntahobali had brought motions requesting that he be tried separately from Nyiramasuhuko, though these were unsuccessful. *Id.* ¶¶ 6300, 6434.

88. Rugiririza, *supra* note 55; *see also* Landesman, *supra* note 30, at 86. R

89. Landesman, *supra* note 30, at 130–31. R

90. *Id.*

91. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 3053, 3062, 3067.

92. *See, e.g.*, Wood, *supra* note 81, at 287 ("[H]er case has received disproportionate media attention in comparison to her male counterparts. Presumably, rape warfare is not newsworthy in itself, but a female leader advocating violence against women is a less com- R

rape is treated seriously among international crimes (even though, in this case, the Prosecution slipped and failed to properly charge rape as genocide[93]). On the other hand, though, the fact that a woman was charged with mass-rape crimes, and has now been convicted, has become sensationalized. In this vein, Canadian journalist Michele Landsberg was sharply critical of the *New York Times Magazine*'s decision to feature Nyiramasuhuko as opposed to any of the many Rwandan men prosecuted and convicted for mass rape (including rape as genocide). According to Landsberg:

> Ever since the feminist breakthroughs of the mid-twentieth century, when male violence against females (from sexual harassment to rape, wife battering, incest and sex trade trafficking) was finally exposed, named and labelled as criminal, the media have never been more relieved and satisfied than when they can point to a woman who is "just as bad" or "even worse."[94]

Carrie Sperling, a U.S. law professor, posits how reaction to the Nyiramasuhuko trial "says more about our continued resistance to view women as equals than it says about her uniqueness among her female peers."[95] Sperling argues that

> [t]hose who view [Nyiramasuhuko's] actions during the genocide as somehow inexplicable because of her gender engage in the stereotypical thinking that perpetuates the special victimization of women. . . . [T]his arbitrary role of women as "the other," "the pure," and "the innocent" permits, if not perpetuates, the brutal and degrading treatment specifically forced on women in times of conflict.[96]

This Article, in turn, explores how both of these perspectives are suspect and, in response, ultimately posits a more nuanced approach.

---

mon occurrence."); Vespirini, *supra* note 83, at 2 ("Nuns, mothers, schoolgirls and even grandmothers all took part in the slaughter in Rwanda. Where Nyiramasuhuko is alleged to stand out from other female killers is in having encouraged militia to rape Tutsi women before killing them."). It may be that the purported novelty that electrifies her case emanates more from what Nyiramasuhuko did as a woman than from the fact she is a woman. Regardless, her gender remains in the forefront. R

93. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 25.

94. Michele Landsberg, *Men Behind Most Atrocities, but Women Are Singled Out*, TORONTO STAR, Sept. 21, 2002, at K01.

95. Sperling, *supra* note 2, at 638. R

96. *Id.* at 638, 658.

II. Legal Proceedings

Nyiramasuhuko and Ntahobali were initially indicted together.[97] The case subsequently was expanded when the other defendants were joined.[98] The joint trial commenced on June 12, 2001, and concluded on December 2, 2008.[99] Post-trial proceedings then ensued. In total, 726 days were taken up in trial and post-trial proceedings.[100]

Each of the Butare Six defendants has appealed the convictions.[101] Judges have been assigned to the case before the Appeals Chamber.[102] Should the Appeals Chamber affirm Nyiramasuhuko's sentence, then she will be transferred to one of the eight states that have concluded agreements with the ICTR to incarcerate convicts.[103]

The charges against Nyiramasuhuko dryly read as follows:

Count One:	Conspiracy to Commit Genocide
Count Two:	Genocide
Count Three:	Complicity in Genocide
Count Four:	Direct and Public Incitement to Commit Genocide
Count Five:	Murder as a Crime Against Humanity
Count Six:	Extermination as a Crime Against Humanity
Count Seven:	Rape as a Crime Against Humanity[104]
Count Eight:	Persecution as a Crime Against Humanity

97. Prosecutor v. Pauline Nyiramasuhuko & Shalom Ntahobali, Case No. ICTR-97-21-1, Amended Indictment (Aug. 10, 1999) (listing both individuals as indicted). This indictment opens with a succinct, and elegantly written, historical background to the Rwandan genocide. *Id.* ¶¶ 1.1–.30. In a separate section, it offers a summary of the power structure present in Rwanda in the lead-up to genocide. *Id.* ¶¶ 3.1–.10. These historical and political understandings, in turn, have become authenticated through ICTR judicialization.

98. The order that the six cases be tried together was made on October 5, 1999. *See Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6320 (June 24, 2011).

99. *Id.* ¶¶ 6341, 6597.

100. The ICTR website provides case minutes for each day of the proceedings. *See Status of Cases*, Int'l Crim. Tribunal for Rwanda, http://www.unictr.org/Cases/tabid/204/Default.aspx (last visited Mar. 24, 2013). Because these minutes are quite skeletal in nature, they provide little in the way of texture or detail.

101. *Le TPIR terminera ses travaux au 31 décembre 2014, comme prévu* [*ICTR to Complete Its Work by December 31, 2014*], France-Rwanda Trib. (Nov. 13, 2012), http://www.france-rwanda.info/article-le-tpir-terminera-ses-travaux-au-31-decembre-2014-comme-prevu-112393578.html.

102. Nyiramasuhuko v. Prosecutor, Case No. ICTR-98-42-A, Order Assigning Judges to a Case Before the Appeals Chamber (July 15, 2011).

103. These states are Senegal, Rwanda, Sweden, Italy, France, Swaziland, Bénin, and Mali. *Dakar and the UN Sign an Agreement on Enforcement of ICTR Sentences*, Hirondelle News Agency (Nov. 23, 2010), http://www.hirondellenews.org/ictr-rwanda/408-collaboration-with-states/collaboration-with-states-other-countries/24638-en-en-231110-ictrsenegal-dakar-and-the-un-sign-an-agreement-on-enforcement-of-ictr-sentences1368913689.

104. The initial indictment drawn up against Nyiramasuhuko did not include rape charges. These were added upon subsequent amendment. *See* Wood, *supra* note 81, at 289. R

Count Nine:	Other Inhumane Acts as a Crime Against Humanity
Count Ten:	Violence to Life as a War Crime
Count Eleven:	Outrages Upon Personal Dignity as a War Crime[105]

A person commits genocide, stipulated by Article 2 of the ICTR Statute, when he or she commits a listed act (killing members of the group, for example, or causing them serious bodily or mental harm) with the specific "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such."[106]

Crimes against humanity, pursuant to the specific language of Article 3 of the ICTR Statute, involve specified acts that must be "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."[107] Nyiramasuhuko was charged with extermination (namely, the act of killing on a mass scale), murder, persecution, rape, and other inhumane acts as crimes against humanity.[108]

War crimes (Article 4 of the ICTR Statute) concern certain acts when committed in international or noninternational armed conflict (the latter being the case for Rwanda) when there is a nexus between the act and the armed conflict.[109] Nyiramasuhuko was charged with two counts of war crimes, namely (1) violence to life, health, and physical or mental well-being and (2) outrages upon personal dignity.[110]

Article 6 of the ICTR Statute enumerates the bases upon which a person can be found responsible for committing the proscribed criminal conduct.[111] Articles 6(1) and 6(3) both figured in the charges against Nyiramasuhuko. Article 6(1) states that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime."[112] Article 6(3) addresses the responsibility of superiors for the acts of subordi-

105. *See Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6186.

106. S.C. Res. 955, Annex, art. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

107. *Id.* art. 3.

108. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6039. The interplay among these crimes against humanity is complex and well beyond the scope of the present discussion. For example, "where the Chamber has entered a conviction for extermination as a crime against humanity, it will not consider the same underlying conduct as a basis for a conviction for murder as a crime against humanity." *Id.* ¶ 6070. "The crime of other inhumane acts was deliberately designed as a residual category for sufficiently serious acts which are not otherwise enumerated in Article 3 of the Statute." *Id.* ¶ 6127.

109. ICTR Statute, *supra* note 106, art. 4. R

110. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6146.

111. ICTR Statute, *supra* note 106, art. 6. R

112. *Id.* art. 6(1).

nates.[113] Pursuant to Article 6, then, the Trial Chamber had to consider whether Nyiramasuhuko directly committed the crimes for which she was charged, in the case of each charge, or had superior responsibility over others.

Defense counsel—Nicole Bergevin (from Canada, who served as lead counsel for many years) and Guy Poupart—put in place a multifaceted strategy.[114] They challenged the credibility of Prosecution witnesses.[115] At times they succeeded, but mostly they did not.[116] They also focused heavily on alibi evidence[117] and prevailed in refuting some of the Prosecution's allegations regarding Nyiramasuhuko's presence at massacre sites. In the case of the Hotel Ihuliro roadblock, although the Prosecution established "that Nyiramasuhuko was present at the roadblock . . . during occasions in the relevant time period," the Chamber found that "it ha[d] not been proven beyond a reasonable doubt that Nyiramasuhuko also manned that roadblock."[118] Both she and Ntahobali were spared responsibility for rapes committed by soldiers at the École Évangeliste du Rwanda.[119] But many of the Prosecution allegations were proven beyond a reasonable doubt, in particular Nyiramasuhuko's critical presence at killings at the BPO and the yard in front of it, where many Tutsi had sought refuge only to be treated with "unfathomable depravity and sadism."[120] Also proven was the factual allegation that Nyiramasuhuko distributed, and ordered the distribution of, condoms to Hutu men to rape Tutsi women before killing them, so as to protect the men from AIDS.[121] On this latter note, the Chamber found that Nyiramasuhuko ordered a woman (presumably a supporter of genocide) to distribute the condoms with the following exhortation: "Let no Tutsi woman survive because they take away our hus-

113. *Id.* art. 6(3) ("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 failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.").

114. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 4. Each defendant sequentially put on his or her defense. Nyiramasuhuko's defense case ran from January 31, 2005, to November 24, 2005. *Id.* ¶¶ 77, 6473. She began testifying in her own defense on August 31, 2005. *Id.* ¶ 6462.

115. *Id.* ¶ 4.

116. *Id.* ¶¶ 4, 249, 346, 356, 359, 382.

117. For some flavor of the level of detail involved, see, for example, *id.* ¶ 2577.

118. *Id.* ¶ 3150 ("Nor is the Chamber satisfied that the Prosecution has proven beyond a reasonable doubt that during the relevant time period, Nyiramasuhuko utilised the roadblock with the assistance of soldiers and other unknown persons, to abduct and kill members of the Tutsi population."). Ntahobali was found beyond a reasonable doubt to have manned the roadblock. *Id.* ¶ 3128.

119. *Id.* ¶ 6186.

120. *Id.* ¶ 21.

121. *Id.* ¶ 4985. Although established, these facts proved insufficient when it came to justifying a conviction since there was not "reliable evidence to show a link between Nyiramasuhuko's actions in distributing the condoms on this occasion . . . and actual rapes committed against said Tutsi women." *Id.* ¶¶ 5939, 6091.

bands."[122] Paradoxically, during the genocide, hundreds of male AIDS patients were released from hospitals and assembled into rape squads.[123] Their goal was to rape and thereby cause a slow, inexorable death.

On June 24, 2011, Trial Chamber II, composed of Judges Willam Sekule (Presiding Judge, from Tanzania), Arlette Ramaroson (Madagascar), and Solomy Balungi Bossa (Uganda),[124] delivered the following verdicts:

Count One:	Guilty for entering into an agreement with members of the Interim Government on or after April 9, 1994, to kill Tutsis in Butare *préfecture*.[125]
Count Two:	Guilty for ordering the killing of Tutsis taking refuge at the BPO.[126]
Count Three:	Charge dismissed because it had been pleaded as an alternative to Genocide.[127]
Count Four:	Not guilty.[128]
Count Five:	Charge dismissed because it is cumulative of Extermination as a Crime Against Humanity.[129]
Count Six:	Guilty for ordering the killing of Tutsis taking refuge at the BPO.[130]
Count Seven:	Guilty as a superior of the *Interahamwe* who raped Tutsis taking refuge at the BPO. Trial Chamber II stated that the elements of the crime of genocide had been met but, because this crime had not been properly charged owing to a defect in the indictment, it was therefore not possible to enter a conviction.[131]
Count Eight:	Guilty for ordering the killing of Tutsis taking refuge at the BPO.[132]
Count Nine:	Not guilty.[133]

122. *Id.* ¶ 4985. Although established, these facts proved insufficient to convict Nyiramasuhuko on the charge of direct and public incitement to commit genocide because this speech was directed only to one woman and not broadly. *Id.* ¶ 6016 (finding the speech "more akin to a 'conversation'").

123. Landesman, *supra* note 30, at 89, 116.

124. Judge Bossa replaced Judge Winston Maqutu in 2003. *International Criminal Tribunal for Rwanda: Chronology*, AM. U. WAR CRIMES RES. OFF., http://www.wcl.american.edu/warcrimes/2003ictr_status.cfm (last visited Mar. 24, 2013).

125. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 5727.

126. *Id.* ¶ 5969.

127. *Id.* ¶ 5981.

128. *Id.* ¶ 6034.

129. *Id.* ¶¶ 6071–6072.

130. *Id.* ¶¶ 6049–6051.

131. *Id.* ¶¶ 6087–6088.

132. *Id.* ¶ 6120.

133. *Id.* ¶ 6145.

Count Ten: Guilty for ordering the killing of Tutsis taking refuge at the BPO.[134]

Count Eleven: Guilty as a superior of the *Interahamwe* who raped Tutsis taking refuge at the BPO.[135]

The official, authoritative judgment is over 1500 pages long. Understandably, the ICTR published an unofficial summary of the judgment and sentence, which was read out by the Chamber. The summary, which distills the judgment to eighteen pages, addresses the central findings.[136] Producing these summaries has become common practice among international criminal tribunals.

The *Nyiramasuhuko* judgment is incredibly detailed (although at times quite repetitive). Hundreds upon hundreds of pages are given over to a comprehensive analysis of the specifics of witness testimony. Careful assessments are rendered of witness credibility and reliability—as they must be, given the salience of precepts of due process and the need to connect senior leaders to the actual crimes. That said, the sterility of these assessments, even when the result is favorable to the witness, interfaces awkwardly with what is at times the most poignant of testimony.[137]

In these proceedings, the Prosecution and the accused presented 189 witnesses and introduced 913 exhibits into evidence.[138] Nyiramasuhuko called twenty-six witnesses in her defense, including herself.[139] The trial transcript is over 125,000 pages long.[140] Witnesses were examined by each of the six defendants' counsel.[141]

The judgment often identifies defects in the Prosecution's indictment and, in this regard, queries whether or not those defects can or have been cured. One concern in this regard is whether the material facts that support a charge are pleaded with sufficient precision and specificity so as to provide adequate notice to the accused to be able to prepare a defense.[142]

134. *Id.* ¶¶ 6166–6167.

135. *Id.* ¶ 6183.

136. Prosecutor v. Nyiramasuhuko (*Nyiramasuhuko Summary*), Case No. ICTR-98-42-T, Summary of Judgement and Sentence (June 24, 2011).

137. *See, e.g.*, *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 2185 ("Before raping Immaculée, Shalom took the youngest child from her arms and threw the child to the side. Witness TA picked up the child and consoled it to keep it quiet. After raping Immaculée, Shalom placed two heavy logs on her legs, one above the knee and one below knee. . . . Witness TA testified that she went to visit Immaculée at a hospital and Immaculée told Witness TA that she had contracted AIDS during the 1994 events. Immaculée died in January 2001." (footnotes omitted)); *id.* ¶¶ 2756–2757 ("Witness SU showed them her aged breasts to discourage the men from raping her as she was very thin. . . . One night, an *Interahamwe* woke up Witness SU who removed her clothes, showed him her breasts and told him '[p]lease, don't take me with you, I'm an old lady and my breasts are falling.'").

138. *Id.* ¶¶ 139, 142.

139. *Id.* ¶ 77.

140. *Nyiramasuhuko Summary*, Case No. ICTR-98-42-T, ¶ 5.

141. Barad, *supra* note 34.

142. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 100.

R

Another concern is whether Nyiramasuhuko had received adequate notice of the legal basis of her alleged criminal responsibility, that is, whether she was charged on the basis of superior responsibility.[143] One way to cure any initial defects is for the Prosecution to subsequently disclose timely, clear, and consistent information that precludes prejudice for the defendant.[144] In the case of some charges, the judges found that initial defects had been cured, but not in others.[145] Concerns regarding the clarity and precision of the pleaded charges have arisen in other ICTR cases, as well.[146]

Nyiramasuhuko was found to be at the core of the genocidal campaign in Butare, a pivotal region of the country. She conspired with the Interim Government, of which she formed a core part, to kill Tutsis within Butare *préfecture* with the intent to destroy the Tutsi ethnic group in whole or in part.[147] Nyiramasuhuko's participation in Cabinet meetings, support of Habyalimana's ouster and replacement, and agreement with Cabinet policy each constituted key facts inferentially supporting this conviction. When informed of the massacres of the Tutsi population, the Cabinet did nothing to quell them but, instead, encouraged them through the use of directives and instructions.[148] None of the other five defendants were convicted on the charge of conspiracy to commit genocide (Count 1), only Nyiramasuhuko.[149]

The Trial Chamber found insufficient proof establishing Nyiramasuhuko's responsibility for violence at the Hotel Ihuliro road-

143. *See, e.g.*, *id.* ¶ 5615.

144. *See, e.g.*, *id.* ¶ 1836.

145. *See, e.g.*, *id.* ¶¶ 105–131, 4044, 4057, 4763, 5122.

146. On this note, the judgment and sentence of Trial Chamber III in the *Prosecutor v. Ndahimana* case offers an informative explanation of the concerns in this regard:

> The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused. The Prosecution is expected to know its case before proceeding to trial, and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds. Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of the proceedings, or the exclusion of evidence outside the scope of the indictment. In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.

Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgement and Sentence, ¶ 35 (Dec. 30, 2011) (footnotes omitted); *see also* Gaspard Kanyarukiga v. Prosecutor, Case No. ICTR-2-78-A, Judgement, ¶ 73 (May 8, 2012) ("The Prosecution is expected to know its case before it goes to trial and cannot omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.").

147. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 5678.

148. *Id.* ¶ 5669.

149. *Id.* ¶ 6186.

block.[150] But it found sufficient proof to link her to the terrible events that occurred at the BPO.[151] In sum, the Trial Chamber found "beyond a reasonable doubt that: between 19 April and late June 1994 Nyiramasuhuko, Ntahobali, *Interahamwe* and soldiers went to the BPO to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and the Tutsi refugees were killed in various locations throughout Ngoma *commune*."[152]

Regarding genocide (Count 2), the Trial Chamber again addressed Nyiramasuhuko's involvement in Cabinet meetings, attendance at the Kambanda and Sindikubwabo speeches, and removal of *préfet* Habyalimana.[153] The Trial Chamber did not find that this conduct provided a basis for responsibility under Article 6(1) of the ICTR Statute.[154] On this note, the law requires the conduct of an accused to substantially contribute to a crime in order for aiding or abetting to be found.[155] Nyiramasuhuko's tacit approval of the messages in the speeches did not rise to that level.[156] Nor did her involvement offer a legal basis for the charge of incitement to commit genocide, specifically Count 4, for which she was found not guilty.[157] However, she was found responsible under Article 6(1) for genocide (Count 2) for ordering killings at the BPO office.[158] This conduct also established her guilt for ordering extermination as a crime against humanity (Count 6) and ordering persecution as a crime against humanity (Count 8).[159]

Turning to Count 7, the ICTR defines rape as "the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator."[160] Trial Chamber II chided the Prosecution for failing to properly plead rape as genocide.[161] It found no basis to conclude that the Prosecution had cured this defect through subsequent adjustments. According to Trial Chamber II, "[a]lthough the evidence establishes in this case that rape was utilized as a

150. *Id.* ¶ 2577.

151. *Id.*

152. *Id.* ¶ 2781.

153. *Id.* ¶ 5746.

154. *Id.* ¶ 6186.

155. *Id.* ¶ 5596.

156. *Id.* ¶ 6186. A contrast arises with the *Ndahimana* judgment, released late in 2011, in which a *bourgmestre* in Kibuye *préfecture* was found guilty of genocide and extermination as a crime against humanity in part because his on-site physical presence at the time a church full of refugees was demolished—which resulted in the death of 1500 to 2000 Tutsi—accorded tacit approval to the demolition. Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgement and Sentence, ¶¶ 824–828 (Dec. 30, 2011).

157. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6186.

158. *Id.* ¶¶ 5876, 5969.

159. *Id.* ¶¶ 6051, 6099, 6120.

160. *Id.* ¶ 6075.

161. *Id.* ¶ 5828.

form of genocide . . . it would be prejudicial to the Accused to hold them responsible for a charge of which they had insufficient notice."[162] Hence, it did not enter a conviction for genocide on the basis of rape.[163] Convictions were entered on the basis of rape as a crime against humanity (on ethnic grounds) and outrages upon personal dignity as a war crime.[164] By her "presence and position of authority," Nyiramasuhuko was found guilty of aiding and abetting the rapes at the BPO.[165] The ICTR found on the facts that she issued instructions to rape the women gathered at the BPO[166] and, hence, that she ordered rapes.[167] Ntahobali was convicted for committing multiple rapes himself and for ordering *Interahamwe* personnel to rape.[168]

Yet another perplexing obstacle arose, however, in terms of the Prosecution's pleading strategy regarding rape. This difficulty involved the question of whether Nyiramasuhuko's responsibility could be located under Article 6(1) or Article 6(3). According to Trial Chamber II:

> Although the evidence clearly established Nyiramasuhuko's direct role in ordering *Interahamwe* to rape Tutsi women at the Butare *préfecture* office, the Prosecution only charged Nyiramasuhuko with responsibility as a superior for rape. Therefore the Chamber has only assessed Nyiramasuhuko's superior responsibility for the rapes at the Butare *préfecture* office.[169]

Trial Chamber II identified this as a "serious omission on the part of the Prosecution."[170] In any event, Trial Chamber II found Nyiramasuhuko re-

162. *Nyiramasuhuko Summary*, Case No. ICTR-98-42-T, ¶ 25 (June 24, 2011). For the discussion of this matter in the judgment, see *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 5828–5837 (regarding events at roadblock); *id.* ¶¶ 5857–5865 (regarding events at BPO). The defect in the Prosecutor's charge could not be cured; the Prosecution "provided insufficient notice of its intention to pursue rape as genocide." *Id.* ¶ 5835; *see also id.* ¶ 5864 (regarding events at BPO). This defect also affected the charges against Ntahobali. *Id.* ¶¶ 5835–5836.

163. Nonetheless "[t]he Chamber notes . . . that it will mention rapes in the course of its legal findings on genocide. This will be done to convey the entire set of facts in a coherent fashion, and will not be taken into account by the Chamber in assessing genocide. Instead, they will be considered when assessing the counts of rape as a crime against humanity, and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto." *Id.* ¶ 5837; *see also id.* ¶ 5865 (regarding events at BPO).

164. *See id.* ¶¶ 6076, 6185, 6200.

165. *Id.* ¶ 5869.

166. *Id.* ¶ 5870.

167. *Id.* ¶ 5877.

168. *Id.* ¶¶ 6075, 6210.

169. *Nyiramasuhuko Summary*, Case No. ICTR-98-42-T, ¶ 26 (June 24, 2011); *see also Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 6087, 6093.

170. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6087. After all, it had "already found that Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the BPO." *Id.*

sponsible under Article 6(3).[171] She was determined to have had a superior-subordinate relationship with the *Interahamwe*.[172]

Regarding Count 9, other inhumane acts, Trial Chamber II considered only the allegation that Nyiramasuhuko had forced victims to undress, including before abducting and killing them.[173] Trial Chamber II found that the Prosecution had not adduced sufficient evidence to support this allegation and, hence, entered a finding of not guilty.[174] It is imprudent to conceptualize this dismissal as incidental or as merely reflecting an ancillary part of the violence inflicted upon women in Rwanda. Incidents of forced nudity, whether as precursors to rape and murder or simply as humiliating ends in themselves, demonstrate the widespread and public nature of the violence. Discussing gender-based crimes committed in the Holocaust, for example, Monica Tulchinsky reports on female concentration camp detainees having no "provisions for menstruation" so that they "would be forced to allow the blood to run down their legs, or would be told to collect it with their hands," as well as being forced "to urinate in the latrines in the presence of SS men or male prisoners" and "to stand naked at roll call as punishment."[175] Tulchinsky concludes: "A large emphasis is placed by survivor testimonies on these humiliating experiences, and they represent the pervasive nature of the sexual degradation of women that contributed to the environment of widespread sexual violence."[176] The final two counts (10 and 11) concern war crimes. Nyiramasuhuko was found guilty—because of her having ordered the killings of Tutsi refugees at the BPO—for ordering violence to life, health, and physical or mental well-being of persons.[177] She was found guilty of outrages to personal dignity for her superior responsibility for rapes at the BPO.[178]

Trial Chamber II delivered its sentence at the same time as its judgment. When it comes to sentencing, the ICTR "has considerable, though not unlimited, discretion on account of its obligation to individualize penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted."[179] The Trial Chamber's discretion is to be contoured by several considerations. The gravity of the offenses committed is "the deciding factor in the determination of the sentence."[180] Although similar cases (that is, prior

171. *Id.* ¶ 6093.

172. *Id.* ¶ 6088.

173. *Id.* ¶ 6186.

174. *Id.* ¶ 6137.

175. Monica Tulchinsky, Sexual Violence in the Holocaust: Shame, Silence, and Scholarship 8 (Apr. 2012) (unpublished paper submitted for research seminar at Washington and Lee University School of Law) (on file with author).

176. *Id.*

177. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 6166–6167.

178. *Id.* ¶ 6183.

179. *Id.* ¶ 6188.

180. *Id.* ¶ 6189.

sentences awarded) are instructive, they are not binding as benchmarks.[181] Also, the ICTR Statute and the Rules provide that sentencing judges shall take into account the general practice regarding prison sentences in Rwanda, as well as any aggravating and mitigating circumstances.[182]

The Prosecution requested a sentence of life imprisonment.[183] Trial Chamber II granted this request.[184] It emphasized the vast number of victims, Nyiramasuhuko's abuse of her superior position, and the vulnerable nature of the victims (particularly at the BPO).[185]

III. Myth As Strategy, Trial As Sensation

In Rwanda, the endemic nature of rape was motored by gender-based hatred in addition to ethnic hatred—the two brutally intersected in the demonization of Tutsi women.[186] Trial testimony, authenticated by the text of the judgment, demonstrates how Nyiramasuhuko ordered the rape of those "arrogant" Tutsi women who, alternately, tempted and stole Hutu men (an image aimed at galvanizing female support for the rapes) or, on the other hand, spurned and humiliated them (an image aimed at men to commit rape).[187] These taunts, discontinuous in rhetoric—depending on the gender of the audience—are, nonetheless, unified in result, regardless of the audience.[188] Overall, the trial judgment carefully pursues a neutral approach to the gender of the lead defendant. Her gender, in fact, is never discussed. How to evaluate this neutrality through silence? Arguably, it avoids tabooifying Nyiramasuhuko as defendant or scandalously accentuating her guilt just because she is a woman.[189] And, arguably, the silence as to gender reflects what a criminal court is supposed to do—that is, mi-

181. *Id.* ¶ 6190.

182. *Id.* ¶ 6191. Whereas aggravating circumstances need to be proven beyond a reasonable doubt, mitigating circumstances need only be established on the balance of probabilities. *Id.* ¶¶ 6193, 6197.

183. *Id.* ¶ 6201.

184. *Id.* ¶ 6271.

185. In mitigation, the Trial Chamber considered Nyiramasuhuko's service as a Government Minister and previously in the Ministry of Health, but accorded these "very limited weight." *Id.* ¶ 6209.

186. In Rwanda, sexual violence overwhelmingly targeted women. *See* Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath (1996), *available at* http://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf. Whether in Rwanda, or elsewhere, I do not mean to overlook sexual violence committed against men and boys. Sexual violence against men and boys remains underreported and inadequately redressed. *See* Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 Eur. J. Int'l L. 253, 255 (2007).

187. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 2268, 2764, 4985.

188. *Cf.* Adam Jones, *Gender and Genocide in Rwanda*, 4 J. Genocide Res. 65, 65, 84 (2002) (noting generally "the bluntness of the *génocidaires*' appeals to gendered expectations and aspirations, again including women as active agents of the slaughter" and also that "there appears to have been a kind of gendered jubilation at the 'comeuppance' of Tutsi females, who had for so long been depicted in Hutu propaganda as Rwanda's sexual elite").

189. In this regard, the judges defied the pessimistic, if not downright dire, predictions of one commentator that

croscopically assess the guilt or innocence of the person in the dock on the basis of what that person is alleged to have done. The degendering of the lead perpetrator might additionally permit a clearer assessment of the criminal responsibility of the five other accused, all men, including her son. This silence also brings into sharper relief the judgment's vivid exposition of the gender-based nature of many of the crimes, in particular mass rape of Tutsi women, for which Nyiramasuhuko was found responsible. That said, on this latter note, the judges chose not to cure the Prosecutor's problematic shortcomings in failing to properly plead rape of Tutsi women at the BPO as genocide.[190] Had the Trial Chamber chosen to cure this defect, it would have further authenticated the use of rape as a tool of genocide in Rwanda. The Trial Chamber, after all, *said* that her superior responsibility for rape amounted to genocide.[191] But it chose not to *convict* on this basis, because it felt compelled to protect the due process rights of the defendant and, by logical extension, the integrity of the trial process.[192]

On the other hand, this conscious textual gender neutrality may present shortcomings and lost opportunities. For example, neutrality skips over the reality that, when disaggregating the multiple motivations that prompt a person to commit atrocity, it is somewhat stilted (perhaps even scripted) not to consider the role of gender in that process. Moreover, degendering runs the risk of glossing over the acute etiological need to better understand the role of femininities and masculinities in how mass atrocity emerges and, by logical extension, the cultivation of more effective reintegrative and preventative efforts in its aftermath.

Public representations of the trial, in any event, are rife with problematic essentialisms of femininity and motherhood.[193] These caricatures informed the way in which the media expressively telegraphed the trial to the public. Essentialisms also suffuse the strategic discourse of those invested in Nyiramasuhuko's conviction and, conversely, those invested in her acquittal (including Nyiramasuhuko herself). Although trial lawyers

> [t]he idea of finding a woman . . . guilty of such atrocities performed on her own gender may prove to be too controversial for the Tribunal. . . .
>
> On the other hand, the outrage over discovering that a woman could commit such atrocities may provide Pauline with little defense. She could be found guilty because of her classification as a woman, rather than as a war criminal.

Miller, *supra* note 3, at 372–73. R

190. *Nyiramasuhuko Summary*, Case No. ICTR-98-42-T, ¶ 26 (June 24, 2011).

191. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6180.

192. *Id.* ¶ 5835.

193. For a lucid overview and incisive commentary regarding academic and media representations of Nyiramasuhuko up until 2007, see SJOBERG & GENTRY, *supra* note 27, at 158–71. These authors conclude: "Gendered descriptions of Nyiramasuhuko and her role in the genocide permeate media and academic accounts of her case." *Id.* at 164. Some of the media and academic articles discussed by Sjoberg and Gentry also inform my discussion herein, although I include several other probative articles they do not consider. The discussion herein also builds upon their analysis by incorporating academic and media responses to the 2011 conviction, which postdates publication of their book. R

refrained from blatant excesses in this regard, they are far from the only stakeholders in the trial process. Stakeholders who condemn Nyiramasuhuko's conduct, including victims, turned to her status as woman and mother to underscore her personal culpability and individual deviance (that is, she is a worse perpetrator because she is a woman, mother, and grandmother).[194] Those who defend her conduct, including Nyiramasuhuko herself, invoked womanhood and motherhood tropes to emphasize the impossibility of her culpability (that is, she can't be a perpetrator, in particular of rape, because she is a woman, mother, and grandmother).[195] Either way, however, the outcome is unsettling. In this vein, as legal scholar Nicole Hogg observes, "[b]oth seeking to excuse [women's] behaviour and condemning it for breaching gender norms draws us into stereotyping women and undermines the complex realities of women's experiences of mass violence."[196] It is, assuredly, deeply disturbing when a minister in part tasked with promoting women's interests exhorts policies of mass rape. Sensationalizing her conduct, however, may be counterproductive and, as explored below, may occasion troublesome externalities.

Political scientists Laura Sjoberg and Caron E. Gentry develop a heuristic that identifies the deployment of paradigmatic narratives of the mother, the monster, and the whore to stylize those women who commit political violence, including women who participate in genocide such as Nyiramasuhuko. Sjoberg and Gentry argue that "[m]any stories about women's participation in genocide employ the mother, monster and whore narratives to deny women's agency in their own heinous violence."[197] Sjoberg and Gentry trace the emergence of motherhood imagery before and during Nyiramasuhuko's trial proceedings until 2007, when their book was published. As this Article demonstrates, this same imagery has persisted since 2007, including in the post-trial phase. That said, unlike Sjoberg and Gentry, I believe the analysis is not well served by classing, and often shoehorning, media representations into one of the monster, whore, or mother narratives. Rather, all three narratives overlap, whether synergistically or discordantly, and conspire to fuel gender-based tropes that both disturb and distort conversations about women as atrocity perpetrators. One effect of Sjoberg and Gentry's siloing of these narratives into three separate categories, and the resultant need to code evidence and pigeonhole it into a particular category, is a tendency toward redundancy

194. *See* Hogg, *supra* note 33, at 100; Sperling, *supra* note 2, at 652–53. R

195. *See* Hogg, *supra* note 33, at 82; Sperling, *supra* note 2, at 652–53. R

196. Hogg, *supra* note 33, at 101. R

197. SJOBERG & GENTRY, *supra* note 27, at 147. Sjoberg and Gentry's pioneering work on women's political violence concerns itself with how stereotypes about women who commit atrocity ultimately deny, as a collective matter, women's agency and subordinate women's choice. Hogg—writing specifically on Rwanda—argues that "[w]omen in leadership positions played a particularly important role in the genocide, and gendered imagery, including of the 'evil woman' or 'monster', is often at play in their encounters with the law." Hogg, *supra* note 33, at 69. R R

in their book and, also, a fair bit of hairsplitting as these three narratives are, in practice, not so readily distinguishable.[198] This quibble, however, in no way unsettles Sjoberg and Gentry's crucial observation that the turn to stereotype and myth dehumanizes the implicated women and, by extension, all women.

A. *Instrumental Pretexts*

Protagonists, antagonists, and apologists in the proceedings invoked myth to favor operational outcomes.

Although the final judgment was carefully gender neutral, gendered themes flitted about the trial proceedings. The Prosecution's opening statement, delivered by Silvana Arbia of Italy, emphasized Nyiramasuhuko as a "woman who had lost every sense of feeling."[199] The *Hirondelle News Agency* reports that, when she learned of the conviction, Prosecutor Holo Makwaia, who "led the prosecutions team in the case," said: "I am very happy because according to the law even when a woman commits offences like rape could [sic] also be convicted and sentence[d]."[200] Nyiramasuhuko's defense lawyers are quoted—in interviews conducted by Hogg—as describing her as "very nice, a mother hen" and as denying that she had any power in the genocidal government, owing in part to her being relatively new to politics.[201]

Prosecuting the case in a court of law is one thing. Prosecuting it in the court of public opinion is quite another. And, on this latter note, stakeholders embraced well-worn, and wooly, gender-based stereotypes.

While in a Congolese refugee camp, Nyiramasuhuko—when informed that she had been accused of murder—told the BBC that "she was not involved in the killings."[202] Why? Because, in Nyiramasuhuko's own words: "I couldn't even kill a chicken. If there is a person who says that a woman, a mother, could have killed, I'll tell you truly then I am ready to confront that person."[203]

198. The tendency toward repetition has been identified by a reviewer. Pamela Grieman, Book Review, 38 WOMEN'S STUD. 490, 491 (2009) (reviewing SJOBERG & GENTRY, *supra* note 27), *available at* http://dx.doi.org/10.1080/00497870902837596. R

199. *See Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 2165 n.5754 (June 24, 2011). Arbia currently serves as the Registrar of the International Criminal Court. *See The Registrar*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/the%20registrar/Pages/the%20registrar.aspx (last visited Mar. 24, 2013).

200. *Rwanda: ICTR Prosecutor Welcomes Judgement Against Nyiramasuhuko*, HIRONDELLE NEWS AGENCY (June 24, 2011), http://allafrica.com/stories/201107042152.html.

201. Hogg, *supra* note 33, at 93. R

202. Hazeley, *supra* note 43. R

203. *Id.*; *see also* Rugiririza, *supra* note 55 (very similar quotation, with some slight textual differences). Sperling argues that Nyiramasuhuko's response to the accusations "exhibits precisely the kind of gender bias that portrays women as weak, subservient, or pure, incapable of committing the kinds of atrocities for which she stands accused." Sperling, *supra* note 2, at 650. Hogg, commenting generally, argues that "[w]omen who participated in the genocide should not hide behind their sex to claim their innocence," but also that "women R

When asked whether women killed during the genocide, Nyiramasuhuko pithily responded: "I have no example [of that]. It's not possible because one did not know [how] to massacre like that."[204] These apparently aphoristic claims were echoed by Maurice Ntahobali, who told Landesman in 2002: "'[Nyiramasuhuko] was committed to promoting equality between men and women . . . . It is not culturally possible for a Rwandan woman to make her son rape other women. It just couldn't have taken place.'"[205] Nyiramasuhuko's mother, Theresa Nyirakabue, also chimed in on a strikingly similar note,[206] although she later acknowledged that Nyiramasuhuko might have participated in genocide—albeit not because she wanted to but, rather, because of fear.[207]

Sperling also reports that Nyiramasuhuko "claimed to be a victim of sexism, targeted for persecution precisely because she is an educated woman."[208] Nyiramasuhuko's argument also resurfaced—and may actually have been bolstered—by some media and academic discussion of the trial. One commentator posits that the case against Nyiramasuhuko raises the possibility that "[m]en may have found an ideal way to assuage their guilt over the rape of women: blame a woman instead."[209] Landsberg, the Canadian journalist previously quoted for having identified how Nyiramasuhuko's prosecution may provide succor for those who wish to blame women for women's plights, further unpacks this theme in grandiloquent terms that, whether inadvertently or intentionally, render her somewhat of an apologist for Nyiramasuhuko:

> In truth, the whole sexist, patriarchal culture of Rwanda should be on the stand. . . .
>
> . . . .
>
> . . . In every culture where men are dominant, and where patriarchal values hold sway over minds and hearts, many women help perpetuate unspeakable cruelties against vulnerable girls and young women. Female genital mutilation, dowry burnings, honour killings—women play their roles in all these crimes, not only because they are powerless and have no choice, but also because

who do not conform to gender expectations should also not be demonized and treated as aberrations." Hogg, *supra* note 33, at 102. R

204. Sperling, *supra* note 2, at 651. R

205. Landesman, *supra* note 30, at 87. R

206. "'It is unimaginable that she did these things . . . . She wouldn't order people to rape and kill. After all, Pauline is a mother.'" *Id.* at 125.

207. Landesman, *supra* note 30, at 132. R

208. Sperling, *supra* note 2, at 650. Sperling also notes that Nyiramasuhuko stated: "The [Rwandese Patriotic Front] have put on their list all intellectual Hutus. I'm amongst those Hutu who have been to university. I studied law. All women who went to university are seen as killers." *Id.* (citing AFRICAN RIGHTS, RWANDA, NOT SO INNOCENT: WHEN WOMEN BECOME KILLERS (1995)). R

209. Miller, *supra* note 3, at 373. R

> they have drunk deeply of patriarchy's poisons and thoroughly digested them.[210]

This argument is excessively reductionist. Although far from coequal, gender relations in pregenocidal Rwanda, and genocidal Rwanda, were considerably more nuanced, complex, and dynamic. Rakiya Omaar, Co-Director of African Rights, has been quoted as bluntly stating that "the argument that women were helpless to act against the genocide is bullshit."[211] In any event, pathologizing—and othering—an entire culture for sexism hearkens back to nativist rhetoric. Furthermore, the application of this logic to Nyiramasuhuko erases her individual agency in her own conduct. It also voids the agency of women in general—an outcome that is certainly not conducive to sustaining a political context of gender equality, human rights, and women's empowerment. Nyiramasuhuko was a very powerful woman, which suggests the inaptness of caricaturizing her as nothing more than a passive tool of culture, a robotic automaton of patriarchy, or a marionette manipulated by a cabal of men.

Unsurprisingly, a genocide survivor responded to Landsberg's polemic. In a rebuttal piece, Chantal Mudahogora rejects the analysis that Nyiramasuhuko was nothing more than a cudgel motored by structural sexism over which she had no control.[212] For Mudahogora, each and every person with responsibility for genocide in Rwanda should face the consequences, regardless of gender—including Nyiramasuhuko.[213] In making her case, Mudahogora marshals different gender-based memes. Mudahogora writes:

> Where I disagree with Landsberg is that I believe it is very important to focus on Nyiramasuhuko in particular, not only because of her alleged active participation in genocide and her crucial position in the government, but also and above all because she is a mother, with all the social criteria and expectations that that entails.[214]

Mudahogora therefore turns to motherhood to underscore how much worse of a perpetrator Nyiramasuhuko is. In this regard Mudahogora, too, obscures Nyiramasuhuko's political agency, occupational authority, and

---

210. Landsberg, *supra* note 94. R

211. Hogg, *supra* note 33, at 80 n.66 (citing Interview by Hogg with Rakiya Omaar, Co-Director, African Rights, in Kigali, Rwanda (June 13, 2001)). R

212. Chantal Mudahogora, *When Women Become Killers*, HAMILTON SPECTATOR, Oct. 19, 2002, (Magazine), at M13. Mudahogora was responding to an article written by Michele Landsberg that also appeared in the *Hamilton Spectator*. *See* Michele Landsberg, *Misplaced Blame: With Many Men Behind the Rwanda Atrocities, Why Does the Media Single Out a Woman As a Unique Monster*, HAMILTON SPECTATOR, Sept. 28, 2002, (Magazine), at M13. *Misplaced Blame* is nearly the same article that Michele Landsberg published in the *Toronto Star*. *See* Landsberg, *supra* note 94. R

213. Mudahogora, *supra* note 212. R

214. *Id.*

professional responsibilities. Despite her prominent public role, Nyiramasuhuko is tugged back into the private realm, where her real evil lies:

> As I said, Nyiramasuhuko was a government minister and politician, but first of all she was the mother of a family. It was a huge shock to all of us who survived the atrocities to see educated women who were supposed to save lives but who instead became involved in the genocide and, on top of it, in some cases forced their own male children to rape and kill other children and parents. It is unbelievable.[215]

This discussion about Nyiramasuhuko and motherhood departs from Sjoberg and Gentry's conceptualization of the content of motherhood as a narrative paradigm. In a nutshell, Sjoberg and Gentry depict the motherhood narrative as one in which a woman's maternal instincts drive her to support the violence of others or, alternately, to act violently in order to avenge perceived betrayals or losses (for example, a previously murdered husband).[216] Either way, the narrative's effect is to dull the mother's responsibility for her crimes—she is either a helpless supplicant or emotionally crazed. Echoes of the supportive-mother construct redound in Landsberg's portrayal if applied to Nyiramasuhuko, in the sense that Nyiramasuhuko would be seen as compelled to support the genocide because she was powerless in the face of patriarchy. Nevertheless, Mudahogora presents motherhood in a more exigent and punitive fashion. Because she is a mother, Nyiramasuhuko is a bigger disgrace. Motherhood, in this regard, is not a shield so much as it is a sword. Motherhood presents a basis for Nyiramasuhuko to be cast as an even greater pariah—all the more abnormal than her male counterparts. A female perpetrator, then, becomes more of a monster if she is a mother—suggesting the malleability of Sjoberg and Gentry's narratives, rather than their severability.

B. *Her Case As News*

Gender-based platitudes—even the most hackneyed ones—have been routinely invoked to mythologize, sensationalize, and spectacularize Nyiramasuhuko's prosecution. Consider the titles of a number of published articles on the trial—whether in the academic or popular press: "A Woman Scorned,"[217] "Mother of Atrocities,"[218] and "A Woman's

215. *Id.* Sjoberg and Gentry note similar tendencies in public descriptions of Plavšiæ. *See* SJOBERG & GENTRY, *supra* note 27, at 155. R

216. *Id.* at 33 ("Within the mother narrative women are characterized as acting either in a support role (the nurturing mother) or out of revenge (the vengeful mother).").

217. Wood, *supra* note 81. R

218. Sperling, *supra* note 2. R

Work."[219] Ironically, the "Mother of Atrocities" law review article laments how "the press seems . . . fixated on [Nyiramasuhuko's] gender."[220]

1. How She Looks

Nyiramasuhuko's physical appearance routinely arises in media coverage. For example, Elizabeth Barad, who conducted a clandestine interview with Nyiramasuhuko in 2003, describes her as "portly" and "[d]ressed in a navy-blue, nondescript dress only brightened by a floral scarf around her throat."[221] Barad observes how, at the time, she had a "warm attitude," only to elaborate further:

> In the years since that meeting Nyiramasuhuko's appearance changed dramatically and accusations against her were increasingly proven. She gradually lost a great deal of weight and dressed in brighter, more flattering colours with her head wrapped in African fashion. One of her judges, Arlette Ramaroson, told me in her chambers, "She's now wearing a gold cross around her neck . . . ."[222]

Barad adds, on the theme of Nyiramasuhuko as enigmatic paradox, that she "even included in her diary, admitted as an exhibit, lists of victims killed during the genocide, with, in a different ink, checkmarks after each name. On the same pages there were also domestic jottings detailing what she spent on vegetables, sugar and rice."[223]

Barad is not alone when it comes to being fulsomely drawn to Nyiramasuhuko's physical appearance and wardrobe preferences. Landesman describes Nyiramasuhuko's courtroom presence as suggesting "a schoolteacher" and notes that she prefers "plain high-necked dresses" that draw attention to "the gleaming gold crucifix she usually wears."[224] Danna Harman, writing for the *Christian Science Monitor*, opens a 2003 piece on Nyiramasuhuko with the following:

---

219. Landesman, *supra* note 30. R

220. Sperling, *supra* note 2, at 637 (also lampooning media queries such as "how could a woman, a mother, a female that looks so feminine commit such atrocities"); *see also id.* at 651 ("The press seems more focused on Pauline's womanly attributes than any other aspect of the case against her."). R

221. Barad, *supra* note 34. According to the byline of her article, Barad "practices international human rights law, gender and intellectual property law. As Chair of the New York City Bar's Rwanda Legal Task Force, Elizabeth organised two ethics seminar [sic] and a gender-sensitivity workshop for the Rwandan justice system." *Id.* The trial judgment very occasionally refers to some witness statements that reference Nyiramasuhuko's appearance, although in the spirit of the witness knowing her before the genocide so as to emphasize the credibility of the witness placing her at a particular location during the genocide. *See, e.g.*, *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 2697–2698 (June 24, 2011) ("She described Nyiramasuhuko as somewhat fat with a dark complexion."). Similar occasional discussion arises regarding Ntahobali. *See id.* ¶ 2995. R

222. Barad, *supra* note 34. R

223. *Id.*

224. Landesman, *supra* note 30, at 86. R

> With her hair pulled neatly back, her heavy glasses beside her on the table, she looks more like someone's dear greataunt than what she is alleged to be: a high-level organizer of Rwanda's 1994 genocide who authorized the rape and murder of countless men and women. Wearing a green flowery dress one day, a pressed cream-colored skirt and blouse set the next, the defendant listens stoically to the litany of accusations against her.[225]

In contrast, Ntahobali is described in the same article as "sit[ting] a row ahead of her in the courtroom, cleaning his fingernails with the edge of a briefing paper. During the breaks in proceedings he sits still, avoiding eye contact with his mother."[226]

In the penultimate paragraph of her article, Harman discusses the cross-examination of a prosecution witness.[227] She then concludes the article, in a new paragraph, somewhat pithily: "Nyiramasuhuko adjusts one of the shoulder pads of her pretty dress and jots a note. She is listening, but it is impossible to know what she hears of the pain."[228]

Reporting for the BBC on the 2011 conviction, Josephine Hazeley remarks that Nyiramasuhuko was "[l]ooking younger than her 65 years."[229] Agence France Presse picks up this same theme in its reporting on the 2011 conviction,[230] while also noting her attire.[231]

Assuredly, the physical appearances of prominent male defendants, along with their dressing habits, also surface when the media reports on their trials.[232] Perhaps invariably, these aspects of trials inveigle and titillate the public. Such references, however, tend to be more ancillary and

225. Harman, *supra* note 54. R

226. *Id.*

227. *Id.*

228. *Id.*

229. Hazeley, *supra* note 43. R

230. Rugiririza, *supra* note 55 ("The mother of four, who looks markedly younger than her 65 years, was sentenced to life in jail Friday."). R

231. *See id.* ("Her attire has ranged from colourful African prints to sober dresses with a large cross.").

232. Some reports of Thomas Lubanga's conviction, for example, mention that he wore a ceremonial white robe at the time the verdict was announced and that he wore a grayish blue tie and suit at his sentencing hearing. *See, e.g.*, Marlise Simons, *Congolese Rebel Convicted of Using Child Soldiers*, N.Y. TIMES, Mar. 15, 2012, at A12 (mentioning, in an approximately one-thousand-word article, his appearance only briefly: "Mr. Lubanga, 51, dressed in an elegant white ceremonial robe"); *Thomas Lubanga Sentenced to 14 Years in Prison for Congo War Crimes, Use of Child Soldiers*, CBSNEWS.COM (July 10, 2012), http://www.cbsnews.com/8301-202_162-57469235/thomas-lubanga-sentenced-to-14-years-in-prison-for-congo-war-crimes-use-of-child-soldiers/ (reporting that Lubanga was "[w]earing a gray suit and tie," but also that the judge "praised Lubanga for being 'respectful and cooperative' throughout the case despite it twice being held up by prosecutors defying court orders linked to identifying witnesses."). Reports of the trial of Ratko Mladiæ, while mentioning the cap he has worn to court, tend to focus more on how he acts—his obstructionism, in particular—than how he looks. *See, e.g.*, Peter Biles, *Mladiæ's Courtroom Antics*, BBC NEWS (July 4, 2011, 12:03 PM), http://www.bbc.co.uk/news/world-europe-14016622.

less central to these reports than the discussion of clothes and looks to reports of the Nyiramasuhuko trial.[233]

2. What She Does

As an influential minister, Nyiramasuhuko exercised an obligation to promote the best interests of the Rwandan people, with specific responsibilities in matters of both family and women's affairs. The breadth of her responsibilities, however, tapers off in public discourse. Her general obligations fade, as does the "family" aspect of her specific portfolio. Instead, she is projected as the "women's" minister—which makes her choice to order women to be raped and killed all the more incomprehensible and the gravity of her crimes all the more extreme. Examples of this reductionism, and concomitant bewilderment, are plentiful:

> Though it was Nyiramasuhuko's duty to promote the rights of women, she will be recorded in history as the first woman ever convicted by an international court of genocide and for ordering rape as a crime against humanity.[234]
>
> The shocking thing about her trial is that her ministerial brief was to promote and protect women's human rights.[235]
>
> As the former minister of Family and Women's Affairs, Nyiramasuhuko, instead of protecting women, incited her son and others to rape and kill Tutsi women as she stood in a military uniform at roadblocks, sometimes carrying a machine gun.[236]
>
> These facts are harrowing. More shocking still is that so many of these crimes were supposedly inspired and orchestrated by Pauline Nyiramasuhuko, whose very job was the preservation, education and empowerment of Rwanda's women.[237]

The media projection of the shocking nature of her crimes, owing to her betrayal of her portfolio to protect women, departs from the more careful presentation advanced by the Prosecution. For example, on the question of sentencing, the Prosecution submitted that Nyiramasuhuko "held one of the highest positions in the country as Minister," and "[o]ne

233. *See supra* note 232. R

234. Gregory Townsend, *Epilogue to* Hotel Rwanda, 15 AM. SOC'Y INT'L L. INSIGHTS (2011), *available at* http://www.asil.org/insights111207.cfm; *see also* Wood, *supra* note 81, at 287 (noting that, in her ministerial capacity, "Nyiramasuhuko's official duties before the 1994 genocide included the preservation, education, and empowerment of Rwanda's women"); Rugiririza, *supra* note 55; *Rwandan Woman Jailed for Genocide*, AL JAZEERA (June 24, 2011), http://www.aljazeera.com/news/africa/2011/06/201162410543380915 3.html ("Former minister of women's affairs becomes first female to be convicted of genocide by UN court for Rwanda."). R R R

235. L. Muthoni Wanyeki, *Self-Defence Is Not Murder*, ALLAFRICA.COM (Sept. 21, 2005), http://allafrica.com/stories/200509210429.html.

236. Barad, *supra* note 34. R

237. Landesman, *supra* note 30, at 85. R

of her roles was to protect the population."[238] In determining the sentence, moreover, the Trial Chamber followed this lead and eschewed a reductionist focus on Nyiramasuhuko's ministerial role as one geared only to women's affairs:

> Nyiramasuhuko's position as Minister for Family and Women's Affairs during the events made her a person of high authority, influential and respected within the country and especially in Butare *préfecture* from where she hails. Instead of preserving the peaceful co-existence between communities and the welfare of the family, Nyiramasuhuko, on a number of occasions, used her influence over *Interahamwe* to commit crimes such as rape and murder. This abuse of general authority *vis-à-vis* the assailants is an aggravating factor.[239]

In sum, the careful text of the judgment, focusing on Nyiramasuhuko as a Minister (whose portfolio included women's issues) rather than Nyiramasuhuko as a protector of women (who also was a Minister), palpably departs from the more essentialized treatment prevalent in the media and public commentary on the case.

3. And How She Lords over That Son of Hers

Another mythologized aspect of the trial is Nyiramasuhuko's relationship with her son. Undertones of control linger in descriptions of the mother-son relationship. The agency of the pliant son—her only son—thereby emaciates.[240] Ntahobali is presented as a university student, or even just as a student, at the time of the genocide.[241] This presentation is accurate, to be sure, but still has the effect of infantilizing him, insofar as he was roughly twenty-four years old at the time, worked as a part-time hotel manager (albeit in the family hotel), and—most crucially—had command over *Interahamwe* forces in Butare.[242] Although not mentioning him

238. *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 6202 (June 24, 2011).

239. *Id.* ¶ 6207.

240. SJOBERG & GENTRY, *supra* note 27, at 168 ("Most accounts of Pauline's conduct include the fact that her son, Shalom, was one of the men she commanded to commit rape and mass murder . . . . [T]he narratives always tell of Shalom *actually committing* the violence, but often relieve him of responsibility in whole or in part because his mother made him do it."). R

241. *See, e.g.*, Landesman, *supra* note 30, at 84; *Witness Claims Former Minister Ordered Militia to Rape Refugees*, HIRONDELLE NEWS AGENCY (Feb. 3, 2003), http://www.hirondellenews.org/ictr-rwanda/333-appeals/butare-trial/20101-en-en-witness-claims-former-minister-ordered-militia-to-rape-refugees91529152. R

242. On this latter point, Nyiramasuhuko and Ntahobali both were found to have "wielded effective control over the *Interahamwe* at the BPO" such that "[t]he only reasonable conclusion is that [they] had a superior-subordinate relationship over these *Interahamwe*." *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶¶ 5884–5885. The legal import of these findings is that is that the two accused had superior responsibility under Article 6(3) for the acts of the *Interahamwe* at the BPO—including abductions, rapes, and killings. ICTR Statute, *supra* note 106, art. 6(3). R

explicitly in this regard, Mudahogora seems to have Ntahobali (and Nyiramasuhuko as the manipulative domineering mother) in mind in her commentary of how "educated women . . . forced their own male children to rape and kill other children and parents."[243]

Interestingly, Trial Chamber II had to address these questions of control and agency when it came to assessing whether Nyiramasuhuko stood in a superior-subordinate relationship with Ntahobali.[244] It found that such a relationship did not exist:

> [T]he Chamber considers that the relationship between Nyiramasuhuko and Ntahobali in 1994 was complex, owing in part to the familial and interpersonal relationship shared by these two Accused. This complexity, however, cannot be confused for a superior-subordinate relationship. Cognisant that the burden of proof falls on the Prosecution to establish this element, the Chamber finds that there is insufficient evidence to enter a finding of a superior-subordinate relationship between Nyiramasuhuko and Ntahobali beyond a reasonable doubt.[245]

The controlling mother trope, therefore, did not explicitly arise when it came to sentencing Ntahobali. The Trial Chamber underscored Ntahobali's responsibility as a superior at the Hotel Ihuliro roadblock.[246] It sentenced both Ntahobali and Nyiramasuhuko to life.[247] Nor does it appear that the Ntahobali defense even raised this trope in mitigation, based on the judgment's summary of the defense submissions as to mitigating factors.[248] Hence, the public narrative of the controlling mother is not sourced in, nor does it derive support from, the actual legal findings. In the end, judicial text cannot control how others appropriate the content of that text.

---

243. Mudahogora, *supra* note 212.

244. For discussion of the elements of superior responsibility, see *Nyiramasuhuko Judgement*, Case No. ICTR-98-42-T, ¶ 5645 ("For an accused to incur criminal responsibility under Article 6 (3) of the Statute, in addition to establishing beyond a reasonable doubt that his or her subordinate is criminally responsible, the following elements must be established beyond a reasonable doubt: (1) the existence of a superior-subordinate relationship and that the superior had effective control over this subordinate; (2) that the superior knew or had reason to know that his or her subordinate was about to commit a crime or had done so; and (3) that the superior failed to take necessary and reasonable measures to prevent or punish the commission of the crime by his or her subordinate. The accused need not have the same intent as the perpetrator of the criminal act.").

245. *Id.* ¶ 5883.

246. *See id.* ¶¶ 5847–49.

247. *Id.* ¶ 6271.

248. *Id.* ¶ 6215 (noting instead his willingness to surrender to the ICTR, his young age during the events and at the time of his arrest, that he is the father of three young children, and his good character). *But see* Peter Landesman, *The Minister of Rape*, TORONTO STAR, Sept. 21, 2002, at K1 ("Ntahobali, then a 24-year-old member of the Interahamwe, repeatedly announced he had 'permission' from his mother to rape Tutsis at a hospital.").

R

In 2003, an ICTR Trial Chamber convicted Reverend Elizaphan Ntakirutimana, a Seventh-day Adventist pastor, and his son, Gérard Ntakirutimana, a physician, of genocide.[249] In 2004, in Elizaphan's case, the ICTR Appeals Chamber upheld one of the genocide convictions and added a conviction for extermination as a crime against humanity, in both counts on a theory of aiding and abetting;[250] in Gérard's case, it entered convictions for genocide, aiding and abetting genocide, and murder and extermination as crimes against humanity.[251] Elizaphan Ntakirutimana was the first—albeit since then not the last[252]—clergy member convicted of genocide by an international criminal tribunal, although other clergy had been convicted at the time by national courts in Rwanda and in Belgium.[253] His case acquired considerable notoriety insofar as he had moved to Laredo, Texas, after the Rwandan genocide and his extradition from the United States to the ICTR proved to be a complex matter.[254] Furthermore, the letter that six Tutsi clergy in his flock wrote to him, unsuccessfully imploring his help, contained the provocative words—"We wish to inform you that we have heard that tomorrow we will be killed with our families"[255]—which U.S. journalist Philip Gourevitch adopted as the title for his widely read account of the Rwandan genocide.[256]

Whereas the Ntahobali and Nyiramasuhuko proceedings tended to become telegraphed to the public as "mother and son," the proceedings concerning the Ntakirutimanas tended to become telegraphed as "pastor and

249. Prosecutor v. Elizaphan & Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, ¶¶ 919, 922 (Feb. 21, 2003). Gérard Ntakirutimana had additionally been convicted at trial of murder as a crime against humanity. *Id.* ¶ 810. At the time of conviction, Elizaphan Ntakirutimana was seventy-eight years old. *Id.* ¶ 35. He was released in early December 2006 and died in late January 2007. Press Release, Int'l Crim. Tribunal for Rwanda, Former Pastor Ntakirutimana Dies, ICTR/INFO-9-2-512.EN (Jan. 23, 2007). Gérard Ntakirutimana, forty-four years old at the time of conviction, *Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, ¶ 37, remains incarcerated in Bénin. *Ntakirutimana, Gérard*, HAGUE JUST. PORTAL, http://www.haguejusticeportal.net/index.php?id=9515 (last visited Mar. 24, 2013).

250. Prosecutor v. Elizaphan & Gérard Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement, ¶ 877 (Dec. 13, 2004).

251. *Id.*

252. *See, e.g.*, Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgement (Mar. 12, 2008).

253. *See, e.g.*, *Belgian Jury Convicts 4 in '94 Rwanda Massacre*, N.Y. TIMES (June 8, 2001), http://www.nytimes.com/2001/06/08/world/belgian-jury-convicts-4-in-94-rwanda-massacre.html; *Rwandan Nuns in Genocide Trial*, BBC NEWS (Apr. 17, 2001, 3:44 PM), http://news.bbc.co.uk/2/hi/europe/1280947.stm.

254. *See* Barbara Crossette, *Way Clear for U.S. to Deliver Rwanda War Crimes Suspect*, N.Y. TIMES, Jan. 25, 2000, at A3.

255. *See* Marlise Simons, *Rwandan Pastor and His Son Are Convicted of Genocide*, N.Y. TIMES, Feb. 20, 2003, at A3 ("[T]his case became known above all because of the astonishing letter that six Tutsi pastors wrote to him while they were at the church compound caring for refugees . . . saying 'We wish to inform you that we have heard that tomorrow we will be killed with our families.'").

256. *See* PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1999).

son."[257] When it came to the elder parent figure, Ntakirutimana was reduced to his profession, not his fatherhood. Nyiramasuhuko, on the other hand, was reduced to her motherhood, not her profession. The father remains in the public domain, then, his fatherhood seen as being of low titillation value; the mother remains in the private domain, as mother. Her case is not presented as "Minister and son *génocidaires*," nor is his case presented as "father and son *génocidaires*."

IV. Lessons for International Law in Post-conflict Societies

The proceedings against Nyiramasuhuko offer a number of important lessons regarding the effectiveness of international legal interventions within societies transitioning from mass atrocity. These proceedings, for instance, exemplify the inordinate veneration—at times bordering on the hagiographic—that accrues to international justice as opposed to, and often at the expense of, national and local justice. Recognizing women as agents of violence, as bystanders to violence, as resisters of violence, and as victims of violence grounds a more nuanced understanding of the mechanization of atrocity and, thereby, solidifies deterrent, dissuasive, and reintegrative goals. The Nyiramasuhuko proceedings also point to the acute need to carefully examine the role of femininities and masculinities in the metastasis of atrocity. And, finally, these proceedings signal the limits of criminalization—in particular, at a distant international tribunal—in the process of transitional justice.

A. *International Justice As First-Best Justice*

Nyiramasuhuko is far from the first woman convicted for atrocity crimes committed in Rwanda.[258] She may have been the first such conviction *at an international tribunal*, but the novelty begins and ends there. The

257. *See, e.g.*, Simons, *supra* note 255; *Chamber One Retires to Deliberate on Pastor and Son Judgment*, Hirondelle News Agency (Jan. 31, 2003), http://www.hirondellenews.org/ictr-rwanda/380-trials-ended/ntakirutimana-gerard/19223-en-en-chamber-one-retires-to-deliberate-on-pastor-and-son-judgement82748274; *Hutu Pastor on Trial for Genocide*, CNN World (Sept. 17, 2001, 10:31 AM), http://europe.cnn.com/2001/WORLD/africa/09/17/rwanda.pastor/index.html ("A Rwandan pastor and his son are due to stand trial on genocide charges."); *Pastor Aided Rwanda Genocide*, BBC News (Feb. 19, 2003, 11:40 AM), http://news.bbc.co.uk/2/hi/africa/2778839.stm ("The pastor and his son, who pleaded not guilty to all charges, are the ninth and tenth people to be convicted by the [ICTR] . . . ."); *Pastor and Son Genocide Trial Closes on August 22nd*, Hirondelle News Agency (July 12, 2002), http://www.hirondellenews.org/ictr-rwanda/380-trials-ended/ntakirutimana-gerard/18611-en-en-pastor-and-son-genocide-trial-closes-on-august-22nd76627662; *Prosecution Closes Case in Pastor and Son Trial*, Hirondelle News Agency (Aug. 21, 2003), http://www.hirondellenews.org/ictr-rwanda/380-trials-ended/ntakirutimana-gerard/18567-en-en-prosecution-closes-case-in-pastor-and-son-trial76187618.

258. This reality eludes some media reports. *See, e.g.*, Sukhdev Chhatbar, *Pauline Nyiramasuhuko, Rwandan Woman and First Ever Convicted of Genocide, Given Life Sentence*, Huffington Post (June 24, 2011, 12:13 PM), http://www.huffingtonpost.com/2011/06/24/pauline-nyiramasuhuko-rwanda-first-woman-convicted-genocide-life-sentence-_n_883857.html (reporting an "international law researcher" in The Hague as saying "she is the first woman convicted anywhere in the world of genocide"); *Rwandan Woman Jailed for Geno-*

fact that her conviction is presented in such overheated fashion, however, reveals the powerful tendency to view internationalized justice as the only justice, or at least iconically as the first-best form thereof, which fuels the disregard often accorded national initiatives, especially those undertaken within the post-conflict society itself. The response to the Nyiramasuhuko conviction, therefore, reflects not only problematic gender-based essentialisms, but also vexing nostrums regarding the much-vaunted superiority of enlightened internationalism over clumsy localism. International trials, nonetheless, are not the only indicia of progress, justice, or accuracy. It is, therefore, somewhat disturbing that a Google search of "women convicted for genocide in Rwanda" turns up pages and pages and pages of articles about Nyiramasuhuko (in multiple languages, and often in English), often incorrectly positing her as the first female genocide convict ever, with barely any mention of the many other Rwandan women prosecuted, convicted, acquitted, or serving sentences.[259]

In fact, within Rwanda, when all modalities of post-conflict justice are considered, there are likely several thousand women at diverse levels of responsibility who have been prosecuted for genocide-related offenses.[260]

Turning to individual examples: Agnès Ntamabyaliro—formerly Minister of Justice in the Interim Government—"is detained in Rwanda and has received a life sentence in isolation for her alleged role in the genocide."[261] Yet her case has barely received any mention, certainly not in the international media, even though *exactly like* Nyiramasuhuko she was a high-profile Minister and another woman in the Cabinet. Undoubtedly, the fact that she was prosecuted in Rwanda, as opposed to at the ICTR, contributes to this disparate reaction. Looking beyond the kernel of power, other women who participated in the genocide at an influential level were Rose Karushara (a local official in Kigali), Odette Nyirabagenzi (known as "the terror of Rugenge," a *secteur* of Kigali), and Athanasie

cide, *supra* note 234 ("Nyiramasuhuko, 65, is the first women [sic] to be ever convicted of genocide."). R

259. *See* GOOGLE, http://www.google.com (last visited Mar. 24, 2013) (search "women convicted for genocide in Rwanda").

260. Hogg, writing in 2010 and citing evidence from 2008, notes that almost 2000 women convicted of genocide-related offenses remain in Rwandan prisons. Hogg, *supra* note 33, at 70. Hogg excludes from this figure those "many more" women who would have been convicted of property offenses (which do not carry a prison term). *See id.* Moreover, Hogg's article focuses on "trials of female genocide suspects through the national courts, and not through the complementary 'traditional' justice system called *gacaca*." *Id.* It has been estimated by others that, in 2004, approximately 3000 women, representing 3.4% of the Rwandan prison population, were incarcerated for genocide-related crimes. Reva N. Adler et al., *A Calamity in the Neighborhood: Women's Participation in the Rwandan Genocide*, 2 GENOCIDE STUD. & PREVENTION 209, 212 (2007). Phil Clark, a distinguished Rwanda expert whose estimate of four hundred thousand total persons prosecuted by *gacaca* is among the most conservative (in contrast, the Rwandan government claims two million persons), estimates that between twelve thousand and twenty thousand women have been prosecuted through *gacaca* for genocide-related crimes. *See* E-mail from Phil Clark, *supra* note 10. R R

261. Hogg, *supra* note 33, at 75. R

Mukabatana (a nursing school teacher).[262] Euphrasie Kamatamu, a local political official in Kigali, was convicted in 1998; she was awarded the death penalty but ultimately died in prison three years later of natural causes.[263] Anne-Marie Nyirahakizimana, a major in the armed forces and a physician, was convicted in 1999 by a military court and sentenced to death.[264] She was retried a decade later—after the death penalty had been abolished in Rwanda—by a *gacaca* tribunal and sentenced to life imprisonment in isolation.[265] African Rights additionally identifies a number of other women as responsible for leading killings, for having cruelly turned against their neighbors, and as being journalists who preached genocide, as well as girls who were complicit in the murder of their fellow pupils.[266]

A fulsome focus on international proceedings also distracts from the penological and rehabilitative needs of women convicted in Rwanda for genocide-related offenses. In Rwanda, women prisoners (who in 2002 numbered about two to three percent of the total prison population, but in 2008 were estimated to represent nearly six percent) face steep reintegrative challenges and, as I have argued elsewhere, are among the most isolated demographic segments in contemporary Rwanda.[267] Women accused of genocide-related offenses, but acquitted at trial, also face obstacles upon release.[268] Emphasizing these obstacles, to be sure, must not come at the expense of redressing the ongoing challenges that victims of these crimes face in terms of their social reintegration, economic welfare, and health.

A few Rwandan women, moreover, have also faced, and continue to face, legal process at the national level outside of Rwanda. Sister Gertrude (Consolata Mukangango) and Sister Maria Kizito (Julienne Mukabutera) were convicted in Belgium in 2001 for their role in the murders of thousands of Tutsi refugees in Butare in 1994.[269] Both nuns had sought asylum in Belgium.[270] They were sentenced to fifteen and twelve years' imprisonment, respectively.[271] Ntahobali's wife, Béatrice Munyenyezi (who testified at his trial) moved to the United States in 1998, where she

262. Jones, *supra* note 188, at 83. R

263. Hogg, *supra* note 33, at 94 ("Like Nyiramasuhuko, Kamatamu specifically argued she *had no power* to prevent the genocide."). R

264. *Id.* at 96.

265. *Id.* at 96 n.156.

266. AFRICAN RIGHTS, *supra* note 208, at 14–22, 31–36, 36–69, 79–84. R

267. Mark A. Drumbl, *The ICTR and Justice for Rwandan Women*, 12 NEW ENG. J. INT'L & COMP. L. 105, 115 (2005); Hogg, *supra* note 33, at 70. R

268. For women, the acquittal rate has been estimated at forty percent. Adler et al., *supra* note 260, at 212 (citing Hogg's research). R

269. *See* Hogg, *supra* note 33, at 98. R

270. *Id.*

271. *Id.*

claimed asylum and became a citizen in 2003.[272] In 2010, she was indicted in the United States for allegedly falsifying her refugee (and citizenship) application by covering up her role in the 1994 genocide. Prosecutors "produced witnesses from Rwanda who testified that Munyenyezi was a Hutu extremist who helped orchestrate the rapes and killings . . . at a roadblock near her home."[273] The jury deadlocked; a mistrial was declared, and a trial is set for early 2013.[274] In the interim, Munyenyezi has been released from custody; under strict conditions, she has returned to her home in Manchester, New Hampshire.[275] Agathe Habyarimana (Kanziga), whose influence catalyzed Nyiramasuhuko's own political ascent, continues to elude formal criminal prosecution, despite her place at the very heart of the extremists who incubated the genocidal campaign (ironically, she was airlifted out of Rwanda only days after her husband's assassination and brought to France).[276] Now seventy years old, she still lives in France, although the precise status of her legal residency in that country remains fluid and under challenge. In December 2009, Rwandan prosecutors requested Habyarimana's extradition back to Kigali to face seven counts of genocide.[277] French authorities arrested her.[278] In 2010,

272. Tina Susman, *Jury Deadlocks in Case of Rwandan Immigrant Accused of Genocide*, L.A. TIMES (Mar. 16, 2012), http://articles.latimes.com/2012/mar/16/nation/la-na-nn-genocide-trial-20120316.

273. *Id.*

274. *Trial for Woman in Genocide Case Put Off 5 Months*, FOSTER'S DAILY DEMOCRAT (Sept. 6, 2012), http://www.newhampshire.com/article/20120907/AGGREGATION/120909751/0/0.

275. Tom Haines, *Did Beatrice Munyenyezi Lie to Get into This Country?*, BOS. GLOBE, Aug. 26, 2012, (Magazine), *available at* http://www.bostonglobe.com/magazine/2012/08/25/did-beatrice-munyenyezi-lie-get-into-this-country/sJbnzCe2QOc6t35ufR8lxO/story.html. Incidentally, her sister, Prudence Kantengwa, was convicted in Boston—on charges of visa fraud, fraud in immigration documents, perjury, and obstruction—for lying about her role in the Rwandan genocide to gain U.S. citizenship. Kathryn Marchocki, *Boston Jury Convicts Sister of NH Woman Accused of Rwanda Genocide Role*, N.H. UNION LEADER (May 7, 2012, 10:39 PM), http://www.unionleader.com/article/20120508/NEWS03/120509895.

276. Chris McGreal, *Profile: Agathe Habyarimana, the Power Behind the Hutu Presidency*, GUARDIAN (Mar. 2, 2010, 2:52 PM), http://www.guardian.co.uk/world/2010/mar/02/rwanda-france. She was the pivot of an extremist clique of Northern Rwandan Hutus known as the Akazu, believed to have conceived the plans for genocide. *Id.* Nonetheless, and ironically, Hogg notes that in her pleadings before the French Refugee Commission, Habyarimana (Kanziga) invoked gender essentialisms: she "stressed her role as mother of eight children," she "claim[ed] to have passed her time preparing meals for her family and taking care of the garden and livestock," she "argued [that] she never listened to the radio or read newspapers, and never discussed politics with her husband." Hogg, *supra* note 33, at 91. Hogg sums up by opining that "[t]he image thus presented was of a simple woman, a motherly figure, who was ignorant of political affairs." *Id.* In many ways, this posture is similar to that Nyiramasuhuko advanced at her own trial.

277. *Rwanda: France Will Not Extradite Agathe Habyarimana*, HIRONDELLE NEWS AGENCY (Sept. 28, 2011), http://www.hirondellenews.org/ictr-rwanda/410-rwanda-other-countries/25589-en-en-280911-francerwanda-france-will-not-extradite-agathe-habyarimana1464014640.

278. *Rwanda President's Widow Held in France over Genocide*, BBC NEWS (Mar. 2, 2010, 4:35 PM), http://news.bbc.co.uk/2/hi/europe/8545120.stm.

however, the extradition request was dismissed by an appeals court in Paris.[279] Nonetheless, Habyarimana does face civil proceedings in France that have been brought by a victims' organization, and has been summoned as a witness in this regard,[280] but no criminal charges have yet been brought.

B. *Connivance and Collective Violence*

African Rights' groundbreaking 1995 report, *Rwanda, Not So Innocent: When Women Become Killers*, details the involvement of women in genocide.[281] This report provides a trove of evidence of how women (and even girls) participated in atrocity at multiple levels: by leading killings, by directly killing, by publicizing the names of victims, by singing genocidal songs in support of the massacres, by serving as spies, by looting corpses, by pilfering from the morbidly injured, and by destroying homes.[282] Public portrayals of the Nyiramasuhuko conviction—which highlight her deviance in burlesque fashion—do not reflect these much more textured, and even routine, realities of women's involvement in the Rwandan genocide.

Hogg, who has written elegantly about the role of women in the Rwandan genocide, notes that many "'ordinary' women" were involved in the genocide.[283] According to Hogg, these women did directly take part in killings, but they "committed significantly fewer acts of overt violence than men."[284] Genocide, however, would not have metastasized without these structural and systemic contributions. Hogg posits that, notwithstanding the broad conception of the crime of complicity in applicable domestic Rwandan law, women "may be under-represented among those

279. *See Rwanda: France Will Not Extradite Agathe Habyarimana*, *supra* note 277. R

280. Plainte avec constitution de partie civile (Le collectif des parties civiles pour le Rwanda), Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Evry, Feb. 13, 2007 (Fra.), *available at* http://cec.rwanda.free.fr/informations/CPCR-plainteAHK.pdf.

281. *See* African Rights, *supra* note 208; *see also* Sperling, *supra* note 2, at 638, 653 ("Women, girls, and mothers also willingly and enthusiastically played important roles in the Rwandan genocide. . . . [T]housands of Rwandan women directly participated in the murder, torture and rape of their Tutsi neighbors."). R

282. *See* African Rights, *supra* note 208. This report is critical of the notion that all women were helpless victims or bystanders during the genocide. *See id.* at 1; *see also* Jones, *supra* note 188, at 84. In the case of Darfur, see Blake Evans-Pritchard & Zakia Yousif, *Sudan: Female Singers Stir Blood in Darfur*, Inst. for War & Peace Reporting (Jan. 4, 2012), http://iwpr.net/report-news/female-singers-stir-blood-darfur (discussing "influential female singers" known as Hakamat, whose songs allegedly goad men into committing acts of violence against other tribes). R R

283. Hogg, *supra* note 33, at 69. Hogg argues that when women conformed to gender expectations and participated indirectly in the genocide, the legal system attributed them less moral blame, but when women played a more direct role (thereby challenging gender and cultural stereotypes), they became "regarded as 'evil' or 'non-women' and treated with the full force of the law." *Id.* at 70–71. R

284. *Id.* at 69. It has been estimated that fewer than one in ten members of the *Interahamwe* were women who had received "civil defense" training. Adler et al., *supra* note 260, at 223. R

pursued for genocide-related crimes."[285] She attributes this to the indirect nature of their crimes coupled with the prevalence of male chivalry.[286] To this, I would add that the language of the criminal law generally has great difficulty in articulating these forms of prosaically impersonal contributions to mass crime. One response to this quandary is for the criminal law to develop vicarious liability theories, abandon strict causal-contribution requirements, and expand its reach through doctrines such as joint criminal enterprise and coperpetration. A bolder answer is to transcend the criminal law as the formal *sine qua non* of accountability, and instead earnestly pursue other forms of justice, restoration, and reconciliation such as truth commissions, customary ceremonies, and reparations. The reflexive answer to perceived justice shortfalls is to work criminal law tools harder and faster. Perhaps the time has come to revisit this conventional wisdom. Perceived justice shortfalls can be filled with many things other than more of the same criminal law and penal process.

Hogg's work, moreover, adds a fascinating gender dynamic to the discussion of what, exactly, international criminal law covers and offers a fecund basis for further extrapolation. For decades, activists have lamented that international criminal law failed to adequately cover the many crimes committed against women in bouts of mass atrocity.[287] These activists are right. And their efforts have succeeded in bringing the horrors of sexual violence, rape, forced marriage, and sexual slavery—crimes that affect both men and women, although disproportionately women—into the judicial frame. Yet if international criminal law should be lauded for its expansion to cover crimes against women, then does it not remain awkwardly asymmetrical for international criminal law to undercapture crimes committed by women or, if it captures them, to do so amid great sensationalism that stylizes the situation as aberrant?

C. *Femininities, Masculinities, and Individual Agency*

Sjoberg and Gentry conclude that "all decisions are contextual and contingent, not only women's, and . . . all decisions are made, not only

285. Hogg, *supra* note 33, at 69. Hogg contends that women's participation in genocide, therefore, "was more widespread than detention statistics indicate." *Id.* at 71.

286. Chivalry theory is controversial, which Hogg acknowledges, although she finds it conveys some relevant insights. According to this theory:

> [I]nvestigators, prosecutors and judges are so infected by gender stereotypes that they either cannot perceive of women as criminals or feel protective towards them in spite of their suspected or proven criminality. Men therefore, perhaps unwittingly, exercise their discretion in women's favour at each level of the criminal justice system—during reports, arrests, prosecution and sentencing.

Id. at 81 (footnotes omitted). In response, perhaps one notable advantage of the gender neutrality of the Nyiramasuhuko judgment is that it eschews the apparent contagion of "chivalry theory."

287. CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 266, 271 (2006); ANDREW ALTMAN & CHRISTOPHER HEATH WELLMAN, A LIBERAL THEORY OF INTERNATIONAL JUSTICE 207 n.50 (2009).

R

men's."[288] An acute need arises for such agile analysis in order to grasp the role of the individual—any individual—within the cauldron of collective violence. This quest remains a focus of my own research, for example, even in the most poignant cases of child soldiers and low-level perpetrators. Believing that a refusal to pursue such a direction underachieves the critical goal of deterring future atrocities, I advocate for a more nuanced, grounded, and sublime approach to victims and victimizers, at times the two being one within necropolitical contexts.[289]

Undoubtedly, in understanding why any individual woman perpetrates atrocity, gender matters in terms of deracinating socialization into violence, hate, mythology, and group-based superiority. In understanding why any individual man perpetrates atrocity, masculinities discourse equally helps shed light on possible individual motivations and justifications.[290] I am not arguing in favor of gender-neutral vocabularies to elucidate individual participation in collective violence. Those vocabularies are incomplete. They depersonalize and ring artificially hollow. Rather, I am arguing in favor of an alternative discourse that eschews both stereotype and reductionism and instead embraces the reality that individual participation in collective massacre arises from a complicated admixture of dispositional, situational, structural, and ideological factors—one of which is gender.[291] Only by approaching the subject matter from this angle can a true etiology of atrocity be delineated, and a rich epistemology cultivated, with the concomitant benefits when it comes to enhancing post-conflict reconciliation and actual prevention. I have elsewhere developed the analytic tool of atrocity perpetrators as occupying interstitial positions on a spectrum of circumscribed action.[292] Others develop different approaches,

288. SJOBERG & GENTRY, *supra* note 27, at 197. R

289. On "necropolitics," see Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 40 (Libby Meintjes trans. 2003) ("I have put forward the notion of necropolitics and necropower to account for the various ways in which, in our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of *death-worlds*, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*.").

290. LENE HANSEN, SECURITY AS PRACTICE: DISCOURSE ANALYSIS AND THE BOSNIAN WAR 169–72 (2006); Henri Myrttinen, *Violence, Masculinities and Patriarchy in Post-conflict Timor-Leste*, *in* MEN AND MASCULINITIES IN SOUTHEAST ASIA 103, 103–20 (Michele Ford & Lenore Lyons eds., 2012).

291. I also argue that a gendered analytic framework should focus on *both* men and women. In this regard, I echo Adam Jones, who posits: "The Rwandan genocide offers important evidence that 'gendering' genocide can provide powerful insights into the outbreak, evolution, and defining character of genocidal killing. For this approach to bear full fruit, however, the 'gendering' must be both *careful* and *inclusive*." Jones, *supra* note 188, at 87. R

292. MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 98 (2012) ("A circumscribed actor has the ability to act, the ability not to act, and the ability to do other than what he or she actually had done."). Circumscribed action is presented as a spectrum or continuum, thereby encouraging "procedural inquiry into the specific histories and experiences of the individuals located within its contours." *Id.* at 99.

rooted in tactical agency as opposed to strategies[293] or—as is the case for Sjoberg and Gentry—based on relational autonomy theory.[294] Regardless of the specifics, I believe these endeavors each present fruitful trajectories for future research, especially insofar as they move away from the polarizing binomials of victim or perpetrator.[295] In the case of lower-level offenders, whose agency may be ambiguous but nonetheless tangible, modalities of justice other than criminal trials may be particularly apt at promoting accountability, reparation, and reintegration. In this vein, it is also important to recognize general cross-national survey data that indicates that the international activist community may excessively focus on sexual violence perpetrated by armed forces or groups during conflict and, consequently neglect the pervasiveness of domestic sexual violence—in other words, acts perpetrated by family members, partners, and acquaintances—during wartime.[296]

Obversely, Rwandan women also exercised agency in *opposing* the genocide. It is not evident whether women helped Tutsis any more or less than men did, but, regardless, some women contested the genocidal narrative.[297] Much of their resistance was private, operationalized through empathetic gestures and discreet—albeit highly risky—acts. At the highest level, nonetheless, the elimination of Prime Minister Agathe Uwilingiyimana—the third woman (of three) in the Cabinet—permitted genocide to metastasize.[298] A political moderate, and perceived as a foil to the genocidal movement, Uwilingiyimana was tracked down, sexually assaulted, and killed by Rwandan army personnel (including members of the Presidential Guard) on April 7, 1994.[299] Her brutal murder allowed the most extreme group of *génocidaires* to cement their grip on the highest

293. *See* ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA (2006). For Honwana, tactical agency, or agency of the weak, involves short-term decisions undertaken to cope with and maximize the concrete, immediate circumstances of the surrounding militarized environments. *Id.* at 51, 70, 73.

294. SJOBERG & GENTRY, *supra* note 27, at 196 ("According to a feminist understanding of relational autonomy, human choice is never entirely free, but it is also never entirely constrained."). R

295. For discussion of these themes within the context of Muslim fundamentalism, see Karima Bennoune, *Remembering the Other's Other: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM. RTS. L. REV. 635, 677 (2010).

296. HUMAN SEC. RESEARCH GRP., HUMAN SECURITY REPORT 2012, at 2 (2012) ("[T]he mainstream narrative systematically neglects domestic sexual violence in war-affected countries, even though it is far more pervasive than the conflict-related sexual violence that is perpetrated by rebels, militias, and government forces, and which receives the overwhelming majority of media and official attention."). R

297. Hogg, *supra* note 33, at 77–80.

298. Prior to becoming Prime Minister, Uwilingiyimana served as Minister of Education. In that capacity, she abolished quotas for school admission (which in the colonial period had favored Tutsi, but in the republics [circa 1964 to 1994] had favored Hutu) and replaced them with a merit-based system. Elisabeth King, From Classroom to Conflict? 151–52 (2012) (unpublished manuscript) (on file with author).

299. Max L. Rettig, *Transnational Trials As Transitional Justice: Lessons from the Trial of Two Rwandan Nuns in Belgium*, 11 WASH. U. GLOB. STUD. L. REV. 365, 377 (2012).

echelons of power.[300] Unremitting portrayals of women as victims nourish prejudicial stereotypes of helplessness and, thereby, gloss over the reality that some women are victimized *because they exercise the agency of resistance* and, thereby, threaten the normalization of massacre.

D. *The Limits of Criminalization*

Survivors of mass rape and collective massacre certainly obtain a measure of justice from ICTR convictions, including the convictions of the Butare Six. These convictions, however, represent only a small step in the arc of justice. The value of these convictions, while significant, should not be overstated. Many survivors require ongoing physical and occupational therapy, medical care, and assistance with their children (including children conceived from acts of rape), poverty, stigma, and education. Many of these requirements are pressing. They matter a great deal to survivors. Criminal convictions, however, do not deliver on these fronts. Unlike the International Criminal Court, the ICTR is unable to award collective reparations.[301] ICTR proceedings, furthermore, are very costly—estimated at $U.S. eighteen million per indictment and $U.S. twenty-one million per case completed.[302] Since it began its operations, the ICTR's total budget has consumed over $U.S. 1.4 billion.[303] Criminal trials receive a great deal of attention, to be sure, but they also entail a great deal of expense—this is not justice on the cheap.

Nor do ICTR convictions address the reality of human rights abuses prevalent in Rwanda today. The state is dominated by the RPF government's tight grip on power. The fact that the ICTR, as a matter of law in practice, examines only the crimes committed by Hutu, and not crimes committed by the RPF in its ousting of the genocidal government, consolidates the ethnocratic nature of governance in contemporary Rwanda.

Notwithstanding the Rwandan government's official focus on putatively draining ethnicity from public discourse,[304] ethnicity is sustained in public discourse by the vast number of convictions entered for genocide and crimes against humanity. These convictions pivot off proof of ethnicity among the targeted group and in the mind of the perpetrator and, as a result, collectivize the crime. Hence, Rwandanness becomes myth when

300. *Id.*

301. ICTR Statute, *supra* note 106, art. 23(1), 23(3) (providing as remedies the imprisonment of the convict and, in addition thereto, an order obliging the convict to "return . . . any property and proceeds acquired by criminal conduct").

302. JOHN CIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 150 (2012) (monograph on file with the author) (noting costs per indictment of $U.S. thirteen million and $U.S. thirty-five million at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, respectively, and costs of $U.S. sixteen million and $U.S. 974 million per case completed, respectively).

303. *International Justice: In the Dock, but for What?*, ECONOMIST (Nov. 25, 2010), http://www.economist.com/node/17572645.

304. SCOTT STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA 14 (2006).

trials are used to promote retrospective justice so long as those trials target only one group as defendants.

Conclusion

The *Nyiramasuhuko* trial judgment was issued nearly fifteen years after Rwanda had tumbled into a genocidal abyss. Much has changed—strikingly for the better—over these fifteen years. From the depths of dilapidation, Rwanda's economy has grown considerably.[305] The country has innovated greatly in technology and transportation.[306] Quality of life for many Rwandans has improved substantially.[307] This economic growth, however, is not without a disquieting shadow side. The Kagame government's grip on power is tightening, while the international community is growing increasingly critical of what it perceives as its many human rights abuses both within Rwanda and in neighboring countries, in particular the Democratic Republic of the Congo.[308]

Genocide destroys but, in the Rwandan case, it also ironically generated new socioeconomic possibilities for survivors, bystanders, and returnees—in particular women. In postgenocidal Rwanda, women face many challenges but play more prominent roles in public life than they ever have historically.[309] Rwanda's population was estimated as being seventy percent female immediately following the genocide.[310] Although that figure quickly became dated as many men in the diaspora or who had become refugees returned, in 2000 it still was estimated that over fifty-seven percent of the economically active population was female.[311] Customary land laws and practices that discriminated against women have been scaled

305. Josh Ruxin, *Rwanda 15 Years On*, N.Y. Times: On the Ground (Apr. 11, 2009, 10:18 PM), http://kristof.blogs.nytimes.com/2009/04/11/rwanda-15-years-on; Steve Terrill, *Economic Growth Pulls Rwandans Out of Poverty*, Global Post, (Apr. 1, 2012, 7:55 AM), http://www.globalpost.com/dispatch/news/regions/africa/120328/rwanda-economic-growth-pulling-rwandans-out-poverty ("In the past 17 years Rwanda has pulled its economy up from the ruins to become one of Africa's most dynamic and fastest growing, registering at least 8 percent GDP growth for the past 5 years.").

306. Sarah Lacy, *How to Cross the Digital Divide, Rwanda-Style*, Tech Crunch (June 24, 2009), http://techcrunch.com/2009/06/24/how-to-cross-the-digital-divide-rwanda-style (discussing the extensive funding allocated to fiber optics, computers, and other technology in Rwanda).

307. Terrill, *supra* note 305 ("At least 1 million Rwandans have been lifted out of poverty in just five years . . . . Economic growth between 2006 and 2011 reduced the number of Rwanda's 11 million people living in poverty from 57 to 45 percent."). R

308. Robyn Dixon, *U.S. Under Pressure over Rwanda Involvement in Congo Fighting*, L.A. Times (Dec. 20, 2012), http://articles.latimes.com/2012/dec/20/world/la-fg-congo-rwanda-20121221.

309. For a discussion of these challenges, see Drumbl, *supra* note 267. R

310. Catharine Newbury & Hannah Baldwin, Aftermath: Women in Postgenocide Rwanda 12 n.19 (2000).

311. Heather B. Hamilton, *Rwanda's Women: The Key to Reconstruction*, J. Humanitarian Assistance, Jan. 10, 2000, at 1.

back.[312] Rwandan schools "have achieved gender parity in primary enrollment, although fewer girls complete primary school than boys."[313] Women sit in the Rwandan Parliament in percentage numbers that well exceed the percentage of women in the U.S. House of Representatives or Senate and that also transcend international averages. In 2007, King noted that "Rwanda now holds the world record for the highest proportion of women in parliament, at 56% in the lower house."[314]

One way to consolidate these advances for Rwandan women is to demystify those Rwandan women—such as Nyiramasuhuko—who perpetrated atrocity.

But women's advances also need to be demystified, as well. What women *actually do* in public roles and as public officials matters greatly. Post-conflict transitions are not always elegantly democratic. The autocratic nature of Rwanda's government should not be denied; neither should the fact that empowered women enthusiastically support this autocracy and thrive within it. Women's rights can expand in contexts where other human rights may shrink, shrivel, or remain under siege. Gender relations can equalize while other civic rights—freedom of expression, for example—wither. Even among the winners in the game of ethnocratic politics, moreover, gains can be uneven. It is crucial to hone in on which women have seen their opportunities expand in the post-conflict phase. In contemporary Rwanda, arguably, it is the rights of educated anglophone Tutsi former *émigrées* that have become most robustly actualized, whereas the rights of Tutsi genocide survivors—largely francophone—remain underachieved. Just as the role of women during atrocity calls out for more careful and less assumptive or categorical analysis, so, too, does the role of women as change agents after atrocity.

312. ERNEST UWAYEZU & THEODOMIR MUGIRANEZA, LAND POLICY REFORM IN RWANDA AND LAND TENURE SECURITY FOR ALL CITIZENS: PROVISION AND RECOGNITION OF WOMEN'S RIGHTS OVER LAND (paper presented at Int'l Fed'n of Surveyors, "Bridging the Gap Between Cultures," Marrakech, Morocco, May 18–22, 2011), *available at* http://www.fig.net/pub/fig2011/papers/ts04g/ts04g_uwayezu_mugiraneza_4914.pdf.

313. King, *supra* note 298, at 195 ("This achievement is particularly significant, as less than 30% of the thirty-nine sub-Saharan African countries studied by UNESCO have achieved gender parity in primary education.").

314. *Id.* at 179 (noting also that the global average is nineteen percent and the sub-Saharan African average barely over eighteen percent).

R

33599-mil_34-3 Sheet No. 60 Side B 06/19/2013 08:32:46

CONCEPTIONS OF CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND IMPLEMENTATION: A THEORETICAL FRAMEWORK

*Laura Pedraza-Fariña**

* Law Research Fellow, Georgetown University Law Center; J.D. Harvard Law School, 2009; Ph.D. Yale University, 2005; B.A. Oberlin College, 1997. For helpful comments, discussion, and suggestions, special thanks to William Alford, Francesca Bignami, M. Gregg Bloche, Edith Brown-Weiss, James Cavallaro, Laura Donohue, Dov Fox, Neha Jain, Gregory Klass, David Landau, David Luban, Balakrishnan Rajagopal, Mindy Jane Roseman, Alvaro Santos, Robin West, members of Georgetown Law School Fellows' Collaborative, and participants in Harvard Law School International Law Workshop. I owe a special debt of gratitude to Ryan Goodman and Lawrence Solum for encouraging me to write this Article and for reading and commenting on multiple drafts.

INTRODUCTION

The last two decades have seen an unprecedented explosion in the number of civil society organizations seeking to influence national and international policy making and implementation.[1] Global leaders, activists, scholars, and policy experts have increasingly called for the inclusion of civil society in international governance and in the national implementation of international commitments.[2] Most recently, the wave of civil uprisings that swept the Middle East and North Africa has put fostering civil

1. The number of nongovernmental organizations (NGOs) that sought to impact policy in issues ranging from human rights to the environment nearly doubled in the 1990s, growing from 23,600 in 1991 to 44,000 in 1999, and has continued to grow at a similar pace since then. U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 8 (2000), *available at* http://hdr.undp.org/en/media/HDR_2000_EN.pdf; 5 Y.B. INT'L ORGS. 33, fig.2.9 (Union of Int'l Ass'ns ed., 2011). http://www.uia.be/yearbook-international-organizations-online

2. These actors have emphasized the importance of civil society participation in myriad contexts, which are too many to list here. *See, e.g.*, THE WORLD BANK, ISSUES AND OPTIONS FOR IMPROVING ENGAGEMENT BETWEEN THE WORLD BANK AND CSOS ix (2005) (proposing "options for promoting more effective civic engagement in Bank-supported activities"); Sophie Thoyer & Benoît Martimort-Asso, *Introduction: Participation for Sustainability in Trade*, *in* PARTICIPATION FOR SUSTAINABILITY IN TRADE 1, 5 (Sophie Thoyer & Benoît Martimort-Asso eds., 2007) (describing the demands of civil society organizations for "more direct citizen participation in the international rule-making process" at the IMF, World Bank, and WTO); Hillary Clinton, U.S. Sec'y of State, Remarks to the Community of Democracies: Civil Society: Supporting Democracy in the 21st Century (June 3, 2010) (arguing that a strong civil society "undergirds both democratic governance and broad-based prosperity" and exhorting the United Nations to "do more to protect civil society").

society participation high on the agenda of national governments and international organizations. Indeed, most international organizations have devised mechanisms to engage with civil society[3] and regard civil society participation as contributing to their legitimacy, accountability, and effectiveness.[4]

The meaning of "civil society," however, is deeply ambiguous. It has been interpreted in a variety of ways reflecting conflicting underlying normative values and commitments.[5] International organizations have used the term "civil society" inconsistently, betraying this lack of consensus and clarity about its meaning. For example, in his address to the General Assembly urging international organizations to engage civil society in global governance, then U.N. Secretary-General Boutros Boutros-Ghali defined civil society as encompassing all nongovernmental entities, including business and industry.[6] In contrast, the International Monetary Fund (IMF) excludes individual profit-oriented enterprises from its definition of civil society but includes "business forums" that aggregate and lobby on behalf of private, for-profit business interests.[7] An official U.N. Report on United Nations-Civil Society relations (the *Cardoso Report*) adopts a nar-

3. Jan Aart Scholte, *Civil Society and Democratically Accountable Global Governance*, 39 GOV'T & OPPOSITION 211, 215 (2004) (noting that "[m]ost global governance agencies have now devised mechanisms of one kind or another to engage . . . with . . . initiatives from civil society associations" and giving examples).

4. Reflecting a growing consensus that civil society participation contributes to the legitimacy, accountability, and effectiveness of international organizations and national governments, former U.N. Secretary General Kofi Annan has recently characterized civil society involvement as "not an option but a necessity." Kofi Annan, U.N. Secretary-General, Opening Address to Fiftieth DPI/NGO Conference (Sept. 10, 1997). Numerous other examples of international organizations endorsing civil society participation as increasing their legitimacy and accountability could be cited. *See, e.g.*, U.N. Panel of Eminent Persons on United Nations–Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance*, *transmitted by letter dated June 7, 2004 from the Chairman of the Panel*, ¶ 9, U.N. Doc. A/58/817 (June 11, 2004) [Hereinafter *Cardoso Report*] (arguing that civil society was one of the "emerging pillars" of a new, stronger framework of global governance with enhanced "democratic accountability to citizens everywhere"). In the global trade context, Pascal Lamy applauded civil society organizations for "joining hands to better influence the work of the WTO." Pascal Lamy, Dir. Gen., WTO, Keynote Address to WTO Public Forum (Oct. 4, 2007). In the field of development, the World Bank credited its consultations with civil society with "improv[ing] the quality of policymaking . . . and promot[ing] public sector transparency and accountability." WORLD BANK, CONSULTATIONS WITH CIVIL SOCIETY ORGANIZATIONS, GENERAL GUIDELINES FOR WORLD BANK STAFF 3 (2000).

5. *See, e.g.*, MICHAEL EDWARDS, CIVIL SOCIETY 4 (2004) (likening civil society to "a concept that seems so unsure of itself that definitions are akin to nailing jelly to the wall"); Robert C. Post & Nancy L. Rosenblum, *Introduction*, *in* CIVIL SOCIETY AND GOVERNMENT 1, 1 (Nancy L. Rosenblum & Robert C. Post eds., 2002) ("Civil society is so often invoked in so many contexts that it has acquired a strikingly plastic moral and political valence."). For a comprehensive historical account of the concept of civil society, see generally JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999).

6. U.N. Secretary-General, *An Agenda for Democratization*, ¶ 85, U.N. Doc. A/51/761 (Dec. 20, 1996).

7. *Factsheet: The IMF and Civil Society Organizations*, INT'L MONETARY FUND (Sept. 2012), *available at* http://www.imf.org/external/np/exr/facts/pdf/civ.pdf.

rower definition that excludes industry lobby groups and business federations.[8] Some international organizations and supranational bodies, such as the World Health Organization, appear to use the terms "civil society" and "non-governmental organizations" (NGOs) interchangeably, and to favor the participation of nationally and internationally recognized NGOs in policy making and enforcement.[9] Yet other international bodies, such as the World Bank, focus on the role of local civic associations in developing the capacity of citizens to participate in public life.[10]

The wide range of definitions and uses of "civil society" and the diversity of actors encompassed by each definition has prompted some to doubt its worth as an analytical category.[11] But calls to do away with the concept of civil society are misguided. First, the idea of civil society remains of crucial practical importance, as it is embedded in the language of international organizations and national governments; thus, current scholarship must engage with the varied meanings ascribed to it. Second, although critics of the use of the term "civil society" as an analytical category are correct that current uses of the term provide little guidance for how the wide variety of groups that make up civil society should interact with international bodies and national implementation mechanisms, this deficiency stems from a thin, poorly theorized understanding of the concept of civil society, not from its analytical futility. Third, different normative understandings of civil society counsel different prescriptive outcomes, including different institutional designs.

Two strands of scholarship have studied the relationship between nonstate actors and international organizations. The first seeks to reconcile the reality of the growing impact of nonstate actors with international law

8. *Cardoso Report*, *supra* note 4, at 7, 13. The *Cardoso Report* differentiates "civil society" from the "private sector" and explicitly emphasizes the "public benefit" functions of civil society, that is "a type of civil society organization that is formally constituted to provide a benefit to the general public or the world at large through the provision of advocacy or services." *Id.* This definition excludes both industry lobby groups and business federations. *Id.*

9. *See* Christophe Lanord, World Health Organization Civil Society Initiative [WHO-CSI], *A Study of WHO's Official Relations System with Nongovernmental Organizations*, ¶¶ 1-3, CSI/2002/WP4 (June 2002). Several other documents authored by the WHO's Civil Society Initiative also use the terms civil society and NGO interchangeably. *See, e.g.*, Rene Loewenson, WHO-CSI & Training & Res. Support Ctr. [TARSC], *Overview of Issues from the Bibliography on Civil Society and Health*, 4, CSI/2003/BI1 (Apr. 2003), *available at* http://www.tarsc.org/WHOCSI/overview.php ("In this bibliography the term non government organisation (NGO) is used to mean the same thing as CSOs.").

10. The World Bank has designed a variety of initiatives to "empower vulnerable and marginalized groups." World Bank, *Demand for Good Governance: Global Call for Proposals*, WORLD BANK, http://go.worldbank.org/T7KOXEQLI0 (last visited Mar. 2, 2013).

11. *See, e.g.*, John Grimond, *Civil Society*, ECONOMIST, Oct. 2001, at 18 (urging that the concept of civil society be abandoned because the concept has little foundation in established theory). Krishan Kumar voiced similar concerns, characterizing current scholarly writing on civil society as "an interesting exercise in intellectual history but it [nevertheless] evades the real political challenges at the end of the twentieth century." Krishan Kumar, *Civil Society: An Inquiry into the Usefulness of an Historical Term*, 44 BRIT. J. SOC. 375, 392 (1993).

theory, which has traditionally focused on relationships between sovereign states. This debate has centered on whether nonstate actors can be considered subjects of international law—thus possessing international legal personality with both global rights and responsibilities—and on the development of international law theories that would account for the actual influence of nonstate actors in international lawmaking and implementation.[12]

A second strand of scholarship has focused on the legitimacy and accountability of both nonstate actors and the international legal system itself. These scholars are concerned with two types of democratic deficits. The first relates to nonstate actors themselves and asks whether they are legitimate participants in the international legal system. Concerns regarding their legitimacy stem from their perceived lack of accountability to the global system on which they exert increasing political power.[13] The second type of democratic deficit relates to what Robert Keohane and Joseph Nye have termed the "club model" of international law, in which a relatively small number of cabinet ministers from a relatively small number of countries (primarily from the North) get together in international institutions to make rules of international law.[14] "Club model" institutions suffer from a democratic deficit because they lack transparency and accountability mechanisms.[15] In this context, some scholars view civil society engagement

12. Both adherents of the process school of international law (the "New Haven School") and transnational process scholars criticize the doctrine of international legal personality as unsuited to describe the role of nonstate actors in lawmaking and implementation. The New Haven School prefers the term "participants" to describe how multiple actors engage with international law. *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49–51 (1999); W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 322 YALE J. INT'L L. 575 (2007). Transnational Process scholars employ the dynamic concept of "transnational legal personality" to describe those actors whose actions, through any number of social interactions, influence the content of international law norms. *See, e.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 181-207 (1996). In contrast, international law "skeptics" both on the right and on the left have cautioned against the expansion of nonstate actors' participation in international law. *See, e.g.*, JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (arguing that international law emerges from and is sustained by nations acting rationally to maximize their interests); DAVID KENNEDY, THE DARK SIDES OF VIRTUE 20-21 (2008) (arguing that the human rights movement, and NGOs associated with it, have promoted an interventionist agenda based on Western models that impoverishes local political discourse in developing countries).

13. For a discussion of the legitimacy and accountability of civil society organizations, see generally the articles in the symposia on civil society organizations organized by the Brooklyn Journal of International Law, the Chicago Journal of International Law, and Chicago-Kent Law School. Symposium, *Governing Civil Society: NGO Accountability, Legitimacy and Influence*, 36 BROOK. J. INT'L L. 813, 813-1074 (2011); Symposium, *Paradise Lost? NGOs and Global Accountability*, 3 CHI. J. INT'L L. 155, 155-206 (2002); Symposium, *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289, 289-612 (2000).

14. Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD 219, 220 (Robert O. Keohane ed., 2002).

15. *Id.* at 212.

with international organizations as (partially) curing this democratic deficit by channeling the concerns of the relevant public(s) and increasing institutional transparency.[16] Others think civil society participation exacerbates this deficit by allowing special interest groups to bypass national democratic decision-making procedures.[17]

These two strands of scholarship, however, have failed to engage directly with the varying, and often conflicting, theories about civil society.[18] This Article seeks to fill this gap in the literature by developing a theoretical framework that provides a more fine-grained description of civil society. I propose a typology that distinguishes civil society organizations into their possible functions and purposes, ranging from apolitical and individualistic to policy-oriented and state-integrated. I argue that five groups of theories of civil society, each espousing different value systems and thus emphasizing particular functions of civil society while minimizing others, map onto this framework: (1) market liberal; (2) civic republican and social capital; (3) Habermasian critical; (4) Third World, feminist, and minority critical; and (5) new governance and state-society synergy theories. These distinctive theories provide strikingly different answers to fundamental questions, such as: Why should international organizations and national governments encourage civil society participation? Which civil society actors should participate? Which institutional designs best foster such participation and result in successful implementation? Does civil society participation contribute to or detract from the legitimacy of international organizations?

Seeing civil society through the lens of each of these theories leads to distinct consequences for the design of international institutions and national implementation mechanisms that seek to interface with civil society. Adoption of this theoretical framework would sharpen the debate about

16. *See, e.g.*, Steve Charnovitz, *The Illegitimacy of Preventing Civil Society Participation*, 36 BROOK. J. INT'L L. 891, 894 (2011) ("In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and IOs [International Organizations]."); Anne Peters, *Dual Democracy*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 263, 318 (Klabbers et al. eds., 2009) ("The legitimacy gains of NGO involvement are apt to outweigh the legitimacy problems. Overall, a further democratization of the international legal order requires that the participation of NGOs in law-making and law-enforcement be strengthened.").

17. *See, e.g.*, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 221 (2000) (describing globalism as "a kind of worldwide cartelization of governments and interest groups").

18. Although a few scholars have examined political science theories of civil society in discussions about global governance and national implementation, none have reorganized and synthesized the set of political science and sociological theories examined here. More importantly, none have advanced the theoretical framework and typology of civil society I describe, which identifies and illuminates conflicting, unstated conceptions of civil society as a special problem for international governance and national implementation, allows for their systematic analysis, and reveals divergent possible institutional designs. *See, e.g.*, MARY KALDOR, GLOBAL CIVIL SOCIETY (2003); Francesca E. Bignami, Civil Society and International Organizations: A Liberal Framework for Global Governance (2007) (unpublished manuscript), *available at* http://scholarship.law.duke.edu/faculty_scholarship/1126.

how civil society should interact with the state and with international organizations and what type of civil society organizations should participate in these interactions; pinpoint shortcomings of existing institutional designs; and expand the range of possible design options. It would do so by providing conceptual clarity and a shared language to guide policy debates, by illuminating different understandings of civil society already implicit in some international organizations' policies vis-à-vis civil society, and by showing other perspectives not considered in existing institutional designs.

The theoretical framework I propose also contributes normatively to debates regarding the legitimacy of international organizations. Whether international organizations can legitimately constrain state action is a question of pressing importance, as international organizations have acquired increasing independence from the nation states that created them.[19] The legitimacy of international organizations is important for both pragmatic and normative reasons. As a practical matter, belief in the legitimacy of international organizations is a critical element in motivating state compliance with international law. The legitimacy of international organizations is also important normatively to justify their increasing autonomy and authority.[20] Yet, traditional conceptions of what it means for a state to be legitimate—that is, having a democratically elected government with direct delegation and accountability relationships—do not easily translate to international organizations.[21] In the absence of a global parliament and global elections, a conception of what the legitimacy of international organizations requires must be broader than democratic electoral legitimacy.[22]

Several scholars have postulated that civil society can play a crucial role in the development of a theory of legitimacy for international organizations.[23] But procedures for civil society participation that are inattentive to power disparities within civil society itself and inattentive to the need for fostering the expression of all relevant interests, may paradoxically increase the democratic deficit of international organizations and hinder implementation. In other words, an undertheorized mechanism for civil society participation may undermine the very legitimacy it is designed to provide. In Part III, I rely on the theoretical framework outlined in this Article to develop a theory of civil society—which I label *inclusive-contestatory*—that best explains and justifies a role for civil society participation in international lawmaking and implementation.

---

19. *See, e.g.*, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW MAKERS (2005) (examining the role international organizations play in international law, multilateral treaties, and the institutionalized dispute settlements).

20. *See infra* Part III.A.4.

21. *See infra* Part III.B.

22. *See infra* Part III.B.

23. *See, e.g.*, Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 406 (2006); Charnovitz, *supra* note 16, at 894-95; Peters, *supra* note 16, at 313-18; *see also infra* Part III.B.

My argument proceeds in three parts: Part I is diagnostic. It develops a framework to analyze the relationships among civil society, the state, and international organizations that classifies the functions and purposes of civil society as inward–looking, outward-looking, or boundary-crossing. It analyzes and maps five groups of theories of civil society onto this framework—(1) market liberal; (2) civic republican and social capital; (3) Habermasian critical; (4) Third World, feminist, and minority critical; and (5) new governance and state-society synergy—exposing fundamentally different normative understandings of civil society.[24]

Part II works out in more detail how choosing one theoretical interpretation of civil society over another will lead to different prescriptive outcomes. It relies on a case study of the international regime that seeks to implement the U.N. General Assembly Declaration of Commitment on HIV/AIDS (UNGASS). It first provides a brief overview of the global efforts to address the HIV/AIDS epidemic, focusing on the role of the UNGASS monitoring process. It then illustrates how UNGASS provides inconsistent definitions of civil society that reveal the lack of an underlying analytical framework to guide policy prescriptions. It concludes by showing how the five groups of theories generate distinct monitoring-regime designs, applicable not only to UNGASS but also more broadly to many international monitoring regimes: (1) *delegation* to market-ordered, apolitical, private associations; (2) *deference* to the state; (3) *participation* of minority voices; (4) *criticism* of state action; and (5) *collaboration* among all stakeholders.[25] This Part pays particular attention to civil society participation in the national implementation of international commitments. This emphasis on implementation is driven by documented implementation gaps in a variety of fields, including human rights law.[26]

Part III relies on the theoretical framework developed in Part I to engage normatively with the scholarly debate surrounding the legitimacy of international organizations. I show how debates about civil society's contribution to the legitimacy of international organizations are confounded by different underlying conceptions of civil society, which are seldom explicitly articulated or explored. I then show how my framework can contribute to the debate by suggesting that an outward-looking theory of civil society, based on a capacious reading of Habermasian critical theory, can best justify a legitimizing role for civil society participation in international lawmaking and national implementation. This understanding of civil

24. *See infra* figs.1 & 2.

25. *See infra* tbl.1.

26. *See, e.g.*, TODD LANDMAN, STUDYING HUMAN RIGHTS (2006); TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY (2005); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 487-88 (2001). *But see* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L 171, 171-72 (2003) (arguing that the empirical effect of human rights treaties show minimal, and sometimes no reduction in human rights violations).

society is particularly important in areas likely to engender normative disagreement about the proper role of international institutions, where legitimacy questions are most salient.

I. Civil Society and the State: A Theoretical Framework for Analysis

What is civil society? The term often evokes the emancipatory movements in Latin America of the 1980s and Eastern Europe of the 1990s.[27] More recently, it has been used to describe the wave of popular protests that sparked the "Arab Spring."[28] This understanding of civil society equates civil society to social movements engaged in political opposition. But civil society is also used to describe groups with shared interests or identities, which effectively create cohesive ties among individuals without any explicit political agenda.[29] Civil society may include lobbying groups that represent powerful business interests, NGOs with international reach, and local community associations. Political scientists and sociologists have long grappled with this slippery concept and proposed multiple ways of characterizing the diverse assortment of groups and interests that can be said to make up civil society. I draw from these two fields to create a typology of civil society that, I argue, is particularly well suited to describe and understand the multiple ways in which international organizations have (often implicitly) conceived of civil society. Each category in my proposed typology corresponds to a particular theory or groups of theories of civil society described in detail in Section E. Thus, theories of civil society can be understood as emphasizing the different functions of civil society depicted in this typology. Specifically, I propose that different types of civil society organizations range from inward-looking to outward-looking in their purposes and effects. At one end of the spectrum, civil society is apolitical and serves only individualistic aims. At the other, it is explicitly political, interacting with the state to shape public policy.

A. *Inward-Looking Functions of Civil Society*

Inward-looking functions are directed toward the individual. They include personal psychological advantages derived from being a member of a community; the development of an individual's identity through interac-

27. *See, e.g.*, Michael Ignatieff, *On Civil Society: Why Eastern Europe's Revolutions Could Succeed*, 74 Foreign Aff. 128, 128 (1995); Michael Foley & Bob Edwards, *The Paradox of Civil Society*, J. Democracy, July 1996, at 38, 38.

28. *Arab Spring: Challenges during Political Transitions and Comparative Lessons for Civil Societies in the Middle East and North Africa*, The Graduate Institute, http://graduateinstitute.ch/ccdp/ccdp-research/projects/current-projects/arabspring.html(last updated Jan. 7, 2013) (arguing that "civil society" has been in the "driving seat" of the Arab Spring).

29. The clearest articulation of this apolitical view of civil society comes from Robert Putnam and Francis Fukuyama, who emphasize the role of civil society in building social capital by fostering ties among individuals. Francis Fukuyama, *Social Capital, Civil Society and Development*, 22 Third World Q. 7, 11 (2001); Robert Putnam, *Bowling Alone: America's Declining Social Capital*, J. Democracy, Jan. 1995, at 65, 67.

tions and debates about group goals and policies; the development and adoption of a set of moral values; and the development of self-respect and self-sufficiency. Additionally, civil society associations may foster specific inward-looking individual qualities that tend to prepare citizens for participation in public life, such as trust toward and cooperation with fellow citizens. Associations that foster these qualities may lead indirectly to higher levels of citizen engagement in public life, by "broaden[ing] participants' sense of self [and] developing the 'I' into the 'we.'"[30] Examples of this associational type include voluntary civic associations such as church-related groups, parent-teacher associations, sports groups, and fraternal groups. What all of these inward-looking groups have in common is the lack of an explicit political agenda that seeks to influence governmental decisions.[31]

B. *Inward-Outward Boundary Functions*

At the inward-outward boundary are those instances in which civil society has a dual role as a space for fostering both inward-looking characteristics and outward-looking public discourse. For example, civil society as a "subaltern counterpublic[ ]" (a term coined by feminist critical scholar Nancy Fraser) functions as a space where groups with minority views not (yet) accepted by the wider public can come together to (1) develop and formulate their "identities, interests, and needs" (an inward-looking goal) and (2) deliberate about and develop alternative and often contestatory interpretations of accepted norms (an outward-looking goal).[32]

C. *Outward-Looking Functions*

Outward-looking functions are directed toward others (be it society-at-large or a section of society). Outward-looking aspects of civil society seek to impact opinion-formation in the realm of civil society (for example, through public debate and media campaigns) and decision making in the realm of the state (for example, through monitoring, criticism, and lobbying). In addition, they include "service" aspects of associational life. The monitoring or watchdog role of civil society seeks to hold the state accountable to its national and international commitments and to point out those instances in which it has fallen short. Criticism entails an analysis of

30. Putnam, *supra* note 29, at 67; *accord* Fukuyama, *supra* note 29, at 11 (arguing that voluntary associations of civil society that promote generalized social trust are able to instill in individuals "the habits of cooperation that would eventually carry over into public life"). R

31. The groups listed *typically* carry out inward-looking functions. But this does not rule out that some of these groups may be engaged in outward-looking activities at specific time points. The functional approach described here requires an analysis of the *type* of activity a particular association is engaged in. *See infra* Part I.E.1.

32. *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, SOC. TEXT, no. 25/26, 1990, at 56, 67-68 ("[S]ubaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed towards wider publics."); *infra* Part I.E.3.

the state's actions either through the lens of currently applicable law and norms, or under an alternative paradigm (for example, formulated in counterpublics). Through criticism and mobilization of public opinion and resources, civil society can challenge existing norms or interpretative frameworks and eventually replace them with alternative ones.[33]

D. *Boundary-Crossing Functions*

Finally, civil society could participate in decision and policy making in collaboration with the state. In contrast, all other functions described *above* situate civil society outside political life (by focusing on inward-looking functions) or in opposition to the state (by providing alternative interpretations of dominant norms or by serving as a check on government power through its role as watchdog and critic). Most liberal theories of civil society, in fact, consider that a sharp separation between the state and civil society is necessary for the latter to maintain its independence and its ability to represent a legitimate check on state power.[34] Nevertheless, as I explain in detail below, a boundary-crossing function is increasingly being ascribed to civil society in critical theory and new governance scholarship.[35] This typology is depicted below in Figure 1:

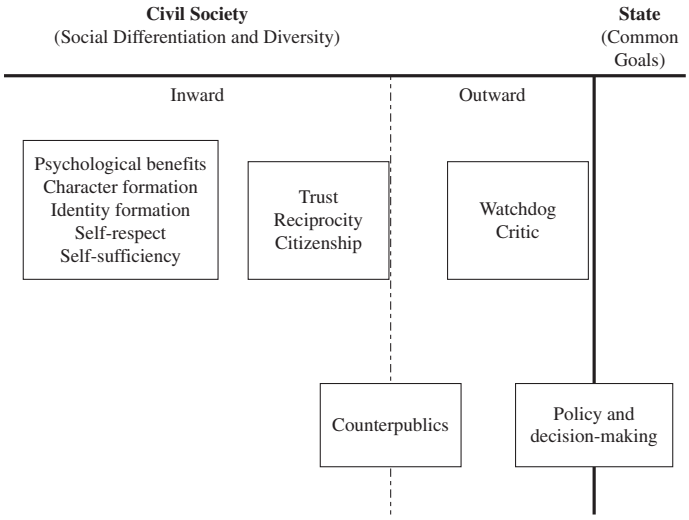


FIGURE 1

33. *See infra* Part I.E.2.

34. *See generally* Post & Rosenblum, *supra* note 5, at 90 (explaining that a separation between state and civil society exists); *see infra* Part I.E.4.

35. *See, e.g.*, Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 443 (1992) (positing that the "fuller and more explicit incorporation of groups into governance might actually enhance the exercise of popular sovereignty through the traditional institutions and practices of territorial representation"); Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE U.S. (Gráinne de Búrca & Joanne Scott eds., 2006).

The typology of civil society functions described *above* can begin to provide a "thicker" understanding of civil society organizations by distinguishing among key functions performed by different associational types. Emphasis on particular inward- or outward-looking functions of civil society will have consequences for institutional design. For example, international organizations that monitor compliance with international agreements may choose different reporting guidelines depending on whether they are interested in (1) fostering cooperation among members of local communities (an inward-looking function); (2) eliciting independent, critical information to evaluate state performance (a watchdog, outward-looking function); or (3) fostering close civil society-state collaboration at the national level (a boundary-crossing, outward-looking function).[36] The creation of thicker community ties to encourage cooperation among local communities may best be fostered by encouraging individual associations of civil society to develop their own monitoring reports and by providing flexible reporting guidelines, in which a plurality of means of communication is considered valid. In contrast, if the international organization is seeking an independent and credible critique of state reports, standardized reporting guidelines may be preferable, as they would allow comparisons between state and civil society reports to be made efficiently. Additionally, in this situation, reports by national NGOs with both technical expertise and a solid reputation may provide the most reliable information to evaluate state performance. Finally, fostering close collaboration between civil society and the state may require the preparation of a single report to be presented internationally and the development of mechanisms to ensure a broad national consultation process.[37] I explore in more detail the consequences of emphasizing particular functions of civil society for the design of monitoring and implementation regimes with the aid of a case study in Part II.

While this analytical framework provides a useful tool to classify different civil society organizations, it cannot answer *which* types of civil society organizations should engage with international organizations and national governments in international lawmaking and implementation, or *how* they should do so. The following Section engages with normative theories of civil society that map onto this framework and provide support for emphasizing specific functions of civil society over others.

E. *Theories of Civil Society*

All democratic perspectives of civil society share some fundamental assumptions. They all agree that civil society and the state represent two realms that are in opposition but also interdependent.[38] They are in oppo-

36. *See infra* Part II.C.2.

37. *See infra* Part II.C.2.

38. *See, e.g.*, Post & Rosenblum, *supra* note 5, at 11 (arguing that civil society and government are in productive tension, because while there must always exist a boundary between them, "civil society requires government to survive, and government, at least democratic government, draws deeply from the strengths of civil society").

sition because civil society fosters the development of different individual and group identities, based on a variety of moral conceptions of the good life, while the state is the realm of shared norms and identities that reflect society's common purposes or compromises. Because of this oppositional relationship, civil society and the state can also pose a threat to each other. Civil society can undermine public discourse about the common good and efforts to reach compromises when particularist groups impose their own conceptions of the good life by capturing state mechanisms of norm creation and enforcement.[39] This can happen, for example, if groups representing dominant economic, religious, or ethnic interests come to dominate governmental policy making, conflating the "common good" with the interests of that particular group. Conversely, the government threatens the plurality of civil society if it seeks to impose a uniform conception of the good life on all civil society associations. Imposed convergence on a single common purpose flowing from this conception can pave the way to totalitarianism by eroding the realm of civil society as a space where alternative or novel ways of life can be developed and tested.[40] But civil society and the democratic state also depend on each other, as both a plurality of identities and shared purposes (or compromises) are essential to the creation of a legitimate democratic government.[41] Beyond these areas of agreement, however, theories of civil society differ sharply in their conceptualization of the proper role of civil society, including how it should interact with state institutions.

The following sections engage with five theories of civil society. For each theory I analyze how it maps onto a distinct portion of the function-based typology introduced *above* thus providing support for emphasizing particular functions of civil society over others. I begin to explore how each theory provides different answers to *which* types of civil society organizations should engage in international lawmaking and implementation, and *how* they should do so. I also engage with key criticisms.

1. Inward-Looking Theories: Market Liberal and Social Capital/Civic Republican Theories

a. Market Liberal Theory

Loren Lomasky provides the flagship definition of civil society adopted by market liberals; he defines civil society as "the realm of voluntary association that stands between the individuals . . . and the state."[42]

39. *See, e.g.*, *id.* ("Government's claim that it is not simply the mirror and agent of the most powerful forces in society must be credible.").

40. *See* Post & Rosenblum, *supra* note 5, at 16 (discussing Hannah Arendt's characterization of totalitarianism "as the end point of unremitting congruence"). Thus, to remain legitimate, democratic governments cannot simply be "the mirror and agent of the most powerful forces in society." *Id.* at 11. A pluralist civil society is a precondition for democratic decision making. *Id.*

41. *See, e.g.*, Post & Rosenblum, *supra* note 5, at 11.

42. Loren Lomasky, *Classical Liberalism and Civil Society*, *in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY 50, 50 (Simone Chambers & Will Kymlicka eds., 2002).

Market liberals construct a dualistic model of civil society that places all voluntary associations in opposition to the state.[43] Market liberals emphasize the values of choice, liberty and efficiency. In this context, competitive markets are a crucial component of civil society because they function as a mechanism that coordinates social interests based on individual choice.[44] The market functions as the main engine of human flourishing, enabling individuals to pursue their self-interest, become self-sufficient, and "take responsibility for their lives and to develop meaningful social roles."[45] Because they prioritize economic aspects of social life, market liberal theories emphasize associations that promote the inward-looking goals of self-reliance and responsibility. Thus, market liberals consider associations of civil society *outside the political realm*, where individuals come together for personal reasons, as vital places where individuals have a chance to be free and flourish.[46]

In contrast to a civil society organized around market competition, which is imagined as the realm where human flourishing can and does take place, the state, according to market liberals, is best kept in the background.[47] Because the government holds the power of coercion, limiting governmental expansion is crucial to securing individual liberties. Thus, the role of the state is limited to enforcing the coercive mechanisms necessary to "secure a framework that encourages productive competition within the private sector."[48] There is a strong presumption against affirmative state action, rebuttable only if "the regulatory means are minimally restrictive of choice, and if they can reasonably be expected to work a substantial improvement in the general welfare."[49]

---

43. Steven Scalet & David Schmidtz, *State, Civil Society, and Classical Liberalism*, *in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 26.

44. *See, e.g.*, Cohen & Rogers, *supra* note 35, at 398 (describing choice and liberty as the core values in U.S. neoliberal constitutionalism). R

45. Scalet & Schmidtz, *supra* note 43, at 34. R

46. *Id.* at 30.

47. *See id.* (characterizing civil society as constituting the forefront, and the state the background, of classical liberal theory).

48. Richard B. Miller, *Overview: The Virtues and Vices of Civil Society*, *in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 370, 383 (internal quotation marks omitted).

49. Cohen & Rogers, *supra* note 35, at 399. Market liberals support governmental provision of services (or governmental regulation of services provided by private firms) in some situations of market failure, understood as the failure of a system of price-market institutions to lead to Paretian efficiency, that is a situation in which it is impossible to make anyone better off without making someone else worse off. Classical examples are governmental provision of public goods (or governmental intervention to foster the private creation of public goods), for example through intellectual property rights, and governmental intervention when imperfect information prevents the public as customers from making informed choices, for example through overseeing and regulating testing of pharmaceutical products. *See generally*, Francis Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351 (1958) (discussing market failures within different types of regulatory models); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422 (2003) (discussing motivational benefits that private firms have over public sector counterparts, resulting in increased efficiency in some sectors). Nevertheless, market failure alone is insufficient to R

Market liberals justify governmental restraints on individual choice and liberty only when necessary to protect the very existence of these values. In this context, market liberals decry the affirmative state as corrupting voluntary associations by encouraging rent-seeking behavior by organized interests. That is, when particular civil society organizations are able to use the affirmative power of the state to secure special advantages (which are subsidized by the public purse), state policies come to be defined by the agendas of special interest groups.[50] In turn, special interest politics lead to decreased efficiency. Efficiency losses take place because political activity "divert[s] the energy of citizens away from economically productive contributions,"[51] and because governments are not as sensitive as private actors to poor performance.[52] For this reason, market liberals are "inclined to define civil society in terms of private associations, and to ignore or be skeptical about associations involved in political advocacy."[53] Market liberals are generally skeptical of organizations involved in political advocacy (or "special interest groups") because the process of political organization and advocacy is thought to produce inefficiencies both by diverting energies from economically productive activities and by using the public purse to subsidize a group's private aims.[54] Partly because of this

justify government intervention, because market liberals argue that political action is often likely to lead to greater inefficiencies. *See, e.g.*, Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417, 417 (1981).

50. FRIEDRICH A. HAYEK, 3 LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 13–15 (1979) ("[The] domination of government by coalitions of organized interests [is] . . . . the inescapable result of a system in which government has unlimited powers to take whatever measures are required to satisfy the wishes of those on whose support it relies."); *see also* Cohen & Rogers, *supra* note 35, at 404. R

51. Cohen & Rogers, *supra* note 32, at 401–02. R

52. *See* Trebilcock & Iacobucci, *supra* note 49, at 1436–39. Trebilock and Iacobucci argue that governments are likely inefficient providers of goods and services even when the goal of these services is not profit-maximization but rather other, public purposes (such as educating students on the virtues of citizenship). This is because governments are "insulat[ed] from the risk of failure," *id.* at 1439, while other private actors (be it for-profit or nonprofit entities) have "incentives to perform well to ensure their organization's survival and retain their employment." *Id.* at 1436. As a consequence, the competitive provision of services by nonstate actors is generally preferred. If the desired goal is not profit-maximization, it is more efficient for the state to set performance standards and allow competition among different providers than to provide the service itself. *Id.* at 1437. R

53. Will Kymlicka, *Civil Society and Government: A Liberal-Egalitarian Perspective*, *in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 83. Market liberals also view positively those apolitical, voluntary, nonprofit associations that focus on service provision, because these organizations are likely to curtail the expansion of the welfare state. *See* FRIEDRICK A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 150-52 (1976).

54. *See, e.g.*, Loren Lomasky, *Classical Liberalism and Civil Society*, *in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY (Simone Chambers & Will Kymlicka eds., 2002). Market liberals object particularly to civil society associations that seek to use the public purse to subsidize their own economic activities and to interfere with the operation of the free market, such as business associations that engage in restrictive market practices. They do not object to those civil society organizations with educative or coordinating functions that do not attempt to use public funds to subsidize their own activities and that act "in ways consistent with a commitment to a minimal state." *See* Cohen & Rogers, *supra* note 35, at 400. R

focus on securing individualistic aims, a market liberal theory is unable to imagine a role for civil society groups engaged in political advocacy that will not devolve into factional politics.

Market liberals' distrust of most affirmative state policies stems largely from the primacy they bestow on the values of choice and individual liberty. Other theories of civil society, however, dispute the superiority of these two values and support state intervention, even at the price of inefficiency, when it furthers a different set of values such as political equality or distributive justice.[55] Market liberals' conceptualization of individuals as producers and consumers also risks the erosion of their identity as members of political or cultural communities.[56] By contrast, social capital and civic republican theories, which I turn to in the next section, seek to foster individuals' shared identities as community members, which they view as crucial to developing and sustaining a democratic government.

b. Social Capital Theory[57]

The development of the theory of social capital owes much to Alexis de Tocqueville's insight that Americans combatted the excessive individualism generated by modern democracy by forming and engaging in voluntary associations.[58] Tocqueville credited civic associations in America with serving as the "schools of democracy" that sustained a vibrant democratic government.[59] To Tocqueville, associational life that fostered public virtues such as trust and reciprocity served as a check on the atomistic tendencies of modern society.[60]

55. *See* Kymlicka, *supra* note 53, at 80. R

56. Michael Walzer made a similar argument in his lecture at the University of Stockholm. Michael Walzer, Gunnar Myrdal Lecture at University of Stockholm: The Civil Society Argument 4 (Oct. 1990), *available at http://cts.lub.lu.se/ojs/index.php/st/article/viewFile/2863/2427* (arguing that "autonomy in the marketplace provides no support for social solidarity").

57. I focus on the theory of social capital as developed and popularized by political scientists Robert Putnam and Francis Fukuyama. *See generally* ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NANETTI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1994); Fukuyama, *supra* note 29. R

58. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 119 (Henry Reeve trans., 3d ed. 1863) (explaining how democracy engenders individualism: "thus not only does democracy make every man forget his ancestors, but it . . . throws him back forever upon himself alone, and threatens in the end to confine him entirely within the solitude of his own heart."); *Id.* at 129 (explaining the crucial role of associations in combatting individualism: "feelings and opinions are recruited, the heart is enlarged, and the human mind is developed, only by the reciprocal influence of men upon one another. I have shown that these influences are almost null in democratic countries; they must therefore be artificially created, and this can only be accomplished by associations." *Cf.* Putnam, *supra* note 29, at 65 (discussing Tocqueville's impressions of American civic associations). R

59. *See* Wayne Norman & Will Kymlicka, *Citizenship*, *in* A COMPANION TO APPLIED ETHICS 210, 215-16 (R.G. Frey & Christopher Heath Wellman eds., 2003) (explaining how Tocqueville saw "the associations in civil society as 'schools of democracy,' teaching the virtues of public-spiritedness, cooperation, and civility").

60. *Id.*

Modern social capital theorists echo Tocqueville's central thesis that "democracy itself depends on active engagement by citizens in community affairs."[61] Social capital theory is an empirical effort, within a civic republican framework, to understand the mechanisms through which civic engagement and social connectedness strengthen democratic norms and institutions.[62] One of the leading proponents of the importance of social capital for long-lasting and effective democratic governance, Robert Putnam, defines social capital as "features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit."[63] Importantly, because the norms that constitute social capital are norms of trust and reciprocity that lead to cooperation in groups, they are "related to traditional virtues like honesty, the keeping of commitments, reliable performance of duties, [and] reciprocity."[64]

Putnam, Leonardi, and Nanetti argue that civic associations contribute to the effectiveness and stability of democratic government "both because of their 'internal' effects on individual members and because of their 'external' effects on the wider polity."[65] In other words, those associations that inculcate in their members "skills of cooperation as well as a sense of shared responsibility for collective endeavors,"[66] will produce spill-over effects in society at large, giving rise to a citizenry that has both the tools and the motivation necessary to engage in public life.[67]

Because relationships of trust, reciprocity and responsibility require repeated, face-to-face interactions among group members engaged in a common goal, social capital theorists emphasize *local community* organi-

61. *See* Robert D. Putnam & Kristin A. Goss, *Introduction*, *in* DEMOCRACIES IN FLUX 1, 6 (Robert D. Putnam ed., 2003); *accord* PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 11 (acknowledging that Tocqueville's emphasis on civic associations as key depositories of civic virtue "play a central role in our analysis"). R

62. Social capital theorist Robert Putnam explicitly places his experimental research program within a civic republican framework. PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 87 ("[Civic republicanism] contains the seeds for a theory of effective democratic governance. . . . We want to explore empirically whether the success of a democratic government depends on the degree to which its surroundings approximate the ideal of a 'civic community'."). R

63. Putnam, *supra* note 29, at 67. R

64. Fukuyama, *supra* note 29, at 7–8. R

65. PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 89. R

66. *Id.*; *accord* Putnam, *supra* note 29, at 73 ("Members of associations are much more likely than nonmembers to participate in politics, to spend time with neighbors, to express social trust . . . ."). R

67. Nancy Rosenblum has labeled this understanding of civil society the "mediating association" approach. Rosemblum uses the term "mediating" to convey the idea that the "moral dispositions" and "social capital" generated in social networks are transferred to and benefit political society as a whole *unintentionally and without government action*. NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 41 (1998).

zations as the preeminent locus of social capital.[68] The common goal that brings participants together need not be political. In fact, Putnam's research showed that the best predictor of good government in Italy was choral societies, soccer clubs, and co-operatives—all inward-looking, apolitical associations.[69] Further, some types of explicitly political groups contribute only negligibly to social capital because they do not foster the type of social connectedness that is crucial to the development of civic virtues among its members.[70] Thus, politically oriented membership organizations—whose roster may count thousands of dues-paying members linked only by their shared concerns (for the environment, for women's rights, etc.) but unaware of each other's existence—do not produce the type of connections that generate social capital. The same is true of large apolitical NGOs such as Oxfam, whose numerous donors are connected only by their belief in the NGO's mission.

Social capital theorists' emphasis on local community networks relies on "small moral worlds" to create, sustain, and improve the nation.[71] Social capital theory is inward-looking precisely because it considers self-regulation and small-scale interpersonal relations as a prerequisite for effective democratic governance.[72]

Community associations that foster qualities of trust and cooperation among their members need not necessarily benefit the wider community, however, and may in fact be detrimental to it. For example, close-knit groups may be hostile to those they view as outsiders.[73] To account and correct for this criticism, social capital theorists postulate that two types of social capital are required for effective democratic governance: bonding social capital (creating in-group bonds) and bridging social capital (creat-

68. *See* Robert D. Putnam, *What Makes Democracy Work?*, IPA REV., no. 1, 1994, at 31, 34 (arguing that "[i]nvestments in the portfolio of social capital must occur at the local level").

69. *Id.* ("[W]hat best predicted good government in the Italian regions was choral societies, soccer clubs and co-operatives. . . . Communities don't have choral societies because they are wealthy; they are wealthy because they have choral societies—or more precisely, the traditions of engagement, trust and reciprocity that choral societies symbolize."); *see also* PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 90 (emphasizing that promoting social capital does not "require that the manifest purpose of the association be political. Taking part in a choral society or a bird watching club can teach self-discipline and an appreciation for the joys of successful collaboration"). R

70. Putnam, *supra* note 29, at 70 (arguing that new mass-membership organizations such as the Sierra Club, while of great political importance, are not as important in generating social capital as local organizations where members interact face-to-face with each other because the ties among members in mass-membership organizations "are to common symbols, common leaders, and perhaps common ideals, but not to one another"). R

71. ROSENBLUM, *supra* note 67, at 41 (citing Alan Silver, *The Curious Importance of Small Groups in American Sociology*, *in* SOCIOLOGY IN AMERICA 70 (Herbert J. Gans ed., 1990)). R

72. *Id.* at 41–42.

73. *See, e.g.*, Fukuyama, *supra* note 29, at 8 ("Many groups achieve internal cohesion at the expense of outsiders, who can be treated with suspicion, hostility or outright hatred."). R

ing bonds across groups).[74] Bridging social capital is strengthened by individual membership in a plurality of associations, which bridges potentially divisive differences.[75] Membership in multiple groups with different goals and aspirations is predicted to moderate extreme views as a result of cross-pressure from groups with different views.[76]

Social capital theorists share with market liberals their emphasis on inward-looking functions of civil society but focus on different sets of inward-looking qualities. To market liberals, the focus is on the individualistic values of self-reliance, liberty and choice. To social capital theorists, the focus is on the virtues of sociability, responsibility, and cooperation that provide individuals with both the tools to engage successfully in public life (for example, by teaching members how to participate in reasoned deliberation and how to reach consensus) and the willingness to do so. In contrast to market liberals, who view the market as a place where individuals can flourish, social capital theories tend to regard market interactions as eroding individuals' ability to develop their identities as citizens and participants in collective projects.[77] Citizens as consumers will lack the ability to understand citizenship as social solidarity and thus the willingness to cooperate toward shared goals. This difference in focus can also be framed as a difference in unit of analysis: while market liberals prioritize the individual consumer or producer and his or her ambitions, social capital theorists prioritize the ties among members of a community or social network.

Both market liberal and social capital theories de-emphasize politically motivated associations that seek to directly influence state policy. Market liberals do so explicitly, motivated by their fear that groups organized for political motives will either capture state mechanisms of coercion and impose their vision of the good life on society at large, or use public dollars to fund the interests of their group members. Social capital theorists minimize the importance of politically-inspired associations indirectly. They do so by celebrating dense interpersonal relations, and emphasizing the importance of local social networks that instill the virtues of civility, reciprocity, and cooperation.

Social capital theory seeks to address empirically one aspect of civic republican theory—the importance of "civic virtue" for democratic governance. But it does not have a developed theory of the state that can guide decisions on how the state should interact with civil society. Civic

74. *See id.*

75. *See* Putnam & Goss, *supra* note 61, at 11. R

76. *See, e.g.*, PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 90; Fukuyama, *supra* note 29, at 9–10. R R R

77. *See, e.g.*, Putnam, *supra* note 68, at 106 ("Compared with earlier generations, we are less engaged with one another outside the marketplace and thus less prepared to cooperate for shared goals. This decline in social capital helps explain the economic and political troubles of our own democracy."). R

republican theory, however, analyzed in the next section, can fill this gap.[78]

c. Civic Republican Theory

Civic republicans see the state as a force for advancing the common good. In contrast to market liberals, who seek compromise rather than consensus over social goals and values,[79] civic republicans are committed to agreement on precisely what the common good requires. While acknowledging that agreement may not be possible on all political issues, they maintain "the possibility of settling at least some normative disputes with substantively right answers."[80]

According to civic republican theory, consensus on what constitutes the common good requires public-regarding deliberation in political institutions.[81] Deliberation is public-regarding when political actors justify their choices by appealing to a broader public good, not to their own private interests.[82] Additionally, the process of rational deliberation can only take place if political equality eliminates "sharp disparities in political participation or influence among individuals or social groups,"[83] and if groups and individuals share a commitment to consensus as a regulative ideal.[84] Thus, although private interests inform the deliberative process, decision making is not merely a compromise among warring factions. Rather, it is an exercise in rational decision making *about* the common good. When deliberation is inclusive of all views, articulated as rational arguments about public needs and wants, affirmative state action is legitimized as resulting from social consensus about what the common good requires in a particular situation.

Public-regarding deliberation requires individuals to come together as citizens. Citizens, as opposed to subjects of an authoritarian regime, participate in government with "independence of mind and judgment," and possess "civic virtue," or a general concern for the public good.[85] As discussed above, to social capital theorists, civic virtue is generated and sus-

78. I address prescriptions derived from social capital and civic republican theory, as well as criticisms to these approaches, in the next section.

79. Market liberals are profoundly skeptical of "people's capacities to communicate *persuasively* to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world. . . . in ways that move each other's views on disputed normative issues toward felt (not merely strategic) agreement without deception, coercion, or other manipulation." Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988) (describing modern pluralist political science understanding of the political process as "insuperably private-regarding or strategic") (emphasis in original).

80. Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

81. *See id.*

82. *See id.* at 1550.

83. *See id.* at 1541.

84. *See id.* at 1550.

85. *Id.* at 1551; *see also* WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 221–24 (1991).

tained in dense, local networks within civil society where individuals can learn the virtues of sociability, responsibility, respect for others, and cooperation. Similarly, contemporary civic republican theorists recognize the importance of private associations as "seedbeds of virtue" that prepare citizens for engagement in politics.[86] For example, Michael Sandel has emphasized the importance of institutions such as townships, schools, religions, and "virtue-sustaining occupations" in "form[ing] the 'character of mind' and 'habits of the heart' a democratic republic requires."[87] Frank Michelman's version of civic republicanism considers that citizenship is exercised both in the realm of politics and through civic associations that are not directly involved in party politics or in efforts to lobby the state, which can create community and provide citizens with the "direct experience of self-revisionary, dialogic engagement."[88]

Civic republican theory prescribes affirmative state action in the realm of civil society. Specifically, civic republicans tend to endorse measures that foster the creation, proliferation, and survival of those civil society organizations that foster in their members the qualities of character that civic republican theories deem necessary for the common good of self-government.[89] Thus, much like social capital theorists, civic republicans prize those inward-looking institutions of civil society that can serve as "private boot camps for citizenship"[90] by inculcating in their members the

86. *See generally* SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

87. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 320–21 (1996).

88. Michelman's version of civic republicanism appears to view civil society similarly to critical feminist and Third World theorists. That is, civil society is prized as a realm where contestatory versions of what constitutes the common good are dialogically developed. For example, Michelman emphasizes that "[u]nderstandings of the social world that are contested and shaped in the daily encounters and transactions of civil society at large . . . are . . . to be counted among the sources and channels of republican self-government and jurisgenerative politics." Michelman, *supra* note 79, at 1531; *cf.* Sunstein, *supra* note 80, at 1542 (arguing that although "[c]itizenship often occurs in nominally private spheres . . . its primary importance is in governmental processes"). *But see* Kathleen Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1721 (1987) (questioning whether Michelman's view of civil society associations as speakers in a non state-centered republican dialogue is consonant with civic republican theory). Michelman, however, differs from critical feminist and Third World theorists, first, in that he places deliberation among members of the judiciary as the key means by which those marginal voices of civil society interact with the state to shape its policies. Second, Michelman's depiction of voluntary associations as participants in a common public life is somewhat at odds with feminist and critical scholars' understanding of civil society as spaces of regroupment, introspection, and opposition to dominant norms. *See infra* Part I.E.3. (discussing critical feminist and Third World theories of civil society). R

89. *See* SANDEL, *supra* note 87, at 25; *see also,* Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 17 (1990) (noting that associations of civil society are unlikely to be self-sustaining in modern society, and emphasizing a role for the state in nurturing the formation and maintenance of community organizations). R

90. Sullivan, *supra* note 88, at 1721 (noting that civic republicans tend to value private, voluntary associations insofar as they function as "private boot camps for citizenship" where "greater participation, feelings of attachment, and common commitment" are taught). R

importance of participation, attachment, and commitment to the common good over self-serving interests.

Although public deliberation and participation in government by civic-minded citizens are central tenets of civic republican theory, civic republicans remain skeptical of civil society associations organized for lobbying and political advocacy for the same reasons as market liberals.[91] Because groups can have hierarchical and unequal internal structures, lack transparency regarding decision-making procedures, and impose conditions on policy makers that benefit that particular group at the expense of society at large, civic republicans seek to save public deliberation from the influence of special interest groups.[92] Thus, civic republican theories generally propose institutional reforms that attempt to shield arenas of public deliberation from direct group influence.[93] For example, some civic republican proposals have focused on sharply delineating, in order to strengthen, particular areas of state power to enhance the ability of political institutions to promote rational deliberation. Cass Sunstein maintains deliberative politics should take place in legislatures;[94] Frank Michelman, on the other hand, places the locus of deliberative politics in the judicial branch.[95]

91. *See* SANDEL, *supra* note 87, at 131 (observing that classical republicans such as James Madison sought to disempower special interest groups "so that disinterested statesmen might govern unhindered by them"); Michael Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1653 (1988) (remarking that "[i]n general, the most important structural goal [of civic republicans] appears to be political insulation"); Sunstein, *supra* note 80, at 1549-50 (noting that intermediate organizations can themselves be a source of oppression in the private realm and emphasizing that "the antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups," and to prevent the influence of interest groups in law-making, republicans "may well attempt to insulate political actors from private pressure and they may also favor judicial review designed to promote political deliberation and perhaps to invalidate laws when deliberation has not occurred."). R R

92. Fitts, *supra* note 91, at 1652. R

93. *See id.*; *see also* Cohen & Rogers, *supra* note 35, at 406 (describing the civic republican strategy of "insulation" as aiming to "strengthen institutions, alternative to secondary association, that have the capacity to consider and act on the common good and to encourage those holding power within such institutions to engage in just such consideration and action"). R R

94. Sunstein, *supra* note 80, at 1539; *cf.* Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (arguing that deliberative politics should take place in the regulatory process and attributing regulatory failures to the lack thereof). R

95. According to Michelman, a civic republican understanding of citizens as self-rulers and law-abiders requires citizens to be able to challenge and re-shape the conception of the common good that underlies dominant understandings of law. Michelman, *supra* note 79, at 1503, 1526-27. Michelman considers that alternative interpretations of what the common good requires often originate in minority voices, which come together as "emergently self-conscious social groups" in the realm of civil society. *Id.* at 1529. It is in civil society where marginalized groups engage in dialogue that can potentially transform mainstream understandings of law. A pluralist civic-republican tradition thus requires the "constant reach for inclusion of the other, of the hitherto excluded." *Id.* Michelman grants a preeminent role to judges as interpreters and evaluators of whether these "voices from the margin" make valid re-interpretative claims of what the common good requires. *Id.* at 1537. R

Civic republicans and market liberals differ markedly in the processes and institutions considered crucial for human flourishing. Market liberals defend the primacy of a minimally-regulated marketplace where individuals can pursue their self-interested aims. Civic republicans emphasize public deliberation isolated from group influence, and the preeminence of those civil society associations that foster republican dialogue and civic virtue.

A powerful criticism of civic republicanism is that consensus on what the common good requires presupposes and depends upon a sufficiently undifferentiated civil society in which such consensus is indeed possible. In other words, pluralism may preclude the pursuit of consensus.[96] In a pluralist society, public deliberation about the common good may lead either to the exclusion of minority voices from public debate and the imposition of majority conceptions of the common good, or to compromise rather than consensus among a plurality of participants with largely irreconcilable views. Contemporary civic republican theorists have proposed interpretations of the republican tradition that defend plurality as an important feature of civic republicanism. Proposals range from focusing on republican deliberation at the local level—where consensus is likely more easily achieved than at the national level[97]—to ensuring group representation at the national level[98] and opening avenues for citizen contestation of legislative, administrative, and judicial decisions.[99]

Additionally, neither social capital theory nor civic republican theory sufficiently explains how civic virtue generated in the realm of civil society transfers to the realm of the state. Social capital itself is often empirically measured by assessing the level of trustfulness in a society, using survey

96. This critique has been wielded both by market liberals, who envision the political process as a series of compromises among a plurality of self-regarding interests, and by feminist, Third World and minority critical theorists, who see consensus decision-making as concealing the informal oppression of marginalized groups. For a description of the market liberal position, see generally JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 171-188 (1962). For a description of the critical perspective, see generally, Chantal Mouffe, *Democracy, Power and the "Political"*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 245, 250-52 (Seyla Benhabib ed., 1996); *see also* John S. Dryzek & Simon Niemeyer, *Reconciling Pluralism and Consensus as Political Ideals*, 50 AM. J. POL. SCI. 634 (2006) (describing the tension between the political values of consensus and pluralism); *infra* Part I.E.3.

97. *See* Walzer, *supra* note 89, at 20 (characterizing republicanism as "an integrated and unitary doctrine in which energy and commitment are focused primarily on the political realm," but postulating that the civic republican doctrine "can be extended to account for a 'republic of republics,' a decentralized and participatory revision of liberal democracy"). R

98. *See* Sunstein, *supra* note 80, at 1542. R

99. *See, e.g.*, PHILIP PETTIT, A THEORY OF FREEDOM 167–172 (2001) (emphasizing that the perils of elite manipulation, faction or corruption can be remedied by "editorial" control through contestatory democracy: establishing minorities' powers of challenge to force public review of contestable decisions in impartial settings, setting up advisory community bodies, carrying out participatory hearings and inquiries prior to passing legislation, and publishing proposed legislation prior to approval).

data from the World Values Studies and association membership.[100] Theories that seek to attribute high levels of citizen participation in government to the high levels of trust arising from face-to-face interactions in civil society organizations can thus be circular and incapable of establishing a chain of causation. In other words, "a group's success is attributed to its social capital, but social capital is measured by group success."[101] Without understanding this process, it is unclear that a program designed to increase associational density in civil society will lead to greater cooperation with and participation in government.[102]

A third important critique of civic republican theory is that it conceives of civil society in merely instrumental terms. In other words, because civic republicans prioritize deliberation in the public, universal sphere of government, they tend to view private associations as valuable only insofar as they can aid deliberation in government. Social capital theorists hold a similarly instrumental view of private associations: their worth derives from their ability to generate social capital. Social capital, in turn, is valuable because it ultimately ensures the ability of citizens to work cooperatively in the public sphere of government. Neither approach emphasizes a role for civil society in developing individual identities, or acting as a watchdog or critic. It is precisely on this oppositional role of civil society that outward-looking theories, examined in the next section, focus.

2. Outward-Looking Theories: Habermasian Critical Theory

Unlike market liberals and many civic republicans, who tend to focus exclusively on the relationship between civil society and the state, Habermasian critical theory focuses more explicitly on the relationship between civil society and both the state and the market economy.[103] This distinction is tightly linked to Jürgen Habermas' division between

100. *See* Peter Knorringa & Irene van Staveren, *Beyond Social Capital: A Critical Approach*, 65 REV. SOC. ECON. 1 (2007).

101. *Id.* at 5 (citing Steven N. Durlauf, *On the Empirics of Social Capital*, ECON. J., Nov. 2002, at F459, F459-79); *see also* Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOC. 1, 19 (1998) ("As a property of communities and nations rather than individuals, social capital is simultaneously a cause and an effect. It leads to positive outcomes, . . . and its existence is inferred from the same outcomes. Cities that are well governed and moving ahead economically do so because they have high social capital; poorer cities lack in this civic virtue.").

102. *See, e.g.*, ROSENBLUM, *supra* note 67, at 43. Rosenblum argues that "[T]here is the tendency to adopt a simplistic 'transmission belt' model of civil society, which says that the beneficial formative effects of association spill over from one sphere to another." *Id.* at 48. Therefore, "[w]ithout a plausible dynamic, the idea of mediating institutions rests on little more than an optimistic 'liberal expectancy.'" *Id.* at 43.

103. *See* Jürgen Habermas, *Three Normative Models of Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 21, 28 (Seyla Benhabib ed., 1996) ("[C]ivil society provides the social basis of autonomous public spheres that remain as distinct from the economic system as from the administration."); *see also* Simone Chambers, *A Critical Theory of Civil Society*, *in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY 90, 92-96 (Simone Chambers & Will Kymlicka eds., 2002).

"lifeworld" and "system."[104] To Habermas, the lifeworld is the informal realm of society containing all those activities and institutions that are organized around communicative acts.[105] In the realm of the lifeworld, individuals interact with each other to create moral and practical knowledge, that is, to create, interpret, criticize, and transmit meaning.[106] Civil society is located in the lifeworld: it is composed of all associations and institutions in which individuals interact with each other through communicative acts designed to create such moral and practical knowledge.[107]

Moral and practical knowledge, instantiated in the lifeworld, stands in opposition to instrumental and strategic knowledge, instantiated in the realm of "system."[108] The latter constrains individual action based on instrumental and strategic imperatives and does not engage in communicative action to develop and clarify valid norms.[109] Both the state and the market are systemic insofar as they coordinate individual activity through the medium of authorized power or by the imperative of profit-making.[110] State power is hierarchical and coercive, while communication in civil society is egalitarian and persuasive. The rationality of the market emphasizes profit-making and efficiency, while the rationality of civil society emphasizes the production and transmission of meaning.[111]

Thus, differentiating civil society from both the state *and* the market helps to clarify different modes of organization characteristic of each realm: civil society is organized around communicative interactions, the state around bureaucratic routine and authorized power, and the market around profit imperatives. Most importantly, however, by placing civil society in opposition to the market economy, Habermasian critical theory emphasizes that it is not only the state that can pose a threat to the autonomy of civil society. Rather, the ability of civil society to critique dominant norms is eroded when institutions of civil society cease to be organized around communication and debate and begin to be organized around profit making. To Habermasian critical scholars, autonomous deliberation

104. *See* JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 153-97 (Thomas McCarthy trans., 1987).

105. *See, e.g.*, Chambers, *supra* note 103, at 92 ("The lifeworld is made up of meanings. We are connected to it via our interpretations and understandings. It is transmitted, altered, and reproduced via communication.").

106. *Id.*

107. JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 429 (1992) ("It is . . . on the institutional level of the lifeworld, that one can root a . . . concept of civil society.").

108. Chambers, *supra* note 103, at 90. R

109. HABERMAS, *supra* note 104, at 154. R

110. *Id.* ("[I]n modern societies, economic and bureaucratic spheres emerge in which social relations are regulated only via money and power.").

111. These definitions of civil society, state, and market are highly stylized, and critical theorists recognize that all three coordinating logics (communication, power, and profit-making) co-exist in the realms of the state, market, and civil society. Nevertheless, they serve to identify dominant modes of coordination in each one of the three realms.

is at the heart of civil society: both the market and the state can undermine civil society by threatening "the ways in which we interact" in civil society.[112]

Although Habermasian critical theorists include in their definition of civil society the type of apolitical private associations prized by market liberal, social capital, and civic republican theorists, they prioritize those associations that can criticize state political institutions, offer alternative interpretations of dominant norms, and generally "perceive, interpret, and present society-wide problems."[113] In practice, this means that critical theorists are largely interested in outward-looking associations of civil society that are expressly political, that is, that seek to take active part in deliberations about the common good and to both criticize and influence lawmaking and enforcement by state entities.[114] Deliberation about common affairs takes place in the "public sphere"—a space within civil society accessible to anyone. The public sphere is both a broad normative ideal for all societies and an empirical reality in democratic states—that tends to fall short of the normative ideal. It requires that: (1) it be open to all who wish to participate; (2) it be autonomous from both the state and the market; (3) participants bracket their inequalities and deliberate as equals relying on the public use of reason; and (4) participants debate the common good, leaving aside their private interests and issues.[115]

This emphasis on outward-looking associations of civil society stems from the essential role ascribed by critical theorists to institutions of civil society in maintaining a legitimate democratic state. An autonomous civil society that is open to all, and in which rational deliberation among equals about the common good takes place, can critically evaluate and analyze state policy to expose arbitrary state action, unjustified or insufficiently justified policies, or underlying assumptions or ideologies behind dominant norms. Thus, a politically-oriented civil society preserves democracy by ensuring that the state gives reasons for its policies that can survive critical scrutiny in the public sphere.

112. Chambers, *supra* note 103, at 94.

113. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 358 (Willam Rehg trans., 1996).

114. Habermas considers the "network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres," to be at the "core of civil society." *Id.* at 367. Thus, it is those politically-oriented associations that organize to debate issues of common concern that take center stage in Habermasian critical theory.

115. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 27, 30, 36-37 (Thomas Burger trans., 1989) [hereinafter HABERMAS, THE PUBLIC SPHERE] (explaining the development of the public sphere in the political realm); *see also* Jürgen Habermas, *"Reasonable" versus "True" or the Morality of World-views*, *in* THE INCLUSION OF THE OTHER 75, 86 (Ciaran Cronin & Pablo de Greiff eds., 1998) [hereinafter Habermas, *Morality of World-Views*] ("Anything valid should also be capable of a public justification. Valid statements deserve the acceptance of everyone *for the same reasons*.") (emphasis added).

R

Critical theory's emphasis on a discursive model of civil society, where individuals come together to debate common affairs, has much in common with civic republican theories of public-regarding deliberation in political institutions. In particular, both theories emphasize the importance of rational deliberation about the common good and the need for all individuals to participate as equals.[116] Critical theorists differ from civic republicans, however, in that they consider deliberative politics to extend beyond the formally-organized political system to the public sphere of civil society.[117] Indeed, Habermasian critical scholars propose a "two-track" version of deliberative politics that accords a prominent role to informally organized associations of civil society. Because the key role of civil society is to identify and interpret social problems and bring them to the forefront, "a good part of the normative expectations connected with deliberative politics" falls onto civil society associations.[118] In fact, Habermas emphasizes that the task of shaping public opinion must not be left to the political system.[119]

Nevertheless, much like civic republicans, critical scholars recognize that civil society associations can be "anarchic" and self-interested.[120] Hence, to Habermas, political decision making falls to the state and the established party system, which "filter" reasons for preferring one normative interpretation over another through institutionalized deliberation processes (such as parliamentary deliberation). Deliberative politics thus depends on "the interplay of institutionalized deliberative processes with informally developed public opinions."[121]

Because Habermasian critical theory ties the flourishing of civil society to a liberal rights framework,[122] Third World scholars have criticized it as excluding those Third World voices that do not fit neatly within such a framework, thus omitting a wide swath of actors (for example, Islamic or Native American social movements) from critical deliberation about the

116. *See* Habermas, *supra* note 103, at 27. R

117. Kenneth Baynes, *A Critical Theory Perspective on Civil Society and the State*, *in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 123, 128 (discussing Habermas' theories of civil society and emphasizing that public associations of civil society have the unique ability to "interpret[ ] social needs and problems, and shap[e] public opinion in response to them"); *see also* HABERMAS, *supra* note 113, at 275 ("A deliberative practice of self-legislation can develop only in the interplay between, on the one hand, the parliamentary will-formation institutionalized in legal procedures and programmed to reach decisions and, on the other, political opinion-formation along informal channels of political communication."). R

118. HABERMAS, *supra* note 113, at 358. R

119. *Id.*

120. *See id.* at 307–08 ("On account of its anarchic structure, the general public sphere is, on the one hand, more vulnerable to the repressive and exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication than are the institutionalized public spheres of parliamentary bodies.").

121. *Id.* at 298.

122. *Id.* at 366–67, 371 ("[A] robust civil society can develop only in the context of a liberal political culture . . . it can blossom only in an already rationalized lifeworld.").

common good.[123] Third World scholars have also criticized this emphasis on a liberal rights framework as privileging established NGOs by requiring that advocacy groups acquire legal identity—and consequently legal recognition as legitimate nonstate actors by the state—before they can be considered part of civil society.[124] This conflation significantly narrows the type of associations that are allowed to participate in international lawmaking and implementation.

Feminist, Third World, and minority scholars have also criticized the Habermasian ideal of the public sphere as leading to the *de facto* exclusion of marginal or minority views. In Habermasian critical theory, the ideal version of the public sphere imagines a single realm where individuals from all walks of life put aside their differences in status to deliberate as equals on issues of general interest.[125] Scholars such as Nancy Fraser, Iris Marion Young, and Jane Mansbridge have pointed out, however, that social inequalities continue to distort deliberation, even when all participants are formally equal.[126] Power and economic inequalities reproduce themselves in deliberative interactions irrespective of the formal equality of all participants.[127] This is because inequalities informally affect deliberation so that those privileged economic or social groups tend to dominate the discussion, which is often conducted using language and terms with which dominant groups are more comfortable, and which often focuses on topics of greater interest to those dominant groups.[128]

Feminist and Third World critical approaches to civil society seek to "render visible the ways in which societal inequality infects formally inclusive existing public spheres and taints discursive interaction within them."[129] The next Section explores these approaches.

3. Inward-Outward Theories: Feminist, Minority, and Third World Critical Theories

Like Habermasian critical scholars, feminist, Third World, and minority critical theorists emphasize the importance of deliberation in the public sphere for democratic government. In particular, they agree with the Habermasian and civic republican criticism of interest-based politics (as

123. *See, e.g.*, BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW 259–61 (2003).

124. *Id.* at 261.

125. *Cf.* Fraser, *supra* note 32, at 62 (criticizing the Habermasian assumption that "a single, comprehensive public sphere is always preferable to a nexus of multiple publics"). R

126. *See, e.g.*, Fraser, *supra* note 32, at 62; Jane Mansbridge, *Democracy, Deliberation, and the Experience of Women*, *in* HIGHER EDUCATION AND THE PRACTICE OF DEMOCRATIC POLITICS 122, 123 (Bernard Murchland ed., 1991); Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 120, 122-23 (Seyla Benhabib ed., 1996); *see infra* Part I.E.3. R

127. *See, e.g.*, Fraser, *supra* note 32, at 63-64. R

128. *Id.* at 64.

129. *Id.* at 65.

exemplified by market liberal theories), which conceive of democratic decisions as compromises among self-interested actors.[130] They also endorse the tripartite model of civil society that distinguishes civil society from both the state and the economy for the reasons described above: namely, that the tripartite model makes clear that the ability of civil society to act as a watchdog and critic depends upon its independence from both state coercion and market imperatives.[131]

These theorists, however, have three major points of disagreement with Habermasian critical theory: (1) the ideal of a single public sphere, (2) the prioritization of legally constituted and formally recognized organizations, and (3) the focus on debates about the common good. First, feminist, minority, and Third World theorists criticize the Habermasian ideal of a single public sphere where all participants bracket their inequalities and debate as if equals relying only on reasoned arguments.[132] To these theorists, this required bracketing of differences is neither practically achievable, nor normatively desirable. It is not practically achievable because "informal impediments to participatory parity . . . can persist even after everyone is formally and legally licensed to participate."[133] Minority groups may have internalized barriers to participation—for example, a diminished sense of one's right to speak, to interrupt, or to assert one's opinion.[134] Additionally, these groups may lack the necessary training to express their points of view through the speech style that is most valued in arenas of public debate, that is, through formal and general arguments, rather than through personal narratives; and through assertive and confrontational statements rather than tentative or conciliatory ones.[135]

130. *See, e.g.*, *Introduction*, *in* DEMOCRACY AND DIFFERENCE (Seyla Benhabib ed., 1996) (summarizing the contributions of feminist critical theorists Jane Mansfield, Seyla Benhabib, Iris Marion Young, Amy Gutman, and Chantal Mouffe, as "defending a version of 'deliberative democracy' [espoused by Habermas] as providing the most adequate conceptual and institutional model for theorizing the democratic experience of complex societies"); Mansbridge, *supra* note 126, at 122-23. R

131. *See* Fraser, *supra* note 32, at 57. R

132. *See, e.g.*, Young, *supra* note 126, at 123 ("Despite the claim of deliberative forms of orderly meetings to express pure universal reason, the norms of deliberation are culturally specific and often operate as forms of power that silence or devalue the speech of some people."); Iris Marion Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, *in* FEMINISM AS CRITIQUE 57, 59 (Seyla Benhabib & Drucilla Cornell eds., 1987) ("Habermas remains too committed to the ideals of impartiality and universality."). R

133. Fraser, *supra* note 32, at 63. R

134. Young, *supra* note 126, at 124 (noting that "[i]n many formal situations the better-educated white middle-class people . . . often act as though they have a right to speak and that their words carry authority, whereas those of other groups often feel intimidated by the argument requirements and the formality and rules of parliamentary procedures, so they do not speak, or speak only a way [sic] that those in charge find 'disruptive.'"). R

135. Feminist scholars such as Nancy Fraser, Iris Marion Young and Jane Mansbridge remark that the deliberative style predominant in public spheres tends to view deliberation as a contest. Deliberation-as-contest privileges assertive and confrontational styles, which are often male-centric, over exploratory or conciliatory ones, which are often female-centric. *See, e.g.*, Young, *supra* note 126, at 122–24. R

Bracketing participants' differences is not normatively desirable: it can mask subtle forms of domination of minority groups by majority elites by treating as neutral a type of deliberative style that is, in fact, culturally contingent.[136] Feminist and minority scholars emphasize the historical domination of public spaces of deliberation by white, upper-middle class men. This domination, they argue, has given rise to a type of rhetorical style that privileges dispassionate over passionate speech, that views deliberation as competition rather than collaboration, and that presents these forms of speaking as the application of "pure universal reason."[137] A key insight of these theorists is that the norms of deliberation of a single deliberative public sphere are likely to reflect the cultural preferences of dominant groups and thus can "operate as forms of power that silence or devalue the speech of [minorities]."[138]

Rather than espouse Habermas' ideal single public sphere, feminist, minority, and Third World theorists conceive of civil society as constituted by multiple publics. These multiple publics are thought to enhance, rather than diminish, the democratic potential of civil society. To Habermas, the emergence of multiple arenas of debate is a sign of fragmentation, which he postulates undermines deliberative democracy.[139] In contrast, feminist critical theories tend to view the coexistence of multiple publics as a resource that ultimately enhances deliberation in the broader public sphere.[140] Multiple publics enhance deliberation by allowing for the development of perspectives irreducible to the common good, which can ultimately transform the opinions of the dominant public.[141] Because a single public sphere is likely to drown minority critiques, smaller arenas of deliberation where minority groups can come together can help these groups "find the right voice or words to express their thoughts" and "articulate and defend their interests in the comprehensive public sphere."[142] Feminist critical scholar Nancy Fraser has termed these smaller arenas of deliberation "subaltern counterpublics" to capture their dual function as both *inward-looking* spaces where subordinated social groups develop their "identities, interests, and needs" and *outward-looking* arenas where minorities deliberate about and develop alternative and often contestatory interpretations of accepted norms.[143]

136. *See, e.g.*, Mansbridge, *supra* note 126, at 130-31, 134. R

137. Young, *supra* note 126, at 123. R

138. *Id.*

139. HABERMAS, *supra* note 104, at 307–08. R

140. *See* Fraser, *supra* note 32, at 62. R

141. Young, *supra* note 126, at 127. R

142. Fraser, *supra* note 32, at 64, 66. R

143. *Id.* at 67-68 ("[S]ubaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed toward wider publics."). For example, Fraser credits feminist subaltern counterpublics with developing new language to re-conceptualize social practices that were either previously accepted by society at large, or that remained a hidden social problem. *Id.* at 68. Thus, terms such as "marital rape" ques-

Because they recognize that dominant rhetorical styles are historically and culturally-contingent, feminist, minority, and Third World critical theories stress the importance of integrating different modes of communication into public deliberation. These theories emphasize, first, that some minority groups may be unable to express their points of view through formal and general arguments.[144] Second, they highlight the importance of different forms of communication, in particular informal, first person narrative styles, to "supplement argument by providing ways of speaking across difference in the absence of significant shared understandings."[145]

A second critique of Habermasian critical theory focuses on how an understanding of civil society that privileges formally recognized and formally constituted NGOs (a process often called "NGOization") undermines Third World social movements and de-politicizes civil society.[146] For example, scholarship on law and development has criticized the "NGOization of civil society [as] severely limit[ing] its radical democratic potential" by excluding social movements that do not have a recognized legal identity.[147] But it is precisely these social movements—and not NGOs constituted by Anglophone cosmopolitan actors—that command grassroot support in developing states and are thus seen as legitimate representatives of their interests.[148] These scholars have also condemned international development institutions for viewing NGOs merely as providers of efficient technical solutions to development problems. To these critics, such an instrumental view of NGOs "largely ignores, down-

---

tioned the state's reluctance to interfere. *Id.* at 67. The term "double shift" emphasized society's unspoken expectations that women who hold full-time jobs take care of the majority of household duties. *Id.*

144. *See, e.g.*, Young, *supra* note 126, at 124 (arguing that norms of deliberation that privilege formal and general speech "must be learned," because they are "culturally specific" and often a "sign of social privilege"). R

145. *Id.* at 129, 131; *accord* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413, 2439 (1989) (emphasizing the key role of narrative—or counterstories—in challenging dominant mindsets, those "bundle[s] of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place").

146. Sonia E. Alvarez, *Beyond NGO-ization, Reflections from Latin America*, 52 DEV. 175, 176 (2009) (defining "NGOization" as "national and global neo-liberalism's active promotion and official sanctioning of particular organizational forms and practices among feminist organizations and other sectors of civil society"). In particular, Alvarez criticizes the promotion and endorsement by national states, Intergovernmental Organizations and International Financial Institutions of "more rhetorically restrained, politically collaborative and technically proficient feminist practices." *Id.*

147. RAJAGOPAL, *supra* note 123, at 261; *accord* Alvarez, *supra* note 146, at 175. For example, the U.N. Economic and Social Counsel (ECOSOC) requires applicants for consultative status with the U.N. to "provide a copy of the registration paper or, if your country does not require registration, please provide other proof of existence." Department of Economic and Social Affairs, NGO Branch, *How to Apply for Consultative Status*, UNITED NATIONS, http://csonet.org/?menu=83 (last visited Mar. 3, 2013). R

148. RAJAGOPAL, *supra* note 123, at 261–62. R

plays, or attempts to coopt the political role of NGOs."[149] According to this thinking, the proper role of civil society (and of NGOs) is to criticize the development project as it is currently imagined by international organizations, thus creating "alternative development discourses and practices."[150]

Finally, feminist, minority, and Third World critical scholars also criticize the requirement that all participants deliberate about the common good. Feminist scholars point out that what precisely constitutes the "common good" is debatable. The indefiniteness and malleability of the concept has the potential to privilege the perspectives of dominant groups and thus be oppressive to minorities.[151] Rather than focus on defining the common good, or finding areas of agreement, the key functions of deliberation should be to expose participants to multiple perspectives, often not reducible to a single common good. This exposure helps participants expand their points of view: by illuminating the partiality of each participant's vantage point while simultaneously exposing all involved to multiple perspectives, participants "can come to understand something about the ways proposals and claims affect others differently situated."[152] Furthermore, deliberation can aid participants to pinpoint precisely where their differences lie, for example by forcing the articulation of unspoken assumptions.[153]

The emphasis on multiple, smaller publics, however, runs the risk of creating isolated enclaves. In other words, unless sufficient emphasis is placed on the mechanisms whereby the contestatory ideas developed in these smaller publics can impact wider publics, and unless wider publics are receptive to these ideas, fostering minority spaces may result in either isolation or tokenism.[154] Additionally, there is in principle no guarantee that the contestatory ideas developed in these smaller publics will be democracy-enhancing. In fact, these smaller publics could be deeply illiberal groups, or develop into radical groups that seek to destabilize or foreclose,

149. William F. Fisher, *Doing Good? The Politics and Antipolitics of NGO Practices*, 26 ANN. REV. ANTHROPOLOGY 439, 445-46 (1997).

150. *Id.* at 443. Third World critical scholars have endorsed Fraser's re-conceptualization of the public sphere as both accommodating social movements and recognizing their contestatory function. For example, Balakrishnan Rajagopal emphasizes that Nancy Fraser's notion of subaltern counterpublics, "which stresses the need to recognize a plurality of civil societies that may exist in these counterpublics, is much more capable of representing the actually existing practices of social movements." RAJAGOPAL, *supra* note 123, at 262. R

151. Fraser, *supra* note 32, at 72; Young, *supra* note 126, at 126. R

152. Young, *supra* note 126, at 128. R

153. In particular, allowing deliberation to take into account claims of self- or group-interest may help minority groups "find ways to discover that the prevailing sense of 'we' does not adequately include them." Jane Mansbridge, *Feminism and Democracy*, AM. PROSPECT, Spring 1990, at 126, 131.

154. For example, dominant groups may "pretend" to listen to minority concerns, and provide token concessions to minority demands, while not allowing minority views to have a substantial impact on policy outcomes.

rather than enrich, the conversation in wider publics.[155] Two mechanisms may mitigate this isolation: first, these smaller publics have a *dual* orientation, one of which is outward-looking; that is, they seek to interact with the wider public. Second, in multicultural societies, overlapping group memberships are likely to at least partially counter isolation by diffusing ideas among overlapping publics.[156]

4. Boundary-Crossing Theories: New Governance, State-Society Synergy Theories

All theories explored in the preceding sections view civil society as a separate sphere, independent from the state. In fact, most democratic political theories of civil society consider that a sharp separation between the state and civil society is necessary for the latter to maintain its independence and thus its ability to represent a legitimate check on state power.[157] Nevertheless, a diverse group of scholars increasingly pays attention to mechanisms of coordination between civil society and the state that accord civil society a more direct role in policy formation.[158] I focus here on these initiatives, as well as on recent proposals by both legal and political science scholars that tend to blur the boundaries between civil society and the state.

155. While acknowledging their potential for engendering illiberal tendencies, some feminist scholars have emphasized that illiberal groups may, paradoxically, serve to contain these tendencies. For example, Nancy Rosenblum argues that a function of associational life may be as much to contain vice as to promote civic virtue. ROSENBLUM, *supra* note 67, at 349-51. This is because some associations which foster such un-civic values as snobbery and separatism may provide "safety valves" that contain these illiberal tendencies. *Id.* at 349. These outlets can provide psychological benefits to members and contribute to the maintenance of the social order by instilling individuals with a measure of self-respect, by providing them with the opportunity "not only to belong but also to exclude others, [with] some place where their contributions are affirmed and where the likelihood of failure is reduced." *Id.* R

156. The idea that overlapping memberships can moderate extreme views and thus preserve democratic stability has a long history in pluralist theories of democracy. *See* SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 88-89 (1960) (arguing that "chances for stable democracy are enhanced to the extent that groups and individuals have a number of crosscutting, politically relevant affiliations").

157. *See generally* Post & Rosenblum, *supra* note 5, at 90.

158. *See* Cohen & Rogers, *supra* note 35, at 397 (proposing a set of institutional reforms that accord "secondary groups an extensive and explicitly public role"); Fraser, *supra* note 32, at 76 (arguing for a "conception [of civil society] that can permit us to envision a greater role for (at least some) public spheres than mere autonomous opinion formation removed from authoritative decision-making"); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 310–11 (2004) (arguing for a new horizontal conception of self-government "resting on the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities in domestic and transnational society generate the rules, norms, and principles they are prepared to live by"); Lucio Baccaro, *Civil Society Meets the State: A Model of Associational Democracy* 1 (Int'l Inst. for Labour Studies, Discussion Paper Series No. 138, 2002) (proposing a new model of associational democracy in which "state and civil society organizations are both part of a single new regulatory framework that transforms both"). R R

Rather than dealing with a discrete theory of civil society, this final Section combines three approaches that advocate a more direct role for civil society associations in lawmaking and implementation in collaboration with the state: some critical theory approaches, new governance theory, and state-society synergy theory. I briefly analyze each below.

Some critical scholars emphasize the need to move beyond the state-civil society dichotomy and allow civil society associations to participate in the political process as decision and policy makers.[159] For example, Joshua Cohen and Joel Rogers propose a more direct and formal governance role for groups in areas where the objects of regulation are either too dispersed, too numerous, or too mutable for the government to set compliance standards and monitor performance.[160] This effort to incorporate civil society into decision-making processes traditionally reserved to parliamentary bodies mirrors "new governance" initiatives that seek to promote experimentation at multiple levels of government, and to foster deliberation and participation in government by recognizing a key role for civil society actors as policy makers.[161] Blurring the boundaries between state, market, and civil society, new governance scholars argue, fosters cooperation, experimentalism, and innovation.[162] New governance scholars believe that allowing civil society (and also the market) to participate in lawmaking and implementation imbues all sectors of society with a problem-solving spirit whereby common problems can be tackled creatively.[163]

159. Nancy Fraser criticizes the Habermasian conception of civil society for promoting a sharp separation between associational civil society, whose deliberation results only in opinionformation (which she terms "weak publics"), and parliamentary bodies, whose deliberation encompasses binding decisionmaking (which she terms "strong publics"). Fraser, *supra* note 32, at 75. Fraser argues that some particular contexts may call for the direct participation of civil society in lawmaking. *Id.* Fraser does not, however, specify which types of situation may call for this direct participation. *Id.* Cohen and Rogers provide a more detailed elaboration of particular contexts that call for a more direct role for civil society in policymaking. Cohen & Rogers, *supra* note 35, at 447–454. R R

160. Cohen and Rogers emphasize three key attributes of civil society organizations that allow them to positively contribute to democratic governance in these areas: their ability to provide on-the-ground information to policy-makers; their potential to equalize representation of dispersed interests by pooling them, thus making representation more fine-grained; and their ability to act as innovative problem solvers. Cohen & Rogers, *supra* note 35, at 424-26. These attributes may be particularly important when policymaking and implementation requires coordination among various actors, or when it requires that policies be tailored to specific local conditions. R

161. *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 442 (2004) ("[T]he obsessive maintenance of traditional boundaries—including those of public and private, profit and nonprofit, formal and informal, theory and practice, secular and religious, left and right—is no longer a major concern with the shift to the Renew Deal [that is the New Governance] paradigm."); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) (arguing for the "reorient[ation] of administrative law toward facilitating the effectiveness of public/private regulatory regimes and away from the traditional project of constraining agency discretion").

162. *See* Lobel, *supra* note 161, at 375-376. R

163. *See id.* at 442.

Importantly, in this framework, the role of the government shifts from regulator and controller to facilitator in the shared problem-solving enterprise.[164] Finally, state-civil society synergy theorists point to empirical research that provides additional reasons for fostering "ties that connect citizens and public officials across the public-private divide."[165] Social science field work has found that when state officials are embedded in the communities in which they work, they create synergies that lead to the more efficient implementation of state policies. "State-society synergy" requires both complementary efforts by state and civil society, that is, efforts that rely on a more traditional division of labor between the two realms, and embeddedness, that is, the development of ties that cross the public-private divide.[166]

A direct policy-making and implementation role for civil society organizations, however, may perpetuate existing social inequalities by allowing groups that already possess a large amount of political power to direct decision making and implementation to their own benefit (and likely to the detriment of society at large). This concern is exacerbated in situations where groups with unequal power and clashing priorities compete to influence regulation in areas with scarce resources.[167] Thus, any regime that seeks to institutionalize a role for civil society in policy making should include mechanisms to safeguard representativeness and to foster a collaborative environment among participating stakeholders. These mechanisms can include rotation schedules for civil society organizations, so that single groups do not dominate the discussion, and multiple perspectives can contribute to the debate without sacrificing efficiency. Additionally, as mentioned *above*, for those civil society theorists (such as feminist, Third World, and minority scholars) who prize civil society's ability to develop alternative and often transgressive critiques of the state, a direct role of

164. *Id.* at 348, 377 (identifying the following features as key elements of a new governance regime: "increased participation of nonstate actors, stakeholder collaboration, diversity and competition, decentralization and subsidiarity, integration of policy domains, flexibility and non-coerciveness, adaptability and dynamic learning, and legal orchestration among proliferated norm-generating entities.").

165. *See* Peter Evans, *State-Society Synergy: Government and Social Capital in Development*, *in* GOVERNMENT ACTION, SOCIAL CAPITAL AND DEVELOPMENT: REVIEWING THE EVIDENCE ON SYNERGY 178, 180 (Peter Evans ed., 1996).

166. *Id.* at 179-80. Relying on experimental data from different instances of state-civil society collaborations, Evans identifies two key features of successful synergy: complementarity and embeddedness. Complementarity requires that the state ensure rule-governed environments that enable diverse civil society organizations to flourish. Embeddedness facilitates implementation by creating dense networks of ties that bind local state and civil society actors. *Id.*; *see also* Danielle M. Varda, *A Network Perspective on State-Society Synergy to Increase Community-Level Social Capital*, 40 NONPROFIT & VOLUNTARY SECTOR Q. 896, 896 (2011) (arguing that synergistic interactions between the state and civil society increase the levels of bridging social capital, thus improving implementation outcomes).

167. *See, e.g.*, Lobel, *supra* note 161, at 458 (recognizing that new governance approaches may produce "a vicious cycle under certain circumstances—tilting more and more entitlements in favor of those already in power"). R

civil society in policy making and implementation risks the moderation of critique and the further NGOization of civil society.[168]

This Part developed a framework that allows for a more fine-grained analysis of the diverse purposes and functions that can be performed by different civil society associations. I argued that the purposes and functions of civil society organizations range from inward to outward-looking. I then posited that five theoretical approaches to civil society map onto this framework and justify emphasizing particular purposes and functions of civil society while minimizing others. This theoretical framework is depicted below in Figure 2:

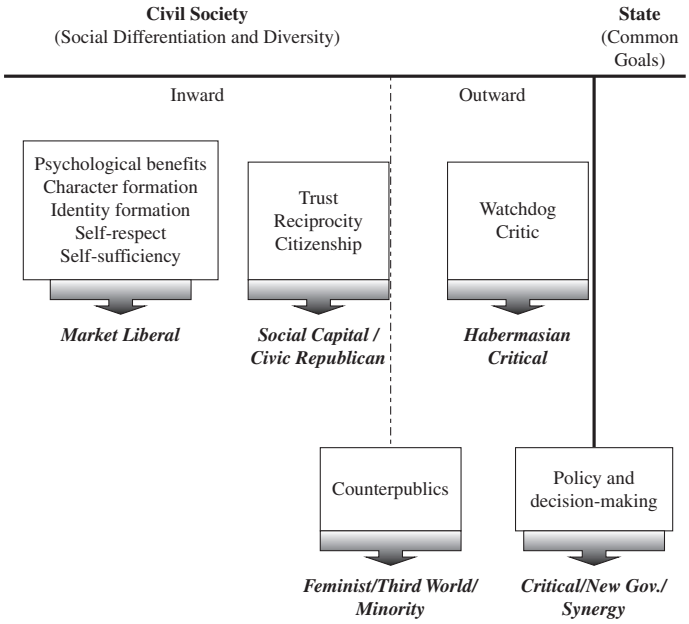


FIGURE 2

Although not all of the functions of civil society depicted in Figures 1 and 2 are mutually exclusive, and it is certainly possible for a single civil society organization to seek to achieve both inward-looking and outward-looking goals, there are often trade-offs. For example, groups that seek to focus on the personal discovery and growth of their members may have to put aside discussions about shared values and the common good.[169] Conversely, groups organized for efficient political representation may fail to serve as sources of individual identity.[170] More importantly for the pur-

168. *See supra* Part I.E.3.

169. *See, e.g.*, ROSENBLUM, *supra* note 67, at 37.

170. *Id.* (noting that while organized political interest groups may "serve the classic function of political representation," they "may fail to serve as important reference points for the moral dispositions of members or to foster deep commitment to democratic values or to the political community as a whole").

pose of this work, international organizations seeking civil society participation should recognize the variety of functions performed by different kinds of civil society organizations, and the normative theories that explain and justify a focus on certain attributes at the expense of others. As I began to explore in this Part, understanding civil society through the lens of each of the five families of theories described above (which in turn emphasize particular functions of civil society) has consequences for the design of international institutions. In Part II, I apply the theoretical framework developed in this Part to a concrete example, the UNAIDS monitoring process to the HIV/AIDS Declaration of Commitment, to work out in more detail how choosing one theoretical interpretation over another will lead to different institutional designs.

II. Applying the Theoretical Framework: The HIV/AIDS Declaration of Commitment and UNAIDS Monitoring Process

This Part provides a brief overview of the global efforts to address the HIV/AIDS epidemic, with an emphasis on the HIV/AIDS Declaration of Commitment and the UNAIDS monitoring process. It then gives examples of how UNAIDS initiatives to increase civil society engagement provide inconsistent definitions of civil society that reveal the absence of an analytical framework to guide policy prescriptions. Finally, it demonstrates the importance of developing such a framework by analyzing how the theoretical framework described in Part I would counsel different institutional designs for civil society participation.

A. *History and Content of UNGASS Commitments*

In the year 2000, the Security Council, for the first time in its history, debated a global health issue.[171] The Council considered that the accelerating spread of the HIV/AIDS epidemic "may pose a risk to stability and security," and urged states to redouble their efforts to mount a coordinated campaign against the epidemic.[172] The Security Council also encouraged "additional discussion among relevant United Nation bodies, Member States, industry and other relevant organizations to make progress, *inter alia*, on the question of access to treatment and care, and on prevention."[173] In 2001, the U.N. General Assembly convened a Special Session (UNGASS) dedicated to HIV/AIDS.[174] At the close of the meeting, representatives of 189 nations unanimously adopted the Declaration

171. *See* Press Release, Security Council, Security Council Holds Debate on Impact of AIDS on Peace and Security in Africa, U.N. Press Release SC/6781 (Jan. 10, 2000); *Rx for Survival; Politics and Global Health*, Public Broadcasting Service, http://www.pbs.org/wgbh/rxforsurvival/series/politics/who_united.html (last visited Mar. 1, 2013) ("In 2000 . . . health moved for the first time onto the agenda of the UN Security Council . . . ."); S.C. Res. 1308, U.N. Doc. S/RES/1308 (July 17, 2000).

172. S.C. Res. 1308, pmbl., U.N. Doc. S/RES/1308 (July 17, 2000).

173. *Id.* ¶ 6.

174. *See* G.A. Res. S-26/2, U.N. Doc A/RES/S-26/2 (Aug. 2, 2001).

of Commitment on HIV/AIDS: "Global Crisis—Global Action" (Declaration).[175]

The Declaration calls for the development of national strategies that involve "civil society and . . . business" as one of the pillars of a national response.[176] It also commits states to submit country progress reports to UNAIDS, the Joint United Nations Program on HIV/AIDS, once every two years.[177] Currently, in a single monitoring process, UNAIDS reporting guidelines combine UNGASS targets with commitments set forth in three other U.N. Resolutions on HIV/AIDS: the Millennium Development Goals[178] and two Political Declarations of Commitment.[179] These three resolutions along with the Declaration represent the core international commitments in the global fight against AIDS.

UNAIDS has designed a series of core indicators to monitor countries' progress.[180] Indicators include epidemiological data related to the spread of the disease and population behavioral patterns, as well as data that reflect the countries' HIV/AIDS policy environment. The latter data is used to derive the National Composite Policy Index (NCPI), designed to "assess progress in the development and implementation of national level

175. *Id.*; Joint United Nations Programme on HIV/AIDS [UNAIDS], Monitoring the Declaration of Commitment on HIV/AIDS, Guidelines on Construction of Core Indicators, UNAIDS/07.12E /JC1318E, 9 (April 2007) [hereinafter UNAIDS, 2007 Core Indicator Guidelines] ("At the close of the groundbreaking UNGASS on HIV/AIDS in June 2001, 189 Member States adopted the Declaration of Commitment on HIV/AIDS.").

176. G.A. Res. S-26/2, *supra* note 174 ¶ 37. R

177. UNAIDS, the World Health Organization (WHO) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) are the key players in the international response to HIV/AIDS.

178. "To have, by then, halted, and begun to reverse, the spread of HIV/AIDS, the scourge of malaria and other major diseases that afflict humanity" and "[t]o provide special assistance to children orphaned by HIV/AIDS" are two of the eight Millennium Development Goals adopted by the General Assembly in the year 2000. G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

179. *See generally* G.A. Res. 65/277, ¶¶ 50, 51, U.N. Doc. A/RES/65/277 (July 8, 2011) (reaffirming the 2006 Declaration of Commitment and setting new targets, which include, by 2015, to reduce sexual transmission of HIV and HIV infection among people who inject drugs by half, to increase the number of people on treatment to 15 million, to halve TB-related deaths in people living with HIV, and to eliminate new HIV infections among children); G.A. Res. 60/262, ¶ 20, U.N. Doc. A/RES/60/262 (June 15, 2006).

180. UNAIDS, *Global AIDS Response Progress Reporting 2012*: *Guidelines*, at 8, UNAIDS/JC2215E (Oct. 2011) [hereinafter UNAIDS, *2011 Core Indicator Guidelines*]; UNAIDS, *Monitoring the Declaration of Commitment on HIV/AIDS: Guidelines on Construction of Core Indicators*, at 9, UNAIDS/09.10E/JC1676E (Mar. 2009) [hereinafter UNAIDS, *2009 Core Indicator Guidelines*]; *see also* UNAIDS, SCALING UP ACCESS TO HIV PREVENTION, TREATMENT, CARE AND SUPPORT: THE NEXT STEPS (2006) *available at* http://data.unaids.org/Publications/IRC-pub07/jc1267-univaccess-thenextsteps_en.pdf; UNAIDS, *Setting Targets for Moving Towards Universal Access* (UNAIDS Working Doc., Oct. 2006), *available at* http://data.unaids.org/pub/guidelines/2006/20061006_report_universal_access_targets_guidelines_en.pdf.

HIV and AIDS policies, strategies and laws."[181] The NCPI is based on interviews with two groups: (1) government officials, and (2) bilateral agencies, U.N. organizations, and civil society organizations.

The NCPI queries whether countries have "ensured the full involvement and participation of civil society in the development of a multisectoral strategy."[182] In addition, UNAIDS encourages governments to involve civil society in the monitoring and evaluation process itself, by convening workshops before the drafting of the report and by reviewing progress reports. Reporting guidelines emphasize that the preparation of national reports should include input from civil society as "partners" that can "provide quantitative and qualitative information to augment the data collected by governments[,] . . . provide a valuable perspective on the issues included in the National Composite Policy Index, and . . . participate in the review and vetting process for progress reports."[183] UNAIDS emphasizes the importance of *process* in the elaboration of the UNGASS reports as an opportunity to develop civil society/government partnerships, noting that "the importance of the Index lies in the process of data collection and data reconciliation between different stakeholders, detailed analysis of the responses, and its use in strengthening the national HIV response."[184] UNAIDS discourages, however, the preparation of independent shadow reports—limiting them to cases in which civil society *strongly* feels it was not adequately included in the national reporting process or the state is unable to provide an official report.[185]

Once every two years, UNAIDS compiles country progress reports, which are reviewed at a special UN General Assembly meeting ("High

181. UNAIDS, *2009 Core Indicator Guidelines*, *supra* note 180, at 27; *see also* UNAIDS, *2011 Core Indicator Guidelines*, *supra* note 180, at 139–42 (NCPI questionnaire for civil society organizations and others). R R

182. UNAIDS, *2009 Core Indicator Guidelines*, *supra* note 180, at 27, 94 (footnote and internal quotation marks omitted). The 2011 Guidelines similarly ask whether the government has included civil society in planning, budgeting, monitoring and evaluation of the national response to HIV. UNAIDS, *2011 Core Indicator Guidelines*, *supra* note 180, at 139–40. R R

183. UNAIDS, *2009 Core Indicator Guidelines*, *supra* note 180, at 16. The 2011 Guidelines characterize civil society's contribution to the national response in similar terms, emphasizing that "civil society organizations are well positioned to provide quantitative and qualitative information to augment the data collected by governments." UNAIDS, *2011 Core Indicator Guidelines*, *supra* note 180, at 15. R R

184. UNAIDS, *2009 Core Indicator Guidelines*, *supra* note 180, at 28. R

185. UNAIDS, *2011 Core Indicator Guidelines*, *supra* note 180, at 15 ("Shadow reports by civil society will be accepted . . . [but] are not intended as a parallel reporting process for civil society. Wherever possible UNAIDS encourages civil society integration into national reporting processes. . . . Shadow reports are intended to provide an alternative perspective where it is strongly felt that civil society was not adequately included in the national reporting process, where governments do not submit a Country Progress Report, or where data provided by government differs considerably from data collected by civil society monitoring government progress in service delivery."); UNAIDS, *2009 Core Indicator Guidelines*, *supra* note 180, at 16. R R

Level Meeting").[186] Civil society can participate in the review process by attending civil society hearings and round-tables.[187] Civil society participation at the international level is channeled through a "Civil Society Task Force," which aims to coordinate communication among civil society participants, provide input on the themes for the round tables, and advise on civil society accreditation to attend.[188]

B. *Inconsistent Definitions of Civil Society: Lack of an Analytical Framework*

Despite numerous references to civil society involvement, UNGASS documents do not provide a clear definition of what groups constitute civil society. Neither do they undertake an analysis of the strengths and weaknesses that different civil society constituents may bring to the response nor an assessment of whether the inclusion of certain types of groups should be favored. In short, the UNGASS process lacks an analytical framework that addresses why civil society should be involved in the response, which kinds of associations should participate, what kind of relationship the state should have with civil society, and how the international community should interact with both civil society and individual states.

For example, some passages in UNGASS preparatory documents include the business sector in its definition of civil society.[189] In contrast,

186. UNAIDS, Know Your Response, http://www.unaids.org/en/dataanalysis/knowyourresponse/ (last visited Mar. 1, 2013) (listing available country progress reports); UNAIDS, 2007 Core Indicator Guidelines, supra note 175, at 7 ("Reports received by UNAIDS, on behalf of the Secretary-General, are used to prepare the *Report on the Global AIDS Epidemic*"); G.A. Res. S-26/2, supra note 174, ¶ 100 (calling on the General Assembly to "[d]evote sufficient time and at least one full day of the annual session of the General Assembly to review and debate a report of the Secretary-General on progress achieved in realizing the commitments set out in the present Declaration"); G.A. Res. 65/180, ¶ 1, U.N. Doc. A/RES/65/180 (Dec. 20, 2010) (calling for a High Level Meeting to "undertake a comprehensive review of the progress achieved in realizing the [2001] Declaration of Commitment on HIV/AIDS and the [2006] Political Declaration on HIV/AIDS"). R R

187. *See, e.g.*, *Informal Interactive Hearing with Civil Society for the High Level Meeting on AIDS*, UNAIDS. Apr. 8, 2011, http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2011highlevelmeetingonaids/csh/ (describing the informal civil society hearing at the 2011 High Level Meeting on AIDS); U.N. President of the Gen. Assembly, Letter dated Mar. 4, 2011, from the President of the 65th Session of the General Assembly to the Member States (Mar. 4, 2011), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/20110304_HLM_PGAs_letter.pdf (announcing the establishment of a civil society task force to assist in "organising the civil society hearing and with maximising civil society input at the [High Level Meeting]").

188. *See Civil Society Application Process to Participate in the 2011 United Nations General Assembly High Level Meeting on AIDS and Civil Society Hearing*, UNAIDS, http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2011highlevelmeetingonaids/civilsocietyand2011highlevelmeetingonaids/ (last visited Mar. 1, 2013).

189. *See, e.g.*, G.A. Res. 55/13, ¶ 14, U.N. Doc. A/RES/55/13 (Nov. 16, 2000) ("[The General Assembly] [i]nvites, in this context, the President of the General Assembly to make recommendations, for consideration by Member States during the preparatory process . . . as to the form of the involvement of such *civil society actors, in particular associations of people living with HIV/AIDS, non-governmental organizations and the business sector, including*

some passages of the Declaration differentiate civil society from both the business and the "private" sectors,[190] while other passages draw a distinction only between civil society and the "private sector,"[191] or between civil society and business.[192] Again, other segments of the Declaration appear to distinguish civil society from local communities, people living with HIV/AIDS and vulnerable groups, suggesting that the term civil society is perhaps meant to encompass NGOs with a developed advocacy agenda.[193] Yet, other passages indicate civil society includes people living with HIV/AIDS, vulnerable groups, and caregivers.[194]

The Civil Society Task Force described above includes representatives from the business sector,[195] once again suggesting a broad view of civil society. The list of civil society organizations approved for participation in the high-level meeting includes several large pharmaceutical companies such as Merck, Pfizer, GlaxoSmithKline, and Bristol-Myers Squibb, as well as other international corporations such as Exxon Mobil.[196] Importantly, neither UNGASS preparatory documents nor the Declaration address whether nonprofit organizations that represent private, for-profit interests (such as business associations or lobbying groups) should be con-

pharmaceutical companies, in the special session and, to the extent possible, in the preparatory process.") (emphasis added).

190. G.A. Res. S-26/2, *supra* note 174, ¶ 103 ("We look forward to strong leadership by Governments and concerted efforts with the full and active participation of the United Nations, the entire multilateral system, civil society, the business community and private sector . . . .") (removed emphasis). R

191. *Id.* ¶ 46 (stating that one action must be to "establish and strengthen mechanisms that involve *the private sector and civil society partners* and people living with HIV/AIDS and vulnerable groups in the fight against HIV/AIDS") (emphasis added).

192. *Id.* ¶ 55 ("By 2003, ensure that national strategies, supported by regional and international strategies, are developed in close collaboration with the international community, including Governments and relevant intergovernmental organizations as well as with *civil society and the business sector* . . . .") (emphasis added).

193. *Id.* ¶ 27 ("Welcoming the progress made in some countries to contain the epidemic, particularly through . . . working in partnership with *communities, civil society, people living with HIV/AIDS and vulnerable groups* . . . .") (emphasis added).

194. *Id.* ¶ 94 ("Conduct national periodic reviews with the participation of civil society, particularly people living with HIV/AIDS, vulnerable groups and caregivers, of progress achieved in realizing these commitments . . . .").

195. Amy Coulterman, *Civil Society Task Force Chosen for the Comprehensive AIDS Review*, NGO Delegation to the UNAIDS Programme Coordinating Board (Feb. 4, 2011), http://unaidspcbngo.org/?p=10780.

196. The full list of international companies approved to participate as civil society in the 2008 High Level meetings is: Becton Dickinson & Co., Bristol-Myers Squibb, Exxon Mobile, GlaxoSmithKline, Merck, Mylan and Pfizer. President of the General Assembly, *List of Civil Society Representatives to be Invited to Participate in the High-Level Meeting on a Comprehensive Review of the Progress Achieved in Realizing the Declaration Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS*, Annex, U.N. Doc. A/62/CRP.1, (Apr. 23, 2008) [hereinafter 2008 List of Civil Society Representatives]. The full list for 2011 is available at http://unaidspcbngo.org/wp-content/uploads/2011/04/Organizations-for-HLM.pdf.

sidered part of civil society and, if so, how they should participate in the response.

In addition, several HIV/AIDS documents contain a long list of attributes of civil society but do not engage in an analysis of the relative importance of these attributes for a coordinated response, or study the extent to which the UNGASS process should seek to enhance certain capacities of civil society (and if so, how).[197] The Guidelines and other UNGASS documents leave unexamined whether the state or the international community should delegate monitoring and implementation to a market-ordered civil society while providing minimal oversight (for example, as advocated by market liberals); act as a coordinator of the national response by fostering local experimentation by civil society while facilitating the scaling up of successful initiatives and preventing duplicative efforts (for example, as advocated by new governance scholars); or engage civil society only indirectly by considering its opinions but delegating ultimate responsibility for drafting a monitoring and implementation plan to the legislature or other governmental body (for example, as advocated by civic republicans).

Analyzing the consequences of tight state control versus loose organizational oversight would bring to light the consequences of two modes of operation that may already be functioning in an *ad hoc* fashion in different countries. Although the more outward-looking partnership and policy making and the more inward-looking "individual empowerment" roles of civil society could coexist, particular institutional designs and modes of participation may require trade-offs. For example, a monitoring system like the one currently in place for UNGASS that discourages the preparation of shadow reports and that requires a relatively high level of technical sophistication may discourage local national constituencies from engaging directly with the reporting process and from bringing their concerns to the attention of the international community, thus indirectly disempowering more local and less organized civil society organizations. A discussion about the proper role of civil society in the response should include a deeper analysis of the impact of particular institutional designs and modes of participation on these features of civil society organizations.

As civil society scholar Michael Edwards has pointed out, "[a]n idea that means everything probably means nothing . . . . At the very least, clarity about the different understandings [of civil society] in play is necessary if we are to have a sensible conversation . . . ."[198] Clarification of these shifting and internally inconsistent concepts of "civil society" and the further disaggregation of the different civil society players according to

197. For example, the Guidelines for the Construction of Core Indicators published by UNAIDS stress the importance of including a broad range of stakeholders in the national response. Inclusion refers "not only to implementation and innovation, but also to issues of public policy, advocacy and oversight functions, monitoring and evaluation." UNAIDS, *Clearing the Common Ground for the "Three Ones"* (Conference Paper for Washington Consultation Apr. 25, 2004), *available at* http://data.unaids.org/UNA-docs/Three-Ones_ConsultationReport_en.pdf.

198. EDWARDS, *supra* note 5, at 3.

their attributes (as shown in Figures 1 and 2) would help sharpen the debate regarding the precise role of different actors in the global response against HIV/AIDS.

C. *Applying the Theoretical Framework: Consequences for Institutional Design*

This Section applies the elements disaggregated in Figures 1 and 2 to the UNGASS process, shows how emphasis on different aspects of civil society will lead to divergent institutional designs, and demonstrates how current institutional arrangements will impact the relationship among civil society, the state, and the international order.[199] It focuses on two key areas of disagreement among the theories of civil society described above: (1) whether the market, and thus business organizations, should be considered part of civil society; and (2) whether the national and international response should prioritize inward-looking, apolitical organizations or outward-looking, politically oriented organizations. This Section illustrates only some of the consequences of incorporating the disaggregated framework illustrated in Figures 1 and 2 to an analysis of civil society. It is not intended to describe all possible consequences for institutional design but rather to illustrate some of the divergent institutional designs dictated by emphases on different functions of civil society.

1. Inclusion of the Market in the Concept of Civil Society

As explored above, UNGASS documents are unclear regarding whether the market should be included in the concept of civil society. In practice, business representatives are part of the Civil Society Task Force and pharmaceutical companies (as well as other corporations) are invited to High-Level Meetings under the rubric of civil society.[200] This means that corporations can be active participants in the same round-table discussions and can address member states and observers at the day-long civil society interactive hearings.[201] At the national level, the UNAIDS monitoring guidelines emphasize the importance of creating a single multisectoral AIDS-coordinating institution, but they appear agnostic as to whether for-profit companies should be included as active members with a certain amount of decision-making power.[202] Member countries have

199. *See infra* Parts II.C.1, II.C.2. & Table 1.

200. *See, e.g.*, 2008 List of Civil Society Representatives, *supra* note 196 (listing Bristol-Myers Squibb, Becton Dickinson and Company, among other private corporations invited to the High Level Meetings as members of civil society). R

201. For a description of the hearing, as well as a webcast and transcript of the 2008 and 2011 review sessions' selected civil society speakers, see *2008 High-Level Meeting on AIDS*, UNITED NATIONS (June 10–11, 2008), https://www.un.org/ga/aidsmeeting2008/ (follow "Statements and Webcasts" hyperlink) and *2011 High-Level Meeting on AIDS*, UNITED NATIONS (June 8–10, 2011), http://www.un.org/webcast/aidsmeeting2008/index.asp (follow "Statements and Webcast" hyperlink).

202. UNAIDS, GLOBAL TASK TEAM ON IMPROVING AIDS COORDINATION AMONG MULTILATERAL INSTITUTIONS AND INTERNATIONAL DONORS, FINAL REPORT (2005), *available at* http://data.unaids.org/Publications/IRC-pub06/JC1125-GlobalTaskTeamReport_en.pdf;

taken different approaches to constructing such a coordinating body. For example, Nicaragua's National AIDS Council does not include private, for-profit entities, while Brazil's does.[203]

In the context of the global fight against HIV/AIDS, it is undisputed that international corporations, and in particular pharmaceutical companies, are key stakeholders that play a role in the response. As researchers and manufacturers of HIV/AIDS cocktail drugs, pharmaceutical price-setting practices have a large impact on access to medicines in the developing world, as do their decisions to enforce international patents against foreign governments.[204] Thus, including pharmaceutical companies in international and national debates about the global HIV/AIDS epidemic is generally considered essential.[205] It may thus appear that concerns as to whether the concept of civil society is broad enough to include pharmaceutical companies reflect purely theoretical debates with little practical relevance.

Indeed, neoliberal, social capital, and civic republican theories of civil society tend to emphasize the oppositional relationship of civil society and the state, but leave unexplored and unproblematized the relationship between civil society and the market.[206] Similarly, new governance theory, while distinguishing between civil society and the market, tends to presuppose a positive and complementary relationship between the two, whereby market and civil society actors are "partners" in implementation and mon-

UNAIDS, *National AIDS Programmes: A Guide to Monitoring and Evaluation*, at 20, UNAIDS/00.17.E (June 2000), *available at* http://www.who.int/hiv/pub/epidemiology/en/JC427-Mon_Ev-Full_en.pdf ("The more diffuse the response, the more important it becomes to have a strong centrally coordinated M&E system to which each sector can contribute information."); UNAIDS, *"Three Ones" Key Principles* 1 (Conference Paper for Washington Consultation Apr. 25, 2004), [hereinafter UNAIDS, *Three Ones Key Principles*], *available at* http://data.unaids.org/una-docs/three-ones_keyprinciples_en.pdf (advocating for the creation of "One National AIDS Coordinating Authority, with a broad based multi-sector mandate").

203. *2008 National Composite Policy Index (NCPI) Reports*, UNAIDS, http://www.unaids.org/en/KnowledgeCentre/HIVData/CountryProgress/2008_NCPI_reports.asp (last visited Mar. 1, 2013) (listing specific information on national multisector AIDS programs for participating countries); *see also*, MIGUEL OROZCO & LAURA G. PEDRAZA FARIÑA, HIV/AIDS POLICY IN NICARAGUA: A CIVIL SOCIETY PERSPECTIVE (2007), *available at* http://www.opensocietyfoundations.org/sites/default/files/nicaragua_20080115.pdf.

204. For a discussion on the role of pharmaceutical companies in access to essential medicines in the developing world, see generally OBIJIOFOR AGINAM, GLOBAL HEALTH GOVERNANCE: INTERNATIONAL LAW AND PUBLIC HEALTH IN A DIVIDED WORLD (2005) and HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007).

205. *See, e.g.*, Peter Piot & Awa Marie Coll Seck, *International Response to the HIV/AIDS Epidemic: Planning for Success*, 79 BULL. WORLD HEALTH ORG. 1106, 1109 (2001) (documenting how dialogue between countries and the pharmaceutical industry "led to widespread support for preferential drug pricing for developing countries, pricing transparency, [and] price competition").

206. *See* JUDE HOWELL & JENNY PEARCE, CIVIL SOCIETY AND DEVELOPMENT 63 (2001) (noting that "[t]he anti-state model of civil society . . . leads to a tendency among donors to assume rather than query the relationship between civil society and the market, so failing to explore critically the tensions and contradictions implicit in this relationship").

itoring efforts.[207] It is precisely this latter theoretical understanding of civil society that appears to implicitly undergird the UNGASS Civil Society Task Force and other UNGASS civil society initiatives, which tend to emphasize partnerships and mutual cooperation among nonstate and state actors.

Nevertheless, much like differentiating the realm of the state (with its monopoly on the use of legal force) from that of civil society (as the realm of voluntary interactions) creates a useful conceptual distinction that allows us to think of civil society as a "watchdog" of governmental activities,[208] differentiating the market from civil society could reveal oppositional relationships between civil society and business entities or nonprofit organizations that advocate on their behalf; bring to the surface conflicts of interest; and allow civil society to play a critical watchdog role vis-à-vis the market. Moreover, if, like Habermasian critical scholars, we understand civil society organizations to be focused on the production and transmission of meaning through communication and debate, rather than profit-making, it is important to differentiate those associations organized around communication and debate from those whose ultimate goal is to secure profits.[209]

A critical and oppositional role of civil society vis-à-vis the market is particularly relevant in the area of HIV/AIDS, where pharmaceutical companies have engaged in aggressive patenting tactics, for example, by suing developing countries that issued compulsory licenses to several essential medicines.[210] Thus, conceptualizing businesses, nonprofit organizations that represent business interests (such as the International Federation of Pharmaceutical Manufacturers Associations),[211] and other

207. *See* Lobel, *supra* note 161, at 377 ("In a cooperative regime, the role of government changes from regulator and controller to facilitator, and law becomes a shared problem-solving process rather than an ordering activity. Government, industry, and civil society groups all share responsibility for achieving policy goals. Industry is expected to participate as part of a search for common goals, not just rigidly asserting its narrow economic or political interests.") (internal citation omitted). R

208. *See, e.g.*, HOWELL & PEARCE, *supra* note206, at 81 ("[T]he conceptual separation of civil society from the state was important, not only because it more accurately reflected empirical reality but also because it made possible the protection of this space to challenge state despotism."). R

209. As emphasized by Nancy Fraser, conceptualizing civil society as a "theater for . . . deliberating rather than for buying and selling, . . . permits us to keep in view the distinctions between state apparatuses, economic markets, and democratic associations, distinctions that are essential to democratic theory." Fraser, *supra* note 32, at 57. This understanding of civil society emphasizes those organizations involved in outward-looking deliberation intended to impact policy outcomes. The critical position tends to deemphasize inward-looking civil society organizations, such as choral societies, as less central to democratic theory. R

210. *See, e.g.*, Andrew Clark & Julian Borger, *Cheaper Drugs for Africa*, THE GUARDIAN, Mar. 14, 2001, http://www.guardian.co.uk/world/2001/mar/15/aids.andrewclark; Press Release, Médecins Sans Frontières, Indian Court Ruling in Novartis Case Protects India as the 'Pharmacy of the Developing World' (Aug. 6, 2007), *available at* http://www.doctorswithoutborders.org/press/release.cfm?id=2096.

211. The International Federation of Pharmaceutical Manufacturers Associations has NGO consultative status before the U.N. Economic and Social Council (ECOSOC). *NGOs*

civil society organizations (such as groups of people living with HIV/AIDS) as "partners" in a shared implementation enterprise risks depoliticizing civil society and obscuring its potential role as critic and watchdog.

2. Monitoring Process Design

Emphasis on particular inward- or outward-looking functions of civil society will have consequences for the design of monitoring regimes. Market liberal theorists favor *strategies of delegation*.[212] In this model, international organizations and national governments would delegate the collection of data and the preparation of a single monitoring report to apolitical, independent civil society actors. Because market-style competition is thought to increase efficiency and decrease rent-seeking, a delegation model should ensure that selection of monitoring providers takes place through a competitive process. For example, the state and/or UNAIDS could call for monitoring proposals and choose to fund the "best" proposals, evaluated using a set of predefined criteria. The UNGASS monitoring process as currently designed requires states to submit official monitoring reports to UNAIDS and encourages the creation of a "National HIV/AIDS Coordinating Authority" (NACA) to develop a national monitoring and implementation system but is silent as to how NACAs implement their monitoring duties.[213]

If the organization or organizations that are chosen to carry out the monitoring report are perceived as legitimate and independent, this model may mitigate claims that the state, in drafting the monitoring report, has favored some groups while failing to include the views of others. It may also justify discouraging the submission of shadow reports to the international monitoring body—the current UNAIDS approach—as third-party monitoring reports would have built-in independence. A market liberal approach to monitoring design, however, also has several drawbacks. First, it threatens to depoliticize civil society by turning the monitoring process into a technocratic exercise, rather than an opportunity for civil society organizations to critique state and market action and formulate alternative proposals. Second, a market liberal theory does not provide a space for politically motivated social movements, NGOs, or other advocacy organizations to act as critics and watchdogs. But arguably social movements or advocacy NGOs may be better able (and better motivated) to call atten-

in Consultative States with ECOSOC, INFORMATION HABITAT, http://habitat.igc.org/ngo-rev/status.html (last visited Mar. 1, 2013). It represents "the research-based pharmaceutical industry, including the biotechnology and vaccine sectors." *About IFPMA*, INTERNATIONAL FEDERATION OF PHARMACEUTICAL MANUFACTURERS & ASSOCIATIONS, http://www.ifpma.org/about-ifpma/welcome.html (last visited Mar. 1, 2013).

212. *See supra* Part I.E.1.a.

213. *See, e.g.*, UNAIDS, *Three Ones Key Principles*, *supra* note 202, at 1 (advocating for the creation of "One National AIDS Coordinating Authority, with a broad based multi-sector mandate"). R

tion to the government's shortcomings than a monitoring system administered by an apolitical body.[214]

Civic republican and social capital theories similarly tend to favor strategies that discourage the direct participation of politically motivated actors. But rather than delegate monitoring to private actors, these theorists favor strategies that foster deliberation *in* government while isolating these deliberative spaces from the direct influence of advocacy groups. In the context of monitoring design, these theories counsel *deference to the state*. An institutional design that emphasizes deference would place the state as the leader of the response. Monitoring the degree and effectiveness of the national response, including the degree of civil society participation, would take place largely through state self-reporting. In practice, self-reporting could be carried out by a specialized body within government, for example by a group of experts in the Ministry of Health. Civil society would participate in the response through established channels of communication with the governmental body in charge of monitoring. For example, the monitoring body could hold consultation meetings with civil society representatives prior to drafting the report, or set up an advice and comment period whereby civil society could evaluate the proposed monitoring report, or establish contestatory mechanisms through which the public could challenge the government's draft monitoring report. In the context of UNGASS monitoring, a civic republican or social capital approach would place NACAs within a government agency, rather than as a stand-alone body open to the participation of multiple stakeholders. UNAIDS would encourage the submission of a single report drafted by the NACA.

Channeling civil society participation through the national state, with effective mechanisms for contestation and consultation, has the advantage of pressing national governments to assume political leadership in the response against HIV/AIDS. In practice, however, state mechanisms for contestation and consultation are likely to be easily abused in weaker democracies or authoritarian regimes, and thus a monitoring system based on deference by the state may provide too few outlets for advocacy organizations to bring their grievances to light.[215]

Additionally, a civil society theory in which inner-looking goals and the creation of social capital take center stage may depoliticize civil society by relegating political advocacy organizations to the background and by

214. *See, e.g.*, Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984) (describing the "fire alarm" model of oversight as relying on citizens and organized interest groups to "sound the alarm" when a particular policy is harming their interests, and explaining how it can be a more efficient way to police compliance than direct governmental oversight).

215. A modified deference structure that allows civil society organizations to submit shadow monitoring reports when they feel strongly that their views were not taken into account in the national consultation process may be one way to address this shortcoming. This, in fact, is the structure that the UNGASS monitoring system currently favors.

conceptualizing civil society solely in instrumentalist terms, that is, as a means to increase social capital and civic virtue.[216]

In contrast, a focus on civil society functions at the inward-outward boundary—as emphasized by feminist, Third World, and minority theories—would seek the creation of multiple deliberative spaces and enact procedures that incorporate the use of alternative modes of deliberation, thus favoring *strategies of inclusion*. As described above, these spaces can serve a dual purpose where social groups (and in particular subordinated or minority groups) both develop their "identities, interests, and needs" and deliberate about and formulate alternative and often contestatory interpretations of accepted norms.[217] A UNAIDS monitoring regime that encourages the drafting of shadow reports, lowers the technical expertise necessary to fill out the report questionnaire, allows narrative styles of reporting, and changes reporting guidelines to give civil society organizations ample opportunity to make comments about specific instances of government failure or abuse would not only encourage the contestatory function of civil society, but may also encourage the formation of civil society associations that represent minority interests.[218] An inward-outward focus may also counsel the creation of new national or international institutions to coordinate broader access to the international monitoring process by, for example, conducting outreach activities and encouraging participation by underrepresented publics.

A reporting process open to different modes of participation, however, raises efficiency and coordination concerns. Standardized reporting guidelines are streamlined to facilitate comparison among countries. Multiple forms of reporting, and in particular narrative reporting, would require an investment on the part of UNAIDS to synthesize multiple independent reports into a single global report. Additionally, without a mechanism to evaluate the validity of each civil society organization's claims, it will be hard to determine which reports contain credible critiques of state conduct. Nevertheless, because it would encourage a broad group of individuals and associations to voice their independent complaints, a model that allows multiple shadow reports would at the very least fulfill an expressive function, empowering individual group members in a manner similar to having one's day in court. Additionally, the ability to directly participate in the creation of a civil society report would also serve an educative function, raising civil society awareness of the UNGASS commitments themselves.

A focus on the outward-looking functions of civil society as watchdog and critic—as emphasized by Habermasian critical scholars—would coun-

216. For a criticism of the use of the concept of social capital in development, see generally JOHN HARRISS, DEPOLITICIZING DEVELOPMENT: THE WORLD BANK AND SOCIAL CAPITAL (2002).

217. *See supra* note 32 and accompanying text. R

218. UNGASS monitoring templates currently do not leave much space for comments, and are designed largely as a questionnaire with a limited set of possible answer choices. *See* UNAIDS, *2009 Core Indicator Guidelines*, *supra* note 180, apps. R

sel a monitoring regime that seeks to obtain up-to-date, on-the-ground information from civil society organizations to critique state performance. The monitoring process would thus be organized around *strategies of contestation*. In this context, interactions between monitoring bodies and local civil society organizations may be mediated by larger, more established umbrella or key intermediary organizations with the capacity to carry out field research and produce a technical shadow report that critically evaluates the governments' progress. For example, a civil society coordinating forum outside the state where civil society organizations come together and debate public policy, acting in a manner similar to the National HIV/AIDS Coordinating Authority, could coordinate the drafting of civil society's shadow report. This type of interaction is likely to favor associations organized for civic or political goals, in particular national NGOs, which are likely to have the capacity to engage in systematic analyses of the governmental response.

A monitoring regime that favors the submission of critical shadow reports would facilitate what has been termed the "boomerang pattern" of state influence.[219] In this model, civil society organizations that do not have access to state channels at home would air their grievances against their state before international institutions, other member states, and transnational or foreign civil society organizations. International organizations would then put direct pressure on the noncompliant state, aided by transnational civil society networks. Nevertheless, because this approach is likely to privilege established NGOs over social movements, or other grassroots local associations, it is particularly vulnerable to the critiques of NGOization discussed above.

Finally, a focus on the boundary-crossing function of civil society that emphasizes mechanisms of coordination between civil society and the state would counsel a monitoring mechanism that relies on *strategies of collaboration*. New governance scholars in particular have employed a variety of institutional arrangements that allow civil society to participate directly in policy monitoring and implementation. Direct civil society participation could be accomplished by the creation of an independent regulatory organ composed of a mixture of civil society, business, and government representatives tasked with authoring the monitoring report. Ad hoc or institutionalized consultation processes could also involve civil society in decision making.[220]

This approach is vulnerable to the critique that powerful interest groups may unduly influence the monitoring process, and that the close cooperation between government and civil society associations may coopt the political role of civil society thereby threatening its ability to remain a

219. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12–13 (1998).

220. For a discussion and analysis of the different types of new governance initiatives that have been employed in the European Union, see Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

critic of government action. Thus, participatory civil society-government institutions also require safeguards against clientelism, for example, by institutionalizing strong deliberation processes, or the rotation of civil society groups that participate in the debate.[221] These safeguards, and in particular rotation protocols for civil society, may also mitigate the risk of cooptation.

These five approaches to monitoring design—*delegation, deference, inclusion, contestation*, and *collaboration*—as well as the corresponding theoretical justifications and critiques, are diagrammed below in Table 1.

D. *UNGASS's Implicit Theoretical Underpinnings*

Implicit in UNGASS's current institutional design is a new governance conception of civil society that underscores strategies of collaboration and views civil society actors principally as "partners" of both government and business entities. To foster coordination at the national level, UNGASS advocates a tripartite coordination framework.[222] This framework conceives of civil society participation as serving mainly an instrumental role: to optimize the use of resources and improve the national response to AIDS.[223] Civil society (and other relevant stakeholder) input is incorporated into a single collaboratively written monitoring report.[224] Shadow reports are discouraged.[225] A decrease in the number of civil society organizations seeking to file independent shadow reports is regarded as an indication of high levels of national collaboration.[226]

---

221. *See* Paul Magnette, *European Governance and Civic Participation: Can the European Union be Politicised?* (Jean Monnet Program Working Paper No. 6/01, 2001), *available at* http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/010901.html.

222. In April 2004, the Consultation on Harmonization of International AIDS Funding—bringing together representatives from governments, donors, international organizations, and civil society—endorsed the "Three Ones" principles: "[o]ne agreed AIDS action framework that provides the basis for coordinating the work of all partners," "[o]ne national AIDS coordinating authority," and "[o]ne agreed country-level monitoring and evaluation system." UNAIDS was called to act as facilitator and mediator in efforts to realize these principles. UNAIDS, *The "Three Ones" in Action: Where We Are and Where We Go from Here*, UNAIDS/05.08E (May 2005), *available at* http://data.unaids.org/publications/irc-pub06/jc935-3onesinaction_en.pdf.

223. *Id.*

224. UNAIDS, *2011 Core Indicator Guidelines*, *supra* note 180, at 15 ("Wherever possible UNAIDS encourages civil society integration into national reporting processes. . . . Shadow reports are intended to provide an alternative perspective where it is strongly felt that civil society was not adequately included in the national reporting process, where governments do not submit a Country Progress Report, or where data provided by government differs considerably from data collected by civil society monitoring government progress in service delivery."). R

225. *Id.*

226. Much Progress to Report: UNGASS 2008, UNAIDS (Mar. 12, 2008), http://www.unaids.org/en/resources/presscentre/featurestories/2008/march/20080312countryprogress/ ("There has been a significant drop in number of shadow reports submitted to UNAIDS, reflecting the substantial efforts in many countries to increase the engagement of civil society in national reporting processes.").

TABLE 1

Typology	Theory	Priorities	Justification	Monitoring Design	Critique
Inward-looking	Market liberal	Apolitical, market-ordered associations.	Limited state. Increase efficiency. Decrease rent-seeking. Foster self-respect and self-sufficiency, freedom and choice.	*Delegation*: Delegate monitoring to independent market-ordered, private associations.	Citizen as consumer: loss of identity as member of a community with shared goals, or as a participant in public life. Resulting atomism: no foundation for social solidarity may increase tension and distrust.
	Civic Republican *and* Social Capital	Local community associations with no explicit political purpose that foster trust, reciprocity, and civic virtue.	State as prime locus of deliberation and decision-making. Decrease rent-seeking. Foster civic virtue through thick local civil society organizations. Foster bridging social capital to minimize emergence of illiberal groups.	*Deference:* Single state-authored monitoring report with built-in consultative and contestatory mechanisms at national level. Promote citizen engagement with government by: (1) encouraging government grants to local community organizations; (2) fostering cross-community work to increase bridging social capital.	May lead to exclusion of disadvantaged groups from deliberation in government. Instrumental view of civil society as valuable only to aid deliberation in government or generate social capital.
Inward/ Outward Border	Feminist; Third World; *and* Minority	Multiple small publics that nurture individual and community identities and engage in political advocacy.	Dual purpose of civil society: (1) to foster and develop individual identity; and (2) to debate and challenge existing accepted norms.	*Inclusion:* Multiple "shadow" reports by a variety of actors, in particular vulnerable groups, using different expressive means.	Multiple publics can give rise to isolated enclaves, disengaged from public-at-large. No guarantee that small publics will be democracy-enhancing. Tokenism: real minority influence may be minimal. Ossification of individual identity.

Typology	Theory	Priorities	Justification	Monitoring Design	Critique
Outward-looking	Habermasian Critical	Associations formally organized for political advocacy.	Key purpose of civil society is to preserve democracy by acting as watchdog and critic vis-à-vis the state and the market.	*Contestation:* Single "shadow" monitoring report by civil society. Create space outside parliamentary and judicial bodies where civil society associations engage in autonomous, rational deliberation about the common good.	NGOization: privileges established NGOs. Excessive focus on single deliberative space may exclude disadvantaged, minority voices.
Civil Society/ State Boundary-crossing	New Governance *and* State-society synergy	Associations organized for political advocacy and with requisite technical expertise	Civil society actors as partners in lawmaking and implementation.	*Collaboration:* Single monitoring report authored by consortium of all stakeholders.	Clientelism. Moderation of critique; cooptation.

A drop in shadow report submissions has, however, several other possible interpretations. It may merely reflect the fact that minority voices lack the capacity and opportunity to develop alternative and contestatory views of the national HIV/AIDS response; that organized civil society groups that disagree with the content of the official state report have opted-out of a monitoring process they no longer view as legitimate; or even that the government has abdicated its responsibilities under UNGASS so that certain civil society groups run the show. Focusing on civil society's role as an innovator and a partner with stakeholders as varied as for-profit entities and state administrative agencies can obscure oppositional relationships between civil society and market actors; between civil society and the state; between civil society and international organizations (such as UNAIDS or WHO); and even between different organizations within civil society. Further, a discourse of cooperation and shared goals is likely to lead to the muting of critique both by a self-selection process (whereby those civil society actors who most agree with governmental or UNGASS policies are more likely to join the collaborative project) and by the progressive marginalization of dissenting (and often disrupting) voices from the "collaboration" table.

In other words, the current UNGASS institutional design is likely to dampen the contestatory function of civil society. But, as I argue in more detail in the next Part of this Article, it is precisely this function of civil society—together with its role as a space to nurture the emergence of alternative, minority views—that can ultimately lend legitimacy to the UNGASS project by allowing potential disagreements about its proper purposes and goals to be both aired and potentially resolved. Its legitimacy is important not only because, as a general matter, legitimacy is a critical

element in motivating compliance, but also because in the particular case of HIV/AIDS regulation what constitutes normative legitimacy is likely to be highly contested, at least in some areas. For example, pharmaceutical companies are likely to have different views from those of people living with HIV/AIDS on whether UNGASS should advocate the issuance of compulsory licenses for HIV/AIDS drugs or promote other measures to lower their price to consumers; and religious organizations are likely to differ from reproductive-rights NGOs on the content of sex-education campaigns, including whether a focus on condom use should be the linchpin of efforts to curb the spread of HIV/AIDS.

The next Section explores this argument in depth and develops several normative implications of the analytical framework. In particular, it proposes that a capacious interpretation of a Habermasian theory of civil society is best suited to explain and justify a role for civil society in lawmaking and implementation as increasing the legitimacy and accountability of international organizations.

III. Toward a Model of Civil Society in International Lawmaking and National Implementation

Inclusion of civil society in international lawmaking and national implementation is often justified on the grounds that civil society participation lends legitimacy to international organizations.[227] This view of civil society as increasing the legitimacy of both international organizations and implementing states is by no means uncontested. To the contrary, one of the most divisive arguments in the legal literature on international organizations concerns whether civil society participation is legitimacy enhancing or a self-serving exercise in rent-seeking.[228]

My own view is that debates on civil society's contribution to the legitimacy of international organizations are confounded by different underlying conceptions of civil society that are never explicitly articulated or explored. The civil society framework I developed in Part I can illuminate these different understandings. It can also contribute to the debate by suggesting that an outward-looking theory of civil society, based on a capacious reading of Habermasian critical theory, can best explain and justify a legitimizing role for civil society participation.

227. *See supra* note 4 and accompanying text.

228. *Compare* Charnovitz, *supra* note 16, at 894 ("In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and IOs [International Organizations]."), *with* Bolton, *supra* note 17, at 221 (describing globalism as "a kind of worldwide cartelization of governments and interest groups").

R

A. *The Legitimacy Problem of International Organizations*

1. State Delegation and the Democratic Deficit of International Organizations

State delegation of decision making and enforcement capabilities to international institutions has conferred upon them public powers[229] that both constrain state sovereignty and affect the well-being and opportunities of citizens everywhere.[230] International organizations, however, are not subject to the same mechanisms of democratic accountability as are territorially-bound nation-states. That is, international organizations do not possess the institutions of modern representative democratic systems, including a constitutional structure and electoral processes, which are widely held to legitimate the exercise of public power by sovereign states. In short, international organizations suffer from what is often referred to as a "democratic deficit": no global elections, no global parliament, and no global constitution constrain their public power.[231]

Delegation provides a measure of legitimacy to the actions of international organizations by formally holding them accountable to the delegating states. Nevertheless, the long chains of delegation—the great distance between national publics and supranational bodies—together with the absence of a robust international system of checks and balances significantly weakens claims to legitimacy through delegation.[232] Most importantly,

229. Public power refers to "those forms of power that are the legitimate subject of democratic control." Kate Macdonald & Terry Macdonald, *Democracy in a Pluralist Global Order: Corporate Power and Stakeholder Representation*, 24 ETHICS & INT'L AFF. 19, 21 (2010).

230. A number of articles have harnessed empirical evidence to make a convincing case that international organizations are increasingly exercising authority as autonomous decision-makers. *See, e.g.*, ALVAREZ, *supra* note 19, at 586 ("Most of the states of the world cannot, on their own or even with the aid of their closest allies, expect to control the standard-setting practices of . . . [International Organizations such as] the Security Council . . . [and] the IMF."); Buchanan & Keohane, *supra* note 23, at 406-07 (arguing that international institutions are "like governments in that they issue rules and publicly attach significant consequences to compliance or failure to comply with them—and claim the authority to do so" and noting that several global institutions affect domestic policy and "limit the exercise of sovereignty by democratic states"); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, T*he Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. Summer/Autumn 2005, at 15, 18. *But cf.* Andrew Guzman & Jennifer Landslide, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1696 (2008) (arguing that "international delegation is not something we need worry too much about" because it "tends to be highly constrained and/or involve highly technical matters"). R R

231. *See* CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT? (Jens Steffek, Claudia Kissling & Patrizia Nanz eds., 2008); Robert A. Dahl, *Can International Organizations be democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999); Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF. July/Aug. 2001, at 2, 2.

232. *See, e.g.*, Curtis Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1558 (2003) ("By transferring legal authority from US actors to international actors—actors that are physically and culturally more distant from, and not directly responsible to, the US electorate—these delegations may entail a dilu-

delegation within a nation-state involves both elected and unelected officials who share the same public constituency. This allows accountability relationships to flow directly from the public through elected officials to their agents, thus minimizing—although not eliminating—potential principal-agent problems.[233] But this relationship does not hold for international organizations, whose decisions impact a range of individuals belonging to multiple political jurisdictions. Multiple accountability relationships are likely to generate conflicting demands on international organizations, thus ultimately diminishing the ability of democratic nation-states to self-govern, because citizens within nation-states will likely be bound by some rules over which they had no say. For these reasons, state delegation provides only a very thin basis on which to defend the normative democratic legitimacy of international organizations.[234]

2. The Legitimacy Debate: Celebratory vs. Skeptical Views of Civil Society

A large part of the debate surrounding the legitimacy of international organizations has been framed around this democratic deficit.[235] The

tion of domestic political accountability."); Buchanan & Keohane, *supra* note 23, at 414–15 (arguing that state consent sufficient for legitimacy cannot be provided through the long chains of delegation that separate most global governance institutions from democratic publics); Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1502–05 (2006) ("As a general matter, the legitimacy of decision-making becomes more strained as the sense of community thins and the distance between those exercising authority and the public grows. This problem is especially acute in the international setting, as the distance is not just physical but may also reflect deep differences in perspectives, assumptions, and values."). R

233. *See, e.g.*, Roland Vaubel, *Principal-Agent Problems in International Organizations*, 1 REV. INT'L ORG. 125, 126–27 (2006) (explaining that global governance institutions exacerbate principal-agent problems because international organizations often have vested interests that differ from those of voters in national states, and because these voters are either "rationally ignorant of most of the activities of international organizations and/or lack the power to impose their will").

234. *See, e.g.*, Esty, *supra* note 232, at 1504-05 (remaking that delegations of authority within a nation state are legitimate in part because a nation state can be understood as composed of a single political community with "[a] shared sense of common destiny"); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2020 (2004) ("The whole point of international law, in its present form, is to supersede the outcomes of political processes, including democratic processes. If, therefore, Americans remain committed to self-government, they do in fact have reason to resist international governance today."); Kingsbury, Krisch & Stewart, *supra* note 230, at 26 ("The rise of regulatory programs at the global level . . . enjoy too much de facto independence and discretion to be regarded as mere agents of states."). R R

235. *Compare* Kenneth Anderson, *"Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT'L L. 841, 868 (2011) ("Legitimacy in a democracy is given by people raising their hands and voting—not by the presence of citizens or activist groups as civil society, however important they may be to articulating versions of a society's politics."), *with* Peters, *supra* note 16, at 318 ("The legitimacy gains of NGO involvement are apt to outweigh the legitimacy problems. Overall, a further democratization of the international legal order requires that the participation of NGOs in law-making and law-enforcement be strengthened.").

question thus has been whether global institutions can approximate the ideal of democracy as it has evolved to constrain sovereign states. In this interpretation, legitimacy—understood in its normative sense as having the *right to rule*—is synonymous with democracy, and most often with electoral democracy.[236] Scholars who have adopted this view, either implicitly or explicitly, tend to analyze civil society in terms of whether it can serve to "cure" the democratic deficit of international organizations.[237] A celebratory view of civil society calls into question the continuing primacy of states in international lawmaking, and advocates for a more prominent role for "global civil society."[238] In this context, the participation of global civil society in international decision making and enforcement is thought to play a legitimizing function by channeling the concerns of those communities likely to be affected by the decisions of international organizations.[239] In contrast, under an opposing, skeptical view, civil society organizations exacerbate, rather than cure, the democratic deficit. In this view, civil society participation is not a cure for the democratic deficit, because civil society cannot be properly construed as representing a global public to which international organizations should be held accountable.[240] This position tends to conceptualize civil society organizations as self-interested groups whose interactions with international organizations serve to extract rents to promote their self-interests.[241] From this view tend to

236. *Compare* Anderson, *supra* note 235, *with* Peters, *supra* note **????**. R

237. *See, e.g.*, CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE, *supra* note 231 (detailing several instances in which deficiencies in democratic values are recognized in an attempt to understand and remedy those faults); Magdalena Bexell, Jonas Tallberg & Anders Uhlin, *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, 16 GLOBAL GOVERNANCE, 81, 81 (2010); Jan Aart Scholte, *Civil Society and Democracy in Global Governance*, 8 GLOBAL GOVERNANCE 281, 281 (2002). R

238. *See, e.g.*, Richard Falk, *Reforming the United Nations: Global Civil Society Perspectives and Initiatives*, *in* GLOBAL CIVIL SOCIETY 2005–2006, 150 (Marlies Glasius, Mary Kaldor & Helmut Anheier, eds., 2006); James Rosenau, *Governance and Democracy in a Globalizing World*, *in* REIMAGINING POLITICAL COMMUNITY 28 (Daniele Archibugi, David Held & Martin Köhler eds., 1998); Karin Bäckstrand, *Democratizing Global Environmental Governance? Stakeholder Democracy After the World Summit on Sustainable Development*, 12 EUR. J. INT'L REL. 467, 493-94 (2006) (arguing that "stakeholder democracy" that moves beyond mere participation to collaboration and truer deliberation among states, business, and civil society can partially cure the democratic deficit of international organizations).

239. *See, e.g.*, Falk, *supra* note 238; Rosenau, *supra* note 238; Bäckstrand, *supra* note 238. R R

240. *See, e.g.*, Kenneth Anderson & David Rieff, *"Global Civil Society": A Sceptical View*, *in* GLOBAL CIVIL SOCIETY 2004–2005 26, 37 (Mary Kaldor, Helmut Anheier & Marlies Glasius eds., 2004) (arguing that "the 'democracy deficit' of the international system is buttressed rather than challenged by the global civil society movement"); Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 364 (2008) ("Private and nongovernmental actors involved in international treaty-making belong to a very specific subset of the international community. Men influence it more than women; the rich have a much more vocal presence than the poor; and some cultural tenets dominate it at the expense of others.") (internal citations omitted).

241. *See, e.g.*, Anderson, *supra* note 235, at 859 ("As a theoretical matter, however, NGOs, merely as such, are what they are—simply organizations consisting of interested indi- R

flow policy prescriptions that seek to narrow the reach of international law, in particular by eschewing any robust international law[242] claims of authority to regulate matters within states.[243]

3. Implicit Conceptions of Civil Society in Celebratory and Skeptical Views

Implicit in both the celebratory and skeptical positions are different conceptions of civil society, which the framework developed in Part I can help illuminate. Celebratory approaches to civil society, although diverse, have tended to converge on postulating a role for civil society organizations as "partners" with international organizations and other stakeholders (notably, businesses). This approach is most salient in some of the efforts to involve civil society in EU governance.[244] This conceptualization of civil society as "partners" in a horizontal relationship with business and international organizations corresponds roughly to a boundary-crossing function of civil society. In particular, under a new governance approach, civil society is thought to contribute to democratic legitimacy by participating in a joint "democratic experimentalism" project. New governance scholars argue that democratic experimentalism will lead to better policies by fitting local solutions to local problems, and to more efficient implementation by relying on private actors.[245]

The problem with new governance approaches to civil society is that in practice they tend to sideline deliberation about underlying disagreements on fundamental norms. Rather, new governance scholars generally assume agreement regarding the proper scope and content of implementation measures and focus on decentralization and local public-private part-

viduals . . . that attempt to persuade international organizations, states, or others in authority, to act . . . ."); Bolton, *supra* note 17, at 221. R

242. By robust international law, I mean those areas of international law, such as human rights law and parts of environmental and trade law, that purport to regulate state conduct previously thought to be the exclusive province of sovereign states.

243. *See, e.g.*, GOLDSMITH & POSNER, *supra* note 12 (arguing that democratic states have an obligation to place their sovereign interests before any rules of international law that threaten states' right to govern themselves free from foreign interference); Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 103 (2000); Dahl, *supra* note 231, at 33–34 (conceptualizing International Organizations as nondemocratic "bureaucratic bargaining systems" and arguing that "[w]e should be wary of ceding the legitimacy of democracy to non-democratic systems" whose "'democratic deficit'" is "a likely cost of all international governments."); John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1741 (2009) (arguing against a robust version of international law because "the institutions interpreting [human rights] norms are not democratic, but bureaucratic and oligarchic and, thus, often hostile to basic economic and personal liberties"). R

244. *See, e.g.*, Gráinne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 56 CURRENT LEGAL PROBS. 403, 412-23, 422 (2003).

245. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 338–39 (1998).

nerships in finding innovative ways to effectuate them.[246] New governance approaches often do not differentiate business from civil society, conceptualizing both groups as "stakeholders" that participate in the joint governance project.[247] Relatedly, conceptualizing civil society as a partner with government and business threatens to dilute or coopt civil society's political role and, as a consequence, its ability to contest dominant norms and develop alternatives. But articulating, defending, and ultimately (at least in some cases) reaching consensus on substantive views about what the goals of a particular institution *should be* are, in my view, key aspects of a theory of civil society that can envision civil society as contributing to the legitimacy of international organizations. Finally, the most salient problem of new governance approaches is that they risk magnifying the preferences of small groups that can exert great political power, thus de facto institutionalizing rent-seeking behavior.[248] This latter critique is reflected in writings by civil society critics who comment on the fact that civil society as conceived by international organizations often consists of "global elites, including those in international NGOs."[249]

In contrast, skeptics, among them civic republicans and market liberals, view civil society with an inward-looking perspective that is suspicious of associations organized for explicitly political purposes. Civic Republicans believe that democratic legitimacy depends on deliberation *in* government, free from the direct influence of civil society. More specifically, at the national level (for example, in the national implementation of international norms) this implies relying on parliamentary or judiciary processes to filter society's preferences, rather than allowing direct government lobbying by civil society organizations. At the international level, this means either attempting to replicate structures of civic republican government at an international scale (for example through the creation of a global parliament) or recognizing that civil society participation must be channeled through sovereign state structures. The latter is indeed the position taken by many civil society skeptics.[250] Market liberals deal with the perceived threat of special interest groups by limiting the reach of bureaucratic power of both national and supranational government institutions. Such an approach counsels strategies of delegation (both at the national

246. *See* David A. Super, *Laboratories Of Destitution: Democratic Experimentalism And The Failure Of Antipoverty Law*, 157 U. PA. L. REV. 541, 553–60 (2008).

247. *See, e.g.*, Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 235–37 (2010).

248. *See, e.g.*, Super, *supra* note 246, at 550 n.26, 564–65. (criticizing new governance approaches as leading to "dialogue among representatives (albeit unelected ones) of various interest groups rather than among the citizenry itself"). R

249. *See* Anderson, *supra* note 235, at 845. R

250. *See, e.g.*, Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 1, 29 (2001) ("To give NGOs a second shot independent of the governments which they have elected has no rationale."); Bolton, *supra* note 17, at 217 ("Civil society's 'second bite at the apple' [i.e. its purported ability to lobby both national governments and international organizations] raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided."). R

and international levels) to apolitical civil society organizations coordinated through market competition, unless market failure requires governmental intervention.[251] Competitive markets are thought to legitimate the authority of both nonstate actors and governments by holding them accountable to efficient outcomes.[252]

Civic republican and market liberal approaches, as different as they are in their conception of what constitutes a legitimate government, agree that civil society associations organized for political purposes cannot contribute, and furthermore are bound to imperil, normative legitimacy. Both theories suppose that direct involvement of civil society in politics increases factional politics driven by self-interest. But, as illustrated in Part I, an inward-looking conception of civil society, with its concomitant skepticism of politically motivated groups, is only one lens through which to analyze civil society. As I argue in the next Section, an outward-looking conception of civil society may indeed open avenues to imagine how civil society could be a legitimate participant in international lawmaking and implementation.

4. The Importance of Normative Legitimacy for International Organizations

Civil society skeptics tend to equate legitimacy with democratic legitimacy effectuated through electoral processes. If legitimacy requires global elections, then global institutions in their present form are not legitimate. But unless we are willing to give up on global governance institutions ever achieving normative legitimacy—and I argue we should not—this conception of legitimacy is too narrow for global institutions. Legitimacy is important for pragmatic reasons: if we wish to reap the benefits of coordination that international institutions promise, international institutions must enjoy ongoing public support in implementing countries.[253] Legitimacy is also important for normative reasons: as international organizations exert increasing authority that constrains state and individual action, a conception of what the legitimacy of global institutions requires is needed to justify this burgeoning authority. It is important to recognize that legitimacy is not an all-or-nothing proposition: the lack of

251. *See, e.g.*, Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 155–157 (1977–78) (describing a "market failure" account of government).

252. *See, e.g.*, *id.* at 152. Markets, however, are not a democratic form of legitimacy since unequally distributed capital counts as "votes."

253. Public support for international organizations need not be grounded on normative legitimacy; rather, the belief that a particular organization is legitimate may be sufficient to induce compliance. Sociological legitimacy, however, is bound to be strongest and more stable when it overlaps with normative legitimacy because people are more likely to consistently follow rules that emanate from institutions whose basic normative underpinnings they agree with. *See* Buchanan & Keohane, *supra* note 23, at 410 (arguing that moral reasons for supporting international institutions are preferable to those based purely on self-interest because "as a matter of psychological fact, moral reasons matter when we try to determine what practical attitudes should be taken toward particular institutional arrangements"). R

an elected global parliament does not mean that international organizations cannot be rendered more responsive to the concerns of those who are affected by their policies, or that civil society cannot perform a valuable contestatory function.[254]

Moreover, international law scholars are increasingly arguing against equating the legitimacy of global institutions to democratic electoral legitimacy. Those involved in the global administrative law project, such as Benedict Kingsbury, Nico Krisch, Richard Stewart, and Daniel Esty, view global institutions through an administrative law lens, arguing that "much of global governance can be understood and analyzed as administrative action."[255] These scholars aim to reduce "legitimacy deficits" of international institutions by incorporating domestic administrative law principles into international organizations and by developing new mechanisms of administrative law at the global level.[256] Global administrative law approaches to legitimacy emphasize the importance of procedural, often technocratic legitimacy, leaving aside debates regarding the democratic legitimacy of global institutions. A second group of scholars, such as Allan Buchanan, Robert Keohane, Joshua Cohen, and Charles Sabel, while recognizing that electoral democracy is not the only means whereby international organizations can gain legitimacy, underscore the importance of addressing concerns about the democratic deficit of international organizations. I situate myself within this latter group.[257] My analysis in the next Section builds upon conceptions of legitimacy advanced by this group but provides a novel perspective through which to examine legitimacy questions: that of an outward-looking theory of civil society attuned to a multiplicity of actors and interests.

B. *The Relational, Contested, and Dynamic Legitimacy of International Organizations*

Normative legitimacy, as distinct from pragmatic or sociological legitimacy, can be conceptualized as the acceptance of an organization, based

254. *See, e.g.*, Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT'L L.J. 61, 92 (2005) ("The fact that the global public realm is uninstitutionalised and 'weak' should not be seen as overly problematic. The absence of a single legislature does not mean that there can be no rule of law nor a live sphere of political contestation."); *see also* Esty, *supra* note 232, at 1514 (arguing that mechanisms that require supranational authorities to be responsive to the concerns and needs of the publics they serve can lend "a degree of quasi-democratic legitimacy" to international organizations). R

255. Kingsbury, Krisch & Stewart, *supra* note 230, at 17. R

256. *See, e.g.*, Esty, *supra* note 232, at 1490; Kingsbury, Krisch & Stewart, *supra* note 230, at 26 ("In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts."). R R

257. *See, e.g.*, Buchanan & Keohane, *supra* note 23, at 403, 433–37; Joshua Cohen & Charles Sabel, *Global Democracy*, 37 N.Y.U. J. INT'L. L. & POL. 763, 765-66 (2006). R

on an assessment that it employs the *right* goals and procedures.[258] In the case of supranational institutions, actors external to them form "legitimacy communities" that articulate particular understandings of what these right goals and procedures entail (legitimacy claims).[259] These claims can be based on whether an organization is congruent with particular modes of democratic governance (representative, participatory, or deliberative democracy claims), but legitimacy claims are not limited to democratic legitimacy. Rather, they may concern procedural legitimacy (conformance to norms and procedures); functional or performance-based legitimacy (delivery of promised outcomes); or justice-based legitimacy (conformance to particular substantive justice standards).[260] Unlike in the domestic sphere, where there is a set of generally accepted legitimacy criteria—most fundamentally democratic and constitutional legitimacy—in the international sphere, where these criteria are not directly applicable, there is considerable normative disagreement regarding how to evaluate the legitimacy of international organizations.

International organizations are subject to often opposing expectations from external actors (states, businesses, or organizations of civil society) regarding their proper roles and substantive commitments. These legitimacy communities will seek to establish accountability relationships with international organizations to both validate their claims and compel them to meet them.[261] Thus, legitimacy in the international context can be conceptualized as both relational (because it is built by dialectical relationships between international organizations and external actors) and contested (because different external actors will disagree on what the legitimacy of international organizations requires). Additionally, because international organizations adjust their purposes and functions in response to demands by these external actors, their legitimacy is dynamic.[262] Thus, the challenge in developing a standard of legitimacy for international organizations is to provide a reasonable basis to achieve coordinated support in the face of serious and persistent normative disagreements about their proper institutional roles and accountability relationships, especially when such disagreements cannot be addressed directly through democratic and constitutional legitimacy mechanisms available at the national level.[263]

Upon which reasonable bases might consensus regarding the right to rule of international organizations be built? Buchanan and Keohane propose three minimal substantive justice requirements (minimal moral ac-

258. *See, e.g.*, Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 145 (2008) (similarly defining "legitimacy" as acceptance of an organization's procedures and ultimate goals).

259. *See, e.g.*, Julia Black, *Legitimacy, Accountability and Polycentric Regulation: Dilemmas, Trilemmas and Organisational Response*, *in* NON-STATE ACTORS AS STANDARD SETTERS 215, 243, 252–53 (Anne Peters et al. eds., 2009).

260. *See, e.g.*, *id.*

261. *Id.* at 254.

262. Buchanan & Keohane, *supra* note 23, at 433.

263. *See id.* at 418.

ceptability, comparative benefit, and institutional integrity)[264] and two additional procedural requirements (the development of "epistemic-deliberative relationships" between international organizations and both democratic states and transnational civil society).[265] According to Buchanan and Keohane, a key procedural feature of a standard of legitimacy for international organizations is the existence of channels whereby transnational civil society can contest and debate existing accountability relationships, including both the terms of accountability (*i.e.* the particular legitimacy claims that particular accountability relationships seek to validate) and the identity of the proper accountability holders.[266] In sum, competing claims about what the legitimacy of international organizations requires must be subject to ongoing scrutiny and be open to revision. In the absence of a global democracy, the "requirement of a functioning transnational civil society channel of accountability . . . helps to compensate for the limitations of accountability through democratic state consent."[267]

But what does the "transnational civil society channel" look like? How does it incorporate the different types of actors that make up civil society? I take these questions as the starting point for developing a theory of civil society in the next Section that can contribute to the legitimacy of international organizations.

Legitimacy concerns are less salient when international organizations serve a purely coordinating function that can be discharged by relying on technical expertise. They are more prominent, however, when international organizations address politically or normatively charged issues and when these organizations enjoy significant power and autonomy to make decisions. The theory of civil society I develop in the next Section is particularly valuable in this latter scenario, where there is likely to be considerable disagreement regarding the proper normative role of international organizations.[268]

C. *Toward a Legitimacy-Enhancing Theory of Civil Society: A Proposal*

A theory of civil society that aims to contribute to the legitimacy of international organizations cannot regard civil society as either exclusively inward-looking or as a partner of state and business actors. Inward-looking theories conceive of civil society organizations as entirely private-regarding or strategic. Thus, at best, they can lend pragmatic legitimacy—that is, legitimacy grounded simply on self-interest—to international orga-

264. *Id.* at 419–24.

265. *Id.* at 432–33.

266. *Id.*

267. *Id.*

268. *See, e.g.*, Esty, *supra* note 232, at 1511–12. R

nizations.[269] On the other hand, boundary-crossing theories threaten to dilute the political role of civil society as a watchdog and critic of both government and market activity. My claim is that only an outward-looking conceptualization can justify a legitimacy-enhancing role for civil society. Thus, a Habermasian critical theory is the best candidate. Nevertheless, Habermasian critical scholars remain insufficiently attentive to the mechanisms whereby divergent normative opinions emerge. Feminist, minority, and Third World perspectives provide a corrective by pointing out how spaces of rational deliberation can paradoxically serve to silence minority dissent, and by emphasizing that the emergence of alternative viewpoints will often require allowing for different forms of communication and the creation of smaller communities of interest where particular alternative identities can take shape. Therefore, I propose a capacious understanding of Habermasian critical theory that imagines civil society as constituting an autonomous space where different normative legitimacy claims are constructed and debated (and where consensus is sought) but that also recognizes that fostering inward-looking qualities is often a prerequisite for the emergence of divergent minority voices and for their crucial contribution to debates in society at large.

1. Habermasian Foundation

My starting point are two fundamental premises of outward-looking Habermasian critical theory: (1) the concept of civil society as distinct from both the market and the state—where individuals interact with each other to create, interpret, criticize, and transmit meaning, and where different normative conceptions of what global justice requires (and how international organizations should contribute to it) can be developed; and (2) the concept of an overarching public sphere that enables the effective expression of criticism and dissent.[270] It then incorporates critiques and insights from feminist/Third World and from civic republican/social capital theories, namely: (1) the importance of not valuing ostensibly dispassionate, logical discussion over personal narratives for the articulation of minority perspectives; and (2) the importance of consensus-seeking deliberation and local face-to-face interactions.

Why are these two premises from Habermasian critical theory crucial for a theory of civil society that will lend legitimacy to international organizations? First, international organizations are subject to two types of legitimacy claims from external actors: normative and pragmatic. Normative legitimacy grounds the acceptance of an institution's right to rule on an assessment of whether it follows the *right* goals and procedures. Pragmatic legitimacy, on the other hand, is grounded simply on self-interest. That is, external actors may deem an organization legitimate simply because of its

269. *See, e.g.*, Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 578 (1995) (defining pragmatic legitimacy as relying on the "self-interested calculations of an organization's most immediate audiences").

270. *See supra* Part I.E.2.

instrumental value in fulfilling their own interests either directly or indirectly. Plainly, pragmatic legitimacy claims are attempts at rent-seeking that do not contribute to the debate regarding the proper role of international organizations.[271] But although civil society organizations can simply act to assert their self-interests against others, they often also make claims about justice, the rightness of a particular position, or what the public good requires. A civil society that is autonomous from both profit motives and institutionalized decision making has the capacity to articulate a variety of normative perspectives that allows us to avoid having policies driven solely by market or bureaucratic rationality. These perspectives are particularly important in the case of international organizations, where there exists significant disagreement regarding their right roles and purposes. Thus, allowing and preserving the capacity of civil society to analyze and challenge fundamental assumptions about the *right* goals and competencies of international organizations is crucial for a legitimizing theory of civil society.

Second, Habermasian critical scholars rightly emphasize the importance of a single public sphere autonomous from both profit motives and state control where all those who wish to participate bracket their inequalities and debate public policy (rather than only advance their self-interest) by appealing to "public reason," that is by translating particular concerns into expressions of general interest. The key insight here is that politically-oriented, outward-looking, autonomous communities can create new ways of imagining the world that challenge unjustified or insufficiently justified policies, as well as underlying assumptions or ideologies behind dominant norms. An overarching public sphere serves as an interface between civil society critique and bureaucratic structures (such as, for example, states and international organizations). This contestatory role of civil society takes seriously claims of democratic deficit, but understands democracy to be "as much about opposition to arbitrary exercise of power as it is about collective self-government."[272]

2. Feminist/Third World and Social Capital Expansions

While crucial for my proposed theory of civil society, these two premises are insufficient. As Third World, feminist, and minority critiques have emphasized, the norms of deliberation of a single public sphere are likely to reflect the cultural preferences of dominant groups, and thus exclude or devalue the speech of minorities.[273] The dominance of public spaces of deliberation by only a small portion of the international community is a significant problem for a theory of civil society that seeks to legitimize

271. For example, powerful pharmaceutical companies may seek accountability relationships with the World Trade Organization to ensure it acts in their interest, such as by globalizing U.S. patent laws that are generally favorable to their interests. Normative legitimacy claims may pursue the same end goal, for example the harmonization of substantive patent law, but their reasons are based on moral claims rather than pragmatic interests.

272. Ian Shapiro, *Elements of Democratic Justice*, 24 POL. THEORY 579, 582 (1996).

273. *See supra* Part I.E.3.

international organizations by reference to civil society's contestatory function. This is because within civil society, well-funded and better-organized groups—whose interest may already be in line with those in a position of power in international organizations—may pose a threat to the emergence of alternative, minority views. If the ideal Habermasian public sphere is in fact dominated by the same types of voices that run both the state and international organizations, civil society may paradoxically lose its ability to criticize these actors.

But a critical framework based on both the concept of civil society as a space where meaning is created, interpreted, criticized, and transmitted, and on the idea of a single public sphere, is capacious enough to incorporate this critique. Multiple publics can coexist with a more encompassing, broader public sphere and, I argue, both are necessary. Smaller publics are important: they allow the emergence of minority views and critiques by providing "spaces of withdrawal and regroupment" in relative independence from dominant views, and by relying on multiple modes of deliberation to elicit these minority views and critiques.[274] But minority communities can devolve into isolated enclaves.[275] A broad public sphere that translates concerns articulated in smaller publics into generalizable arguments is thus an important bridge between "counterpublics" and relevant institutional actors.

A broad public sphere serves another important role: it can help identify areas of substantive agreement about the proper role of international organizations. Indeed, in my view, although minority and feminist critiques are correct that oftentimes multiple perspectives will not be reducible to a single "common good," they tend to be overly skeptical of any efforts to reach consensus. Their insistence on the existence of distinct "feminine" or "minority" perspectives endowed with a type of immutable quality runs the risk of ossifying empirical realities that are often paradoxically the result of majority hegemony. For example, the perception that women are less able to engage in abstract, rational debate than men, arguably does not represent an essential attribute of females but one that is historically contingent.[276] Here, Habermasian critical theory and republican theory overlap by acknowledging "the possibility of settling at least some normative disputes with substantively right answers."[277] In contrast to civic republican theory, however, I argue that civil society organizations can catalyze discussions based on principles regarding how international organizations should contribute to global justice claims, in addition to discussions driven by self-interest.

274. Fraser, *supra* note 32, at 68. R

275. *Id.* at 67.

276. *See, e.g.*, Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, *in* FEMINISM AND PHILOSOPHY: ESSENTIAL READINGS IN THEORY, REINTERPRETATION, AND APPLICATION 434, 435 (Nancy Tuana & Rosemarie Tong eds., 1995) (criticizing gender essentialism, and reviewing the debate between cultural and radical feminists on whether being "female" entails possessing particular essential attributes).

277. Sunstein, *supra* note 80, at 1541. R

A second insight, this time from social capital theory, serves to further refine my proposal. If we agree that small counterpublics are necessary to develop minority identities and views, and that these groups run the risk of turning into isolated enclaves lest they engage with society at large, then empirical data regarding how groups can promote individual engagement with broader societal debates is crucial. Specifically, social capital theory emphasizes the importance of involvement in local community, of engaging in frequent face-to-face interaction with others, and of fostering multiple, overlapping (or bridging) memberships for developing a sense of shared responsibility in participating in public life. In practice, this insight can be translated to promoting the formation of local groups that can foster the direct participation of those whose interests, while affected by the policies of international organizations, are not represented in the overarching public sphere. This can take place, for example, through community organizing campaigns.

3. Implementation

In practice, this proposal may be implemented through a three-phase process that fosters: (1) the creation of local spaces to facilitate the emergence of different normative perspectives, (2) the creation of bridging spaces to promote conversations among different communities, and (3) the creation of broader spaces that are able to translate these concerns into generalizable arguments. For example, to encourage the emergence of minority perspectives, existing civil society organizations and national governments would first identify those populations, groups, or individuals that are likely to be affected by the particular international policy at issue, or that are the explicit targets of international regulation (in the case of UNGASS, these groups would include, among others, sex workers, injectable drug users, and people living with HIV/AIDS). To foster their direct input, funds could be earmarked to subsidize grassroots organizing campaigns that bring together similarly situated individuals. To encourage participation, local meetings would focus on sharing experiences and on reconstructing identities and novel narratives from these experiences. The crucial aspect of phase one is to recognize that affected individuals need spaces to develop their own perspectives. Multiple local meeting spaces would foster face-to-face interactions that social capital theories have found crucial for promoting the type of social cohesiveness that is likely to lead to sustained engagement in political life.

In phase two, "cross-community" programs could be implemented to encourage "different groups . . . to engage constructively with each other through communication and dialogue."[278] Through cross-community programs, groups can discover common interests or concerns, and can be exposed to, and often persuaded by, different normative perspectives. These programs would foster bridging social capital, thereby discouraging the

278. *Strategy #4: Change Through Cross Community Work*, CIVIC VOICES, http://www.civicvoicesforpeace.org/cross-community-work.html (last visited Mar. 1, 2013).

creation of isolated and potentially illiberal enclaves, which constitute a potential risk of the emergence of multiple publics.[279]

The third phase could take place through regional and national civil society task forces, composed of civil society organizations with sufficient capacity and experience, charged with translating concerns and experiences emerging from local community groups into broader priorities and generalizable arguments. To avoid the distortion of views, this phase should include mechanisms to ensure the participation of representatives from diverse multiple publics.

In all three phases, the key is the creation of formal fora independent both from the administrative structure of international organizations and sovereign states, and from business interests, where civil society actors can develop an analysis and critique not only of particular implementation measures, but also of underlying assumptions regarding the proper role and scope of authority of particular international organizations.

International organizations are subject to a variety of legitimacy demands from diverse nonstate actors, including business interests, and often will respond to these legitimacy claims by adjusting their purposes and functions. The proposal advanced here does not ensure, however, that international organizations will take into account norms developed within civil society, or that debates within civil society will reach substantive consensus regarding how international organizations should contribute to global justice. Indeed, the civil society participation structure that I have proposed here may be criticized for constituting a form of procedural justice that does nothing to ensure substantive justice.[280]

But this objection underappreciates the capacity of my proposal to criticize the normative goals of international organizations, and thus to better secure substantive justice. First, because it seeks to actively foster the emergence of views from all those likely to be affected by particular policies, it is poised to generate a more complete set of relevant information and, thus, to lead to more "accurate" policies.[281] Second, because it affords all those affected the opportunity to "tell their story in a meaningful way," it will give participants the satisfaction of having been heard.[282]

279. BARBARA J. NELSON, LINDA KABOOLIAN & KATHRYN A. CARVER, THE CONCORD HANDBOOK: HOW TO BUILD SOCIAL CAPITAL ACROSS COMMUNITIES (2003), *available at* http://concord.sppsr.ucla.edu/concord.pdf.

280. *See, e.g.*, Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1046–47 (2003) ("It is not clear, however, that procedural requirements enhancing public participation will necessarily lead to substantive decisions that are more responsive to public opinion. While enhancing participation procedures to equalize opportunities is an important step in creating the preconditions for political justice, it provides no guarantee that the substantive decision will embody political justice.") (internal citations omitted).

281. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 272, 289 (2004) (noting that an important feature of procedural justice is to strive for "accurate outcomes," which require that all crucial information be both available and taken into account).

282. *Id.* at 273. These two advantages of my proposal correspond to what Lawrence Solum has termed the "accuracy" and "satisfaction" models of procedural justice. *Id.* at 242–267.

Finally, and most importantly, because the theory of civil society I advocate pays particular attention to allowing for the powerful emergence of critique that examines *underlying normative premises*, it will also lead to better *substantive outcomes*, both in the short and long term. Better short-term outcomes will result from displacing existing civil society participation regimes that tend either to depoliticize civil society by over relying on collaborative models of implementation or to pay insufficient attention to the actual dominance of certain cultural norms and perspectives in the international scene. Additionally, this conceptualization of civil society will have long-term, systemic gains as it has the potential to serve as a springboard for the emergence of other forces (such as new epistemic communities and social movements) that can contribute to the ongoing scrutiny and debate regarding the proper role of international organizations.

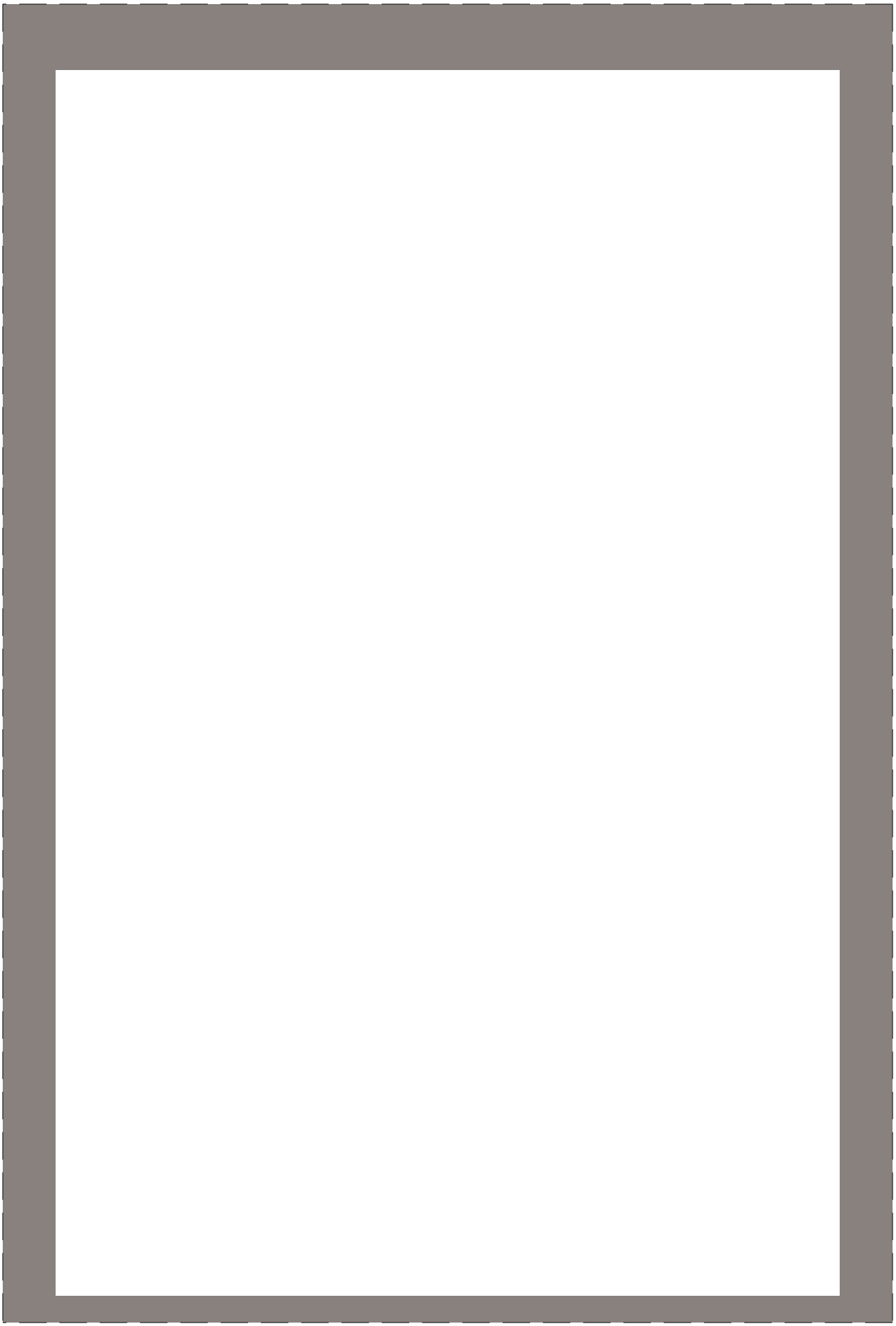
Conclusion

In the past two decades, as the reach of international organizations has expanded, so has the number of civil society organizations that seek to influence international policy making and national implementation efforts. Diverse types of international organizations have enacted consultative mechanisms to incorporate civil society input into decision-making and implementation processes. Nevertheless, and despite its widespread use, the concept of civil society remains undertheorized in the legal literature. In this Article, I first unpacked different theoretical conceptions of civil society that underlie divergent uses of the term. I proposed that civil society can be understood as disaggregated into a series of functions that range from inward- to outward-looking. I then argued that five groups of theories from the fields of political science and sociology map onto this disaggregated framework, can justify and critique existing designs of civil society engagement in monitoring and implementation, and suggest novel institutional designs. Using UNGASS as a case study, I illustrated how these five groups of theories suggest five different monitoring regime designs based on: (1) *delegation* to market-ordered, apolitical private associations, (2) *deference* to the state, (3) *inclusion* of minority voices, (4) *contestation* of state action, and (5) *collaboration* among all stakeholders. These five types of regime design are relevant not only to UNGASS monitoring, but also to a wide range of monitoring regimes that engage civil society, such as those for the implementation of human rights and environmental commitments. More broadly, unpacking different conceptions of civil society can both illuminate theories that underlie existing practice and expand the range of possible institutional design options not only for monitoring regimes but also for other structures of civil society participation in policy making and implementation.

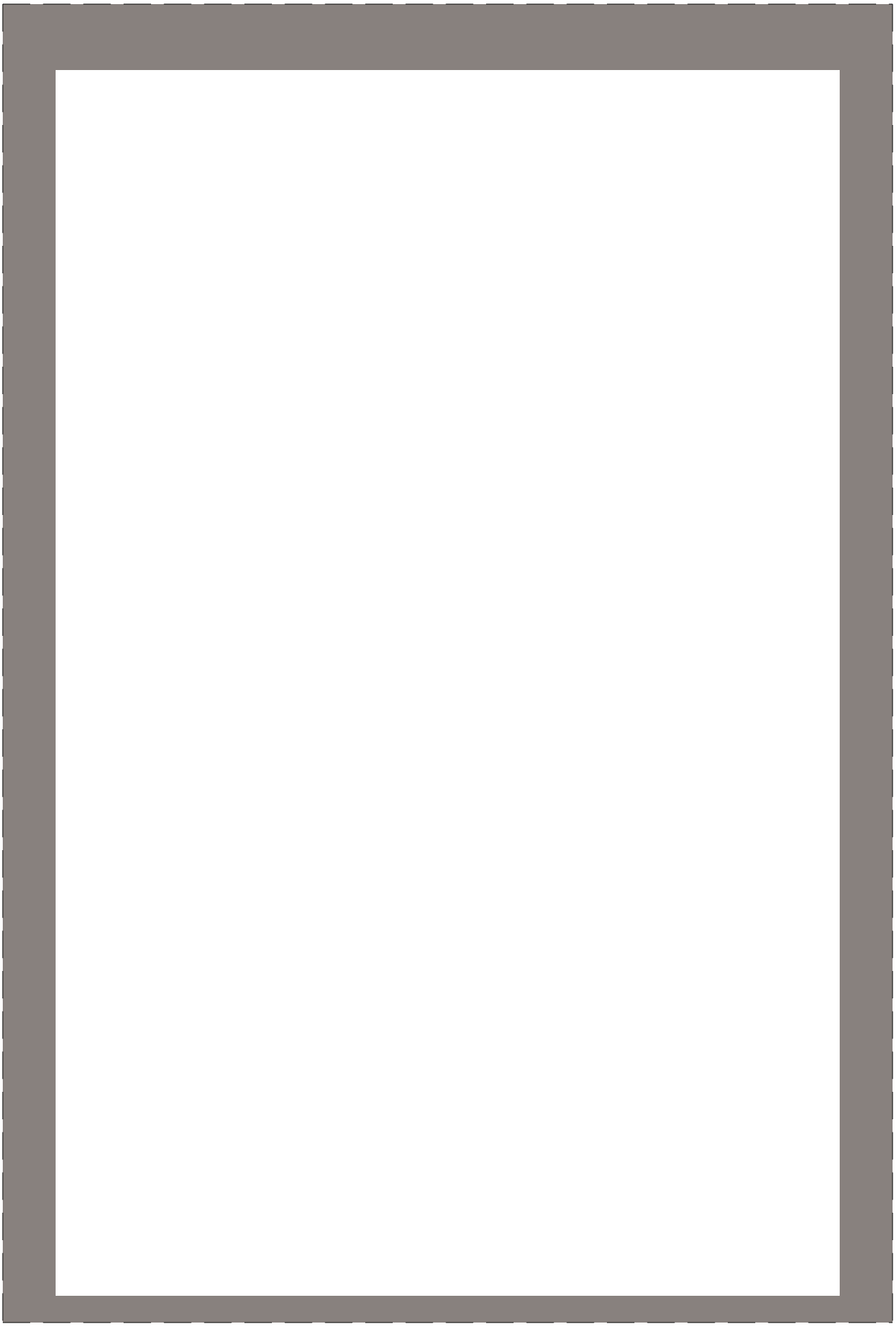
In the last portion of this Article I engaged normatively with debates regarding whether civil society can contribute to the legitimacy of the international legal system. I argued that implicit in the positions adopted by both critics and proponents of civil society participation as a legitimating factor are divergent underlying theoretical understandings of civil society.

I then showed how the framework developed in this Article can both illuminate these divergent understandings and help guide the development of a theory of civil society that can best justify a legitimacy-enhancing function of civil society. Specifically, I developed a theory of civil society based on a capacious interpretation of Habermasian critical theory. I argued that civil society can contribute to the legitimacy of international organizations by constituting a space where different normative legitimacy claims are constructed and debated, and where consensus (even if limited) on what the legitimacy of international organizations requires can be reached. This understanding of civil society is particularly important in issue areas likely to engender normative disagreement about the proper role of international institutions, where legitimacy questions are of particular importance.

33599-mil_34-3 Sheet No. 95 Side B 06/19/2013 08:32:46



33599-mil_34-3 Sheet No. 96 Side A 06/19/2013 08:32:46



33599-mil_34-3 Sheet No. 96 Side B 06/19/2013 08:32:46