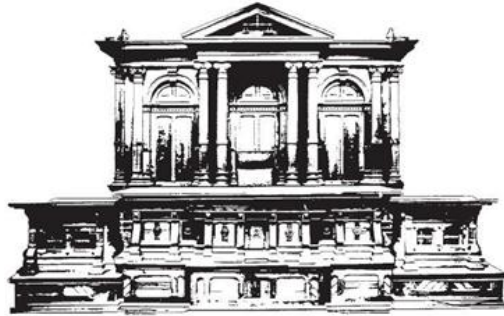

CREIGHTON INTERNATIONAL AND COMPARATIVE LAW JOURNAL



Vol. 2

Fall/Winter 2011

No. 1

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Creighton International and Comparative Law Journal

Published two times per year by the Creighton University School of Law

Vol. 2 Fall/Winter 2011 No. 1

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INTRODUCTION

In this inaugural Fall/Winter volume of the *Creighton International and Comparative Law Journal*, we bring our readers a potpourri of articles from scholars around the world. The *Journal* editors wanted to present articles that could attract and inform a diverse group of readers, and I believe we have met this goal.

The writings in this volume introduce and analyze a variety of subjects. Guy Ben-David brings a unique analysis about how culture affects the rulings of the Israeli Supreme Court. Interestingly, many of Ben-David's sources for his article are only available in Hebrew. The *Journal* therefore owes thanks to Professor Ran Kuttner from Creighton University's Werner Institute, as he helped translate and verify these sources. Aldo Zammit Borda analyzes decision-making patterns in different international criminal tribunals and how the "first trial syndrome" may affect subsequent trials in the tribunals. Michele Cea discusses the financial crisis of 2007–2009, but many of his thoughts and analysis can also be applied to the continuing financial crisis we have seen around the world in 2011. And Emir Aly Crowne discusses the Agreement on Trade-Related Aspects of Intellectual Property. Together, these authors bring us valuable academic perspectives on a wide range of topics in today's international law. The *Journal* greatly appreciates and thanks each author for these contributions.

Publishing the first Fall/Winter issue is an exciting milestone for the *Journal*. It would not have been possible without the willing support from the authors, *Journal* staff, and faculty advisors at Creighton University School of Law. I thank all these individuals for their support and involvement with the *Journal*.

I hope you enjoy these scholarly articles that carry forth and further develop the mission of the *Creighton International and Comparative Law Journal*.

Nicole Bohe
Editor-in-Chief

THE INTEGRATION OF CULTURAL ARGUMENTS IN THE PROVOCATION DOCTRINE IN RULINGS OF THE ISRAELI SUPREME COURT

GUY BEN-DAVID*

*Provocation can cause a reasonable person to kill, but it most certainly does not cause an unreasonable person to kill, as the unreasonable person will certainly react in an unreasonable manner.*¹

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¹ Israeli Supreme Court Justice J. Goitain, in CA 46/54 The General Attorney v. Segal, 9 PD 393, 416 [1955] (Isr.) (in Hebrew).

SUMMARY

The provocation doctrine is one of the ancient doctrines in criminal law. It can be found both in common law and in penal statutes in many countries. In Great Britain, the United States, and numerous other countries, provocation constitutes a circumstance, which, if it exists, reduces the criminal responsibility of the defendant from "murder" to "manslaughter." In Israel, the "absence of provocation" constitutes one of the required elements, together with the decision to kill and the preparation to kill, for premeditation to exist.²

The "provocation doctrine" consists of two cumulative components: Subjective Provocation and Objective Provocation. Subjective Provocation refers to the question of whether the defendant actually killed as a result of provocation. Objective Provocation refers to the question of whether a reasonable person, in the defendant's place, would have been likely to kill as a result of the provocation.

Since Israel is a multicultural state, the provocation doctrine serves as a platform for the integration of "cultural arguments." Cultural arguments have an influence over the requirements for "absence of provocation," a requirement in many forms of jurisprudence and in the *mens rea* requirement for the crime of murder.³

Two points of contact can be found between the cultural background of the defendant and the provocation doctrine: The first point of contact is the defendant's culture, which is liable to influence the intensity of the provocation—addressing the question of which of the defendant's characteristics, if any, should be taken into account to estimate the intensity of the provocation. It may be that a person who is a part of a minority culture will be provoked by words or actions that would not subjectively provoke someone who is not a part of that same culture.

In the second point of contact, we examine the defendant's capability of restraint—addressing the question of how a reasonable person would have acted in those same circumstances involving the same intensity of provocation.⁴ We must then ask which reasonable person we are speaking of: is he a reasonable person from the defendant's culture or a "general reasonable person," if such a person actually exists?

² Section 301 (a) of Israel's Penal Code (1977) provides that:

For purposes of Section 300 [stating that "murder" is "premeditated homicide"], a person who killed another person shall be deemed to have killed him with premeditation, if he resolved to kill him and he killed him in cold blood without any provocation immediately before the act, under circumstances in which he was able to think and to understand the result of his actions, and after he prepared himself to kill him or prepared the instrument which he used to kill him.

For the history of this section, see Yoram Shachar, *Premeditation and Legislative Intent*, 2 MEHKAREI MISHPAT (BAR ILAN LAW REVIEW) 204 (1981) (in Hebrew).

³ YORAM RABIN & YANIV VAKI, CRIMINAL LAW, PART B 954 (2010) (in Hebrew).

⁴ *Id.*

For example, a person from a culture that is considered more "hot blooded" may be expected to respond to provocation differently than a "cold blooded" Englishman. Since the provocation doctrine recognizes the weaknesses of human nature, then in those cases where the defendant's cultural background altered his nature, the culture constitutes a material variable in estimating the degree of culpability of the defendant who killed following a provocative incident.

The aim of this Article is to examine the existing legal doctrine and speculate about the desirable one, regarding the recognition of the provocation doctrine in the rulings of the Israeli Supreme Court. In the first part of the Article, I shall address the definition of the terms "cultural defense," "culture," and "the principle of culpability," and I shall discuss the connection between all of the above as well as the recognition of the defendant's culture as part of the provocation doctrine. I shall devote the second part of the Article to reviewing the development of the provocation doctrine in the rulings of the Israeli Supreme Court, while also criticizing it. In the third part of the Article, I shall review and evaluate the question of the recognition of cultural arguments in the rulings of the Israeli Supreme Court. I shall conclude the Article by summarizing the discussion.

I. THE RELATIONSHIP BETWEEN CULTURAL BACKGROUND AND THE PRINCIPLE OF CULPABILITY AS JUSTIFICATION FOR RECOGNIZING CULTURAL ARGUMENTS AS PART OF THE PROVOCATION DOCTRINE

A. CULTURAL DEFENSE

Recognizing the cultural background of a defendant who belongs to a minority culture is known as "cultural defense." The term "cultural defense" originated in the academic legal literature, mainly in the United States, which focused on the ramifications of multiculturalism on the various fields of jurisprudence.⁵ Various definitions of the term "cultural defense" may be found in the literature, all of which express a similar idea where the cultural background of a defendant who belongs to a cultural minority may be used in his criminal defense proceedings.⁶ In general, the term is not solely restricted to the general defenses afforded under the penal code, but rather it extends more broadly to any kind of mitigation that may be awarded to a defendant.

⁵ *Id.* at 935.

⁶ Norgrew & Nanda define "cultural defense" as follows:

When persons socialized in a minority or foreign culture who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates...the law, if these individuals' conduct conforms to the prescription of their own culture. The intention of a cultural defense in a criminal case is to negate or mitigate criminal responsibility where acts are committed under a reasonable, good faith belief in their propriety based upon actor's heritage or tradition.

JILL NORGREW, SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* 175 (3d ed. 1996).

Several ways exist to recognize the defendant's culture in criminal proceedings. One is to recognize the defendant's cultural background as a general defense to criminal responsibility. Another way is to recognize the defendant's culture as a mitigating factor in sentencing.⁷ A third way is to integrate cultural arguments in the set of general defenses to criminal responsibility,⁸ or as part of existing doctrines in criminal law, such as the provocation doctrine. In this Article, I shall examine the integration of cultural arguments in the provocation doctrine for the crime of murder, as emerging from the rulings of the Israeli Supreme Court.

B. CULTURE

Anthropologists first developed the term "culture" towards the end of the nineteenth century. Culture was first extensively defined in 1871 by the British anthropologist, Sir Edward Burnett Tylor. Tylor defined culture as the complex whole that includes the opinion, beliefs, artistic creations, law, morality, customs, and other attributes and practices acquired by a person who belongs to society.⁹ Later definitions of this term tended to clearly distinguish between the actual behavior and the values, beliefs, and abstract outlooks underlying such behavior.¹⁰ In other words, culture is not only the visible behavior, but also the common ideals, beliefs, and values that people use to interpret their experiences and that are also reflected in their behavior.¹¹

Liberalism is based on the autonomy of the individual to shape his life by making free choices.¹² According to some scholars,¹³ the function of culture is to form a pool of choices so that people can

⁷ See Guy Ben-David, *Cultural Background as a Mitigating Factor in Sentencing*, 26 MEHKAREI MISHPAT (BAR ILAN LAW REVIEW) 835 (2011) (in Hebrew). The Article will also be published in the Criminal Law Bulletin as a lead article in volume 47, no.4 (2011).

⁸ See Guy Ben-David, *Integration of Cultural Arguments in Criminal Defenses*, 7 NETANYA ACADEMIC COLLEGE LAW REVIEW 201 (2010) (in Hebrew).

⁹ EDWARD B. TYLOR, ANIMISM IN THE MAKING OF MAN: AN OUTLINE OF ANTHROPOLOGY (1931).

¹⁰ William Haviland, for example, defined the term 'culture' as a set of rules or values, that realization by members of a particular society produces behavior that is considered in the eyes of its society as acceptable. See WILLIAM HAVILAND, CULTURAL ANTHROPOLOGY 49–50 (8th ed. 1999). A similar definition is given by Robert Levine, who defined the term 'culture' as "[a] shared organization of ideas that includes the intellectual, moral, and aesthetic standards prevalent in a community and the meanings of communicative actions." Robert Levine, *Properties of Culture: An Ethnographic View*, in CULTURE THEORY: ESSAYS ON MIND, SELF AND EMOTION 67 (Richard A. Shweder & Robert A. LeVine eds. 1984).

¹¹ *Id.* at n.10.

¹² MENACHEM MAUTNER, LAW AND CULTURE IN ISRAEL AT THE THRESHOLD OF THE TWENTY-FIRST CENTURY 370 (2008) (in Hebrew).

¹³ WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 339 (2d ed. 2002); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); JOSEPH RAZ, MULTICULTURALISM: A LIBERAL PERSPECTIVE, IN ETHICS IN THE PUBLIC DOMAIN (1994); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); WILL KYMLICKA, MULTICULTURALISM CITIZENSHIP 51, 82–84 (1995).

exercise their autonomy. Others regard culture as establishing a person's identity.¹⁴ Every person has an interest in the continued existence of the culture that shaped his personality, awareness, and daily practices. Defending culture is, in fact, defending an important value shaping the identity. Culture is intrinsic to the human condition, since it is an integral part of our lives from childhood, and the process of its transmission from one generation to the next is known as "enculturation." Standards and meanings are absorbed and assimilated in people through this process of enculturation, and in this way, culture creates our personality, establishes our identity and awareness, and influences our behavior.¹⁵

When a person who belongs to a minority culture performs a cultural practice that constitutes a criminal offense, the need arises to examine the significance of that practice.¹⁶ The defendant's culture needs to be considered because the liberal state, including the legislator, the court and the prosecutor, do not correctly interpret the significance given to the cultural practices.¹⁷ Every practice has its own significance. The real significance given by the participants of a particular cultural practice may differ from the significance the liberal state gives to it.¹⁸ In order to understand the significance of the practice, it is necessary to understand the common cultural language. The cultural language is fundamental,¹⁹ as it is a language directed at specific behavior. Understanding these cultural narratives is a condition to be able to judge the way we lead our lives in a sensible manner. Given that some specific practices are based on real beliefs in the value protected in that practice, the Court must understand the significance associated with that same practice.²⁰

¹⁴ ALISON RENTELN, *THE CULTURAL DEFENSE* 12 (2004).

¹⁵ Avishai Margalit and Moshe Halbertal, *Liberalism and The Right to Culture*, IN *THOUGHTS ON MULTICULTURALISM: MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE* 97 (Menachem Mautner, Avi Sagi, Ronen Shamir eds., 1998) (in Hebrew); MAUTNER, *supra* note 12, at 371; Avi Sagi, *Moral Commitment and Identity in a Multi-cultural Existence*, IN *MULTICULTURALISM IN THE ISRAELI CONTEXT* 65 (2003) (in Hebrew).

¹⁶ MAUTNER, *supra* note 12, at 376–79.

¹⁷ *Id.*

¹⁸ *Id.* at 376, 384.

¹⁹ Gershon Gontovnik, *The Right to Culture in a Liberal Society and in the State of Israel*, 27 *IUNEI MISHPAT* (TEL AVIV LAW REVIEW) 23, 28 (2003) (in Hebrew).

²⁰ An example can be found in the American case *State v Kargar*, 679 A.2d 81 (Me. 1996). This case involved an accused of Afghan origin who, after emigrating to the United States, was prosecuted for federal crimes relating to sexual assault of his minor son - kissing his penis. The defendant explained that the act, in his culture, is an expression of affection for the child without any sexual connotation. The fact that the defendant was tried for, and convicted of, such an act in the first instance is an expression that the prosecutor and the court did not correctly interpret the meaning of that act. The gap between the "liberal interpretation" and "cultural interpretation" in fact may lead to the imposition of culpability and shame unjustly. Another example, presented in Mautner's book, is the practice of female circumcision. Professor Mautner notes in his book that Western feminists fought this phenomenon and saw it as a means of oppressing woman's sexuality. The Third World feminists and other scholars responded by saying that Western

Consequently, the Court must be exposed to the significance of that cultural practice in the eyes of the same culture engaging in the practice. In cases where the criminal act is a result of a cultural dictates, norms, or customs that are given positive significance, an understanding the cultural motives and the significance and added value involved in the practice will all affect the level of the defendant's culpability. Since the provocation doctrine relies and is based on reducing culpability, then understanding the defendant's "cultural language" is essential in light of this principle.

C. THE PRINCIPLE OF CULPABILITY AS JUSTIFICATION FOR TAKING THE DEFENDANT'S CULTURE INTO CONSIDERATION IN THE PROVOCATION DOCTRINE

The principle of culpability is a fundamental principle in criminal law.²¹ According to this principle, there is no crime without culpability (*nullum crimen sine culpa*).²² Requiring culpability articulates the criminal code's insistence that an element of culpability be a requisite for any valid criminal conviction.²³ Without *mens rea*, there is little justification for condemning or punishing an actor.²⁴ According to Ashworth, "The essence of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behavior

feminists do not understand the meaning of "female circumcision" that takes place in cultures where it is practiced. It was claimed that "female circumcision" improves the hygiene and health of women, establishes her feminine identity, serves as a test of courage for a woman who has faced intense suffering, and strengthens resilience to the hardships of life. According to Mautner, while liberals tend to interpret the practice of "female circumcision" as an expression of women's sexuality oppression, in the groups where it exists, it has many different meanings, many of which are not related to sexual oppression by men, but to accepted values in liberal culture itself (courage, standing, suffering, and brotherhood). See MAUTNER, *supra* note 12, at 377–79.

²¹ Mordechai Kremnitzer, *Justified Deviations from the Principle of Culpability*, MEHKAREI MISHPAT (BAR-ILAN LAW REVIEW) 109 (1996) (in Hebrew); S. Z. FELLER, ELEMENTS OF CRIMINAL LAW 39–44 (1984) (in Hebrew).

²² See generally FRANCIS BOWES SAYRE, THE PRESENT SIGNIFICANCE OF MENS REA IN THE CRIMINAL LAW, HARV. LEGAL ESSAYS 399 (1934); Paul R. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983). Modern codes typically follow Model Penal Code § 2.02(1) in providing that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense."

²³ See *e.g.*, the Model Penal Code § 2.02 comment at 23 (1985). "The only exception to this general requirement is the narrow allowance for offenses of strict liability in Section 2.05, limited to cases where no severer sentence than a fine may be imposed." *Id.* The Israel Penal Code § 19 (1977) requires that, "A Person commits an offense only if he committed it with criminal intent unless: (1) in the definition of the offense, negligence is stated to be the necessary psychological basis for its commission; or (2) the offense is of the category of offenses with enhanced liability."

²⁴ PAUL R. ROBINSON, CRIMINAL LAW: CASES STUDIES AND CONTROVERSIES 208 (1997).

and its consequences."²⁵ This approach is grounded in the principle of individual autonomy—that each individual should be responsible for his or her behavior.²⁶ Individuals are regarded as autonomous persons with general capacity to choose among alternative courses of behavior.²⁷ Given the alternative possibilities, an individual may properly be held responsible for conduct only if he or she could have done otherwise.²⁸

Culpability also has considerable weight in how society views the actual severity of the offenses committed. In general, if the defendant's culpability were somehow reduced, there would be a relatively lesser social response or outcry compared to the case with a higher level of defendant culpability. For example, in homicide offenses, different levels of culpability create different societal demand for punishment.

According to the principle of alternative possibilities, a person will bear criminal responsibility for a specific action only if he could have avoided choosing the criminal act. Consequently, in cases where the enculturation process reduced the defendant's capability of choice, this must be accounted for in determining his degree of culpability. Even if we accept the argument that, despite the fundamental role of culture, other courses of action were available to the defendant (apart from the criminal act), it is doubtful whether other courses of action were realistic. For example, in traditional Arab societies, family honor is a supreme value. When a person witnesses an affront to his family honor, his cultural baggage reduces the alternative courses of action. The choice of attacking someone who affronted his honor is a product of the cultural baggage he is carrying. Despite the theoretical existence of other alternatives, such as self-restraint or forgiveness, it is questionable as to whether any of them are realistic. In contrast, if a person coming from a Western culture witnesses the same affront to honor, the alternative courses of action available to him are more numerous, varied, and even realistic. In such circumstances, he may ignore that same act, exercise self-restraint, and give ground.

I do not claim that a defendant who acted by virtue of a cultural dictate lacks "free will."²⁹ People are autonomous and gifted with creative powers. In fact, my argument is that under certain circumstances, the enculturation process may actually limit the

²⁵ ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 158 (5th ed. 2006).

²⁶ ASHWORTH, *supra* note 25, at 25. The principle of individual autonomy has factual and normative elements. The factual element in autonomy is that individuals in general have the capacity and sufficient free will to make meaningful choices. The normative element is that individuals should be respected and treated as agents capable of choosing their acts and omissions, and that without recognizing individuals as capable of independent agency, they could hardly be regarded as moral persons. *Id.* at 25–26.

²⁷ ASHWORTH, *supra* note 25, at 158.

²⁸ ASHWORTH, *supra* note 25, at 26. For a critical discussion see John M. Fischer, *Responsibility and Control*, 79 *JOURNAL OF PHILOSOPHY* 24 (1982).

²⁹ See Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 *ALB. L. REV.* 1127 (1997) (discussing "free will" and "determinism" as part of the provocation doctrine).

capability of choice and lead to non-rational decision-making. If the degree of culpability is derived from free will, then whenever the defendant's culture limits his free will, the culpability of the defendant is also affected.

D. PROVOCATION DOCTRINE AS A PLATFORM FOR CULTURAL ARGUMENTS

A number of connections exist between the defendant's cultural background and the provocation doctrine. The defendant's culture is liable to influence the intensity of the provocation, which may cause the defendant to lose his composure. It is possible that a person who belongs to a specific minority culture will be provoked by words or acts that would not subjectively provoke someone who does not belong to that same culture. Furthermore, culture is also liable to influence the person's degree of self-restraint. For example, it may be expected of a person from a culture that is considered to be more "hot blooded" to respond to provocation differently than a "cold blooded" Englishman. In a similar way, it may be argued that the capability of self-restraint of a Muslim man regarding an affront to his honor is less than that of someone who is not a Muslim, to the same act. The sensitivity of an affront to honor is a product of the cultural norms planted in a person from childhood.

Even if we assume that the enculturation process has reduced the capability of the defendant's choice, and has therefore reduced his degree of culpability, the question still arises of whether it is appropriate to address the cultural background when dealing with murder, which is considered the gravest offense in penal laws.

In general, it may be argued that recognition of cultural arguments in the case of murder may reduce the significance of interests, rights, and values defended in the criminal, legislative, and international fields, such as the sanctity of life, the right to dignity, and defense against bodily injury. These are universal human rights, whose protection is requested in every liberal country supporting human rights. On the other hand, it may be argued that despite the importance of these protected rights, criminal law recognizes various "defenses," even when speaking of the crime of murder. For example, criminal law in specific cases exempts defendants from bearing criminal responsibility, including the crime of murder, if it transpires that the defendant committed the murder under circumstances of insanity or duress.³⁰

³⁰ Israel Penal Code § 34H defines Mental Competence, and § 34L defines Duress:

Section 34H Mental Competence: No Person shall bear criminal responsibility for an act he committed by him, if—at the time the act was committed, because of a disease that adversely affected his spirit or because a mental impediment—he lacked any real ability

- (1) To understand what he did or the wrongful nature of his act; or
- (2) To abstain from committing the act.

Section 34L Duress: No person shall bear criminal responsibility for an act, which he was ordered to commit under a threat, which posed danger of injury to his own or another person's life, freedom, bodily welfare or property, and which he consequently was forced to commit.

Under Israeli law, the legislator recognizes mitigating circumstances that may permit the court to give a murderer less than a mandatory life sentence. Section 300A of the Israeli Penal Code permits a number of mitigating circumstances to be taken into consideration, including if the act of killing was a result of ongoing abuse of the spouse, or if a grave mental illness limited the defendant's capability of understanding what he was doing.³¹ In each of these cases, Israeli law recognizes specific circumstances that may at least mitigate the sentence of a defendant who committed murder, and at most exempt him from criminal responsibility altogether. The common feature of these mitigations is that they all rely on mitigating the defendant's culpability, even when dealing with the crime of murder. Consequently, as a matter of principle, the criminal law recognizes and accepts arguments that indicate a lesser degree of culpability of the defendant, even in murder cases. Whereas a defendant's cultural background reduces their level of culpability in some cases, the acceptance of cultural arguments in murder cases does not constitute a deviation from the criminal law principles in general, or the principle of culpability, in particular.

Another question is whether it is normatively proper to recognize cultural arguments in murder cases. Regarding this question, I shall argue that it depends on the type of cultural argument advanced. If the cultural argument is of a "general defense," I believe that the importance of the sanctity of life may banish cultural arguments from the Court. An example of this is the case of an honor killing that was not committed following a provocative incident. It is clear that the act of murder for defiling family honor is a product of the inherent influence of the culture. After all, if the defendant had belonged to a different culture that does not sanctify the value of family honor as a supreme value, perhaps the defendant would not have murdered the victim who harmed this value.

However, in a democratic society that sanctifies human rights, the right to life and dignity, the defense against bodily injury

³¹ Section 300A ("Reduced Penalty") of the Israel's Penal Code provides that

Notwithstanding the provisions of section 300, a penalty lighter than that prescribed in it may be imposed, if the offense was committed in one of the following cases

(a) In a situation, in which because of a severe mental disturbance or because of a defect in his intellectual capability, the defendant's ability to do one of the following was severely restricted, even though not to the point of the complete incapacity said in section 34H:

(1) To understand what he was doing or that his act is wrong; or

(2) To refrain from committing the act;

(b) In a situation, in which, under the circumstances of the case, the defendant's act diverged by little from the scope of reasonability, as required under section 34P, for the application of the exceptions of self defense, necessity or duress under sections 34J, 34K and 34L.

(c) When the defendant was in a state of severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused.

overcomes any cultural argument whatsoever. Culture is not immunity, and certainly not in its grave forms of expression, such as murder. It is possible that the proponents of cultural defense include someone who disputes my position, since it may be argued that the justification for cultural arguments is valid for every kind of offense, minor or grave. Alternatively, it may be argued that we should recognize the cultural background of a defendant only as a mitigating factor in sentencing.

It is important to emphasize that a mandatory life sentence is imposed for the crime of murder in Israel. Consequently, the Court has no discretion in sentencing defendants convicted of murder for any reason or motive whatsoever, unless the murder was committed in the circumstances as set forth in § 300A of the Israeli Penal Code, which specifies circumstances for a reduced sentence. However, the situation is different when the cultural argument is integrated in the provocation doctrine where the cultural argument is relevant, sincere, and real. The reason for the distinction between the two different approaches lies in the fact that, in accordance with the second approach, the mitigation of culpability (from murder to manslaughter) is associated with specific conditions that the legislator recognized *a priori* that may mitigate the degree of culpability of the defendant.

The defendant's culture does not constitute a defense by itself. Furthermore, the mitigation of the degree of culpability (from murder to manslaughter) does not send a message that the act of murder, committed under the influence of the cultural background, is condoned. Since the provocation doctrine recognizes the weakness of human nature, then it should be noted wherever culture influences human nature and incorporate this into the principle of culpability.

One of the criticisms made against recognizing cultural arguments as part of the provocation doctrine is that it improves the situation of men who killed their spouses out of jealousy.³² The main counterargument is that some of those men who killed following provocation lacked the premeditation that is required for the crime of murder, and they consequently cannot bear such culpability that justifies convicting them for an offense having a higher degree of culpability than that which exists. It need hardly be said that the provocation doctrine does not exempt a person from criminal liability, but it reduces the offense from murder to manslaughter as a result of a lesser level of culpability.

An additional argument is that recognizing the defendant's culture will undermine the deterrence effect preventing others from committing the same or a similar offense.³³ However, it should be noted that deterrence cannot justify conviction when there is no culpability. Furthermore, general deterrence cannot justify a graver sentence than what is appropriate based on his culpability. A sentence greater than that fitting the offender's culpability, in order to deter others, results in using the offender as a means to achieve the aim of deterring the public, which is an approach that is incompatible with the fairness and justice of the judicial system.

³² RENTELN, *supra* note 14, at 32.

³³ Valerie L. Sacks, *An Indefensible Defense: On The Misuse Of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. LAW 523, 541 (1996).

Another general argument against the application of cultural defense in criminal proceedings is that such application will create different standards for different groups³⁴ and therefore undermine the principle of equality.³⁵ Furthermore, this could damage the public order and even lead to anarchy, since every group will decide which standards it will observe and which it will ignore. It may be argued that recognizing the defendant's cultural background, if this background influences his degree of culpability, actually observes the principle of equality and does not undermine it.

The assumption is that a defendant who belongs to a cultural minority is not identical in his personal characteristics to a defendant who belongs to the culture of the majority. If that different characteristic is relevant to evaluating the degree of culpability, then taking that different characteristic into consideration may well lead to a just result in the material sense of equality, even if this recognition does not create equality in its formal sense.

In short, the common denominator to the provocation doctrine, and to the cultural defense doctrine, is the recognition of the limited culpability of the defendant. Consequently, recognizing the defendant's cultural background need not be alien to criminal law but is understandable in the light of this basic principle.

In the next discussion, I shall review the development of the provocation doctrine in the Israeli criminal law.

II. THE DEVELOPMENT OF THE PROVOCATION DOCTRINE IN THE RULINGS OF THE ISRAELI SUPREME COURT

Section 300 of the Israeli Penal Code addresses the crime of murder, and lists a number of alternatives to this offense, whereas § 300(a)(2) is the alternative for clear-cut murder that does not require less than premeditation.³⁶ For a defendant to be convicted in Israel pursuant to this alternative, three elements must exist: "the decision to kill," "preparation," and "absence of provocation immediately prior to the act." If there is doubt these elements exist, the doubt shall apply to the defendant's benefit, who shall be convicted of manslaughter and not of the crime of murder.

Based on the precedent, the elements of "preparation" and "absence of provocation immediately prior to the act" serve as concrete tests that allow the decision to kill to be characterized as a decision that crystallized "calmly and with careful consideration."³⁷ If provocation existed immediately prior to the act, it indicates the decision to kill was taken "while tempers flared" and not "in cold blood." Immediate provocation, such as annoying and provocative goading on the part of the victim or a third party prior to the act, could hinder the defendant's self control so that he responded with

³⁴ JAMES G. CONNELL J. AND RENE L. VALLADARES, *CULTURAL ISSUES IN CRIMINAL DEFENSES*, §§ 7.41–7.43 (2003).

³⁵ Sacks, *supra* note 33, at 542–54.

³⁶ Section 300 of Israel Penal Code provides the following definition of Murder: If a person did one of the following, then he shall be accused of murder and is liable to life imprisonment, and only to that penalty...(2) he caused the death of any person with premeditation.

³⁷ CrimA 396/69 Benno v. The State of Israel, Pad 24(1) PD 561 [1970] (Isr.) (in Hebrew).

the act of manslaughter. In this mental state, before he managed to "cool off" and assess the possible result of his action, he could not regain his ability to control his desire. Apparently, this annoying behavior was liable to "drive one out of his mind" (even a reasonable person) and cause him to act towards the victim as the defendant acted.

The precedents specified two cumulative tests for provocation: The subjective test, which presents the question: did the provocative behavior actually influence the defendant so much that he lost his self-control, and thus committed the lethal act without considering the results of his action?³⁸ It is necessary to show that the defendant actually surrendered to a "flare of temper that occurred within him."³⁹

The second test, which constitutes a material test for the discussion in our case, is the objective test that presents the question: would a reasonable person, in the defendant's place, have been likely to kill as a result of the provocation? Was the provocation so serious that it may be inferred that most people would have found great difficulty in not surrendering to its influence and would have consequently responded in the same lethal manner as the defendant did?⁴⁰ Since we are speaking of cumulative tests, only if the answer to each of these questions is positive would the defendant be convicted of manslaughter instead of murder.

Next, I shall examine the development of the provocation doctrine in the context of multicultural Israeli society. In order to examine this issue, I shall go back to the period of the British mandate, before the establishment of the State of Israel, to a time when the Mandatory Supreme Court attempted to discover the relationship between the British provocation ruling and the Israeli provocation ruling. In the 1946 *D'abit* court ruling⁴¹ and also in the 1947 *El Vazir* court ruling,⁴² the Mandatory Supreme Court interpreted a reasonable person in the provocation ruling as reasonable for that race to which the defendant belongs. The Court explained that the reason for this statement lies in the difference between the existing conditions in Israel and those existing in Great Britain: in Great Britain almost all the residents belong to a single race, and it may be presumed that they all possess the same views regarding their duties and obligations vis-à-vis society, whereas in Israel there are different races, and even sub-groups within the races.⁴³

In the *El Vazir* court ruling, a reasonable person was interpreted to mean a graded reasonable person, whose reasonableness is a function of his racial association. In other words, the Mandatory Supreme Court adopted the approach of the classic objective test, but grafted upon it an additional, relative test, that of

³⁸ YAAKOV KEDMI, ON CRIMINAL LAW, PART B, 599 (1995) (in Hebrew).

³⁹ Benno, Pad 24(1) PD 561 [1970] (Isr.) (in Hebrew).

⁴⁰ Benno, Pad 24(1) PD 561 [1970] (Isr.) (in Hebrew); *see also* KEDMI, *supra* note 38, at 600.

⁴¹ D'abit Case, Annotated Law Reports (ALR) 559(3) (1946).

⁴² El Vazir Case, Annotated Law Reports (ALR) 712(4) (1947).

⁴³ *Id.* at 713–14.

racial association. Consequently, the origins of the cultural defense may be traced back to the mandatory Israeli law, when the Court at that time saw fit to recognize the test of a reasonable person from the same race as the defendant. This recognition, based on race, means it recognized the culture, values, and historical background of that person.

After the State of Israel was established in 1948, Israel inherited the Mandatory Criminal Code Ordinance ("MCCO") from the British; the issue of provocation continued to find expression in § 216(b) of the MCCO.⁴⁴ The difficulty the Court has to cope with, when referring to the reasonable person test in the provocation issue, is how to apply the Mandatory Supreme Court's hybrid test in light of the large number of races and sub-races comprising the population of the State of Israel.

In the *Segal* court ruling,⁴⁵ Justice Zilberg criticized the fact that the very addition of racial and sub-racial differentiation into the objective test of provocation left no stone standing of the objectivity or generality of this test—it had in fact turned into a subjective test.⁴⁶ The difficulty referred to by Justice Zilberg is a practical one, in light of the conditions existing after the establishment of the State of Israel, in that it is difficult to know the signs of a "race" or a "sub-race" to which the Mandatory Supreme Court alluded. However, he assumes that the intention was also to the country of origin and cultural surroundings of the defendant.⁴⁷

Justice Zilberg, who was part of the dissenting opinion, said that the test to be employed in Israel with respect to provocation is "the individual subjective test that takes into account all the personal characteristics of the defendant, and even unusual ones amongst them."⁴⁸ Justice Berenzon stated that when we obtain an objective test by means of the reasonable person, we must see before us such an Israeli person, with his good and bad merits, ailments and ills, characteristics and customs, and not rely on some ideal type of unreal person that philosophers [saw] and described in their imagination and vision.⁴⁹ In other words, in order to answer the question of what constitutes provocation in Israel, we must look at the British court ruling, through the Israeli prism, that will reflect the background of the Israeli experience.⁵⁰

Justice Berenzon, who authored the majority opinion, disagreed with Justice Zilberg and preferred the objective test of the reasonable person, but wished to introduce a certain degree of flexibility into that rigid test by saying that even the objective test is not fixed and therefore does not apply to all places and to all times. Justice Berenzon opposed the "racial theory" adopted by the Mandatory Supreme Court, while arguing that this theory could be

⁴⁴ Criminal Code Ordinance (1936).

⁴⁵ CA 46/54 *The General Attorney v. Segal*, 9 PD 393 [1995] (Isr.) (in Hebrew).

⁴⁶ *Id.* at 409.

⁴⁷ *Id.* at 410.

⁴⁸ *Id.* at 410.

⁴⁹ *Id.* at 432.

⁵⁰ *Id.* at 432–33.

understood against a background of the actual conditions existing in the country and the official policy of the mandate government at that time. However, this policy is alien to the spirit of the State of Israel, whose major aspiration is to absorb Jewish exiles from the Diaspora and assimilate them into a single unified nation.⁵¹ Justice Berenzon also stated that the average, regular person in Israel is not similar to the average Englishman, and the latter is not similar to a regular West African villager.⁵²

Professor Yoram Shachar, when referring to the words of Justice Berenzon in the *Segal* case, asks:

Who is the average, regular, person [in that part of Israel] where there have been gathered together the Englishman, the West African villager, the Pole, and the Yemenite, and contains a large Arab minority, part of which is rural and part urban? Can it be disputed that when the Segal court ruling was given in 1955 there was not a single typical person in Israel?⁵³

While Justice Zilberg's difficulty in adding a racial element to the provocation test is a practical one, Justice Berenzon's is a value-based one. As far as Justice Berenzon is concerned, from the moment that the country of origin and culture of a specific defendant are taken into account, together with his ethnic or racial association, we are abandoning the correct test: the typical Israeli person who was created in Israel, and only he must be used as a criterion in the provocation test.⁵⁴

Yoram Shachar also attributes the words of Justice Berenzon to the spirit of the time, in the language of the aspirations and hope for the future, for the creation of a single and united nation and the building of a new Israeli man, which can be seen in the court ruling in the *Garame* case.⁵⁵ Yosef Garame emigrated from Yemen to Israel twelve years before the incident in question. The defendant, like others from the Yemenite community, believed in the superstition that demons and evil spirits exist in the world and have the power to harm humans. The defendant believed the words of the deceased that he was married to a demon, and that he had the power to bring disaster to him and his family.

This belief was based, *inter alia*, on the fact that both in Yemen and in Israel the deceased was known as a person who engaged in occult wisdom and healed sick people by means of witchcraft. Over the course of time, Garame's fear increased that the deceased would cause harm to him and to his family unless he gave him money to appease him. One day Garame believed the deceased was mocking him and threatening his life. His heart suddenly quivered, and he grabbed a shovel and hit the deceased over the head

⁵¹ *Id.* at 434.

⁵² *Id.* at 33.

⁵³ Yoram Shachar, *The Reasonable Person in Criminal Law*, 38 HAPRAKLIT 78, 83 (1990) (in Hebrew).

⁵⁴ *Id.*

⁵⁵ *Id.* See also CA 181/62 *Garame v. The General Attorney* 17 PD 925 [1963] (Isr.) (in Hebrew).

with it nine times, leading to the deceased's death. Garamé was accused of premeditated murder, but the District Court convicted him of the crime of manslaughter and sentenced him to twelve years imprisonment. The Supreme Court reduced Garamé's sentence to seven years imprisonment, after it ruled that he had committed the act while in a grave state of psycho-neurosis accompanied by paranoid tendencies.⁵⁶

According to Professor Shachar's approach, the aspirations and hope for the creation of a single and united nation, and the building of a new Israeli man, were translated into a categorical demand, as in the case of Yosef Garamé who came to Israel from Yemen a short time earlier. The demand directed at Garamé was that he immediately place himself in the melting pot and emerge in the form of the typical Israeli man being created in Israel, a kind of equitable reasonable person who, though not existing, should exist, since if this is not the case he will not be saved from the image of the reasonable person in any of the meeting places of criminal responsibility that he is liable to encounter.⁵⁷

At the present time, after the "melting pot" task has been accomplished and where the importance of preserving different cultures has been recognized, the question arises whether court rulings given during the mandatory period should be restored to their former glory (while isolating the racial element) so that we may judge cultural elements as part of the doctrine of provocation. Professor Shachar notes that presently, the dissimilarity of some groups can no longer be rejected as a debt charged against the future.⁵⁸ "Things that were justified during the emergence of a new society are less justified when the society is maturing, and will certainly be even less justified as time goes by." The majority ruling in the *Segal*, that an objective test is required in addition to the subjective one, has been rooted in the court's ruling where the test of a reasonable person referred to a reasonable Israeli, without anomalies or exemptions.

Justice Shamgar, in the *Siman Tov* court ruling,⁵⁹ repeated the position taken in *Benno*.⁶⁰ In *Benno*, the correct significance of the objective test is the question of whether the provocation directed at the defendant was so serious, taking into account the circumstances, that it may be inferred that most people would have had great difficulty in not surrendering to its influence, and likely responded in the same lethal manner as the defendant.⁶¹

Justice Shamgar noted that, in examining the defendant's behavior, the Court does not apply the criterion of an ideal imaginary person who fully meets the expectations regarding the proper and desirable form of behavior of a restrained cultured person. Instead, the Court examines the behavior of the defendant based on the theoretical criterion created on the assumption regarding the

⁵⁶ *Id.* at 940.

⁵⁷ Shachar, *supra* note 53, at 83.

⁵⁸ Shachar, *supra* note 53, at 84.

⁵⁹ CrimA 686/80 *Siman Tov v. The State of Israel* 36(2) PD 253 (Isr.) (in Hebrew).

⁶⁰ *Benno*, *supra* note 37.

⁶¹ *Benno*, *supra* note 37, at 580.

behavior attributed to a reasonable person. And for the purpose of formulating the criterion, the Court employs its experience of life and general knowledge.⁶² Justice Shamgar's innovation in *Siman Tov* is the introduction of normative values—a hint of that desirable—into the objective test, as an expression of the special aim that the judicial policy is intended to serve.⁶³ Justice Shamgar also repeats this approach in *Jundi*,⁶⁴ where he notes that the legislator does not distinguish between a reasonable worker and a reasonable banker but sets the behavioral norm of the average reasonable person who is imaginary, representing a merging and integration of characters from whom the aforesaid academic norm is created.⁶⁵

According to Orit Kamir's approach, the character of the reasonable person is a fictitious, imaginary, paradoxical and totally amorphous one, and a product of the clear-cut imagination of the members of the Supreme Court. This is a character that has been created with the logic of the declared ideology of the national, ethnic, and cultural melting pot, and in the shadow of the ethnocentricity of the ruling class. It therefore displays the ideal character of the desirable Israeli, in the light of the implicit vision of the Supreme Court judges.⁶⁶

Kamir distinguishes between the British reasonable person and the Israeli one. While the first exhibits an abstraction of a group of people who together represent the community from which they have been selected, and the use of which for comparison of the defendant's behavior with that accepted in his society, the Israeli reasonable person is composed of pieces of the characteristics of fictitious people who represent the desirable values of Israeli society. The Israeli reasonable person does not represent one who is accepted in the defendant's society, but always reflects the world view of a single social group, which comprises the Supreme Court judges.⁶⁷

⁶² *Siman Tov*, 36(2) PD 253, 264 (Isr.) (in Hebrew).

⁶³ *Id.*

⁶⁴ CrimA 402/87 *Jundi v. The State of Israel* 42(3) PD 383 [1988] (Isr.) (in Hebrew). For a critique of the *Jundi* ruling see Orit Kamir, *Responsibility Determination as a Smokescreen: Provocation and the Reasonable Person in the Israeli Supreme Court*, 2 OHIO ST. J. CRIM. L. 547 (2005).

⁶⁵ *Id.* at 391.

⁶⁶ Orit Kamir, *How Reasonableness Killed the Woman*, 6 PLILIM 137, 155 (1997) (in Hebrew).

⁶⁷ *Id.* at 155–56. Kamir mentions a further distinction between "the English reasonable person" and the Israeli one. The decision on how a "reasonable person" is used in any given context is defined in the common law as "factual," and thus outside judges' professional expertise. Therefore, the juries' decision about how a "reasonable person" would have acted under specific circumstances is not a legal decision but factual, and therefore does not obligate other courts or juries. In this way, a reasonable person can vary depending on time, place and the defendant's societal conventions. On the other hand, in Israeli law, the determination of how the reasonable man would have acted is not a factual question, but a legal one. As a legal determination, it is within the court's authority. Any such determination by the Israeli Supreme Court is a binding precedent on the lower courts and guides the Supreme Court itself. The reasonable man in Israeli criminal law does not change, in principle, from one place, time and procedure to another.

Kamir adds this desirable Israeli not only fails to have pretensions to represent different sectors of the population in different contexts, but also does not have pretensions to represent anyone. The social construct of the desirable Israeli fixes a bar for the desirable height of the common Israeli but fails to fit his dimensions.⁶⁸

The terms reasonableness and a reasonable person are not neutral and objective ones as they are seen to be; they contain political values that serve specific groups in society and harm other social groups.⁶⁹ In *The Politics of Reasonableness*,⁷⁰ Ronen Shamir examines how the doctrine of reasonableness developed and how the term reasonableness became a fundamental internal value by the judges themselves. He argues that the term reasonableness suffers from vagueness and internal contradictions. While reasonableness is presented as a judicial characteristic resulting from the intelligence and professionalism of the judge, the Court also said that a reasonable person is the Court itself.⁷¹ According to his approach, the Israeli courts use the doctrine of reasonableness to systematically discriminate against Arabs and religious Jews.

Justice Aharon Barak also admits that reasonableness is a vague term, used by most of those who use it in a "circular" manner so as not to give it real meaning.⁷² I shall also point out that the difficulties of the doctrine of the reasonable person that raises questions and incredulity become even more pronounced when we attempt to apply it to cases where the defendant does not belong to the culture of the majority, i.e., he does not belong to the society where the reasonable person is supposed to reside.

Who is the reasonable person? To whom shall we compare the actions of the defendant? Is the reasonable person one who belongs to the culture of the majority, or is the reasonable person one who belongs to the culture of the minority? Is he the reasonable Mexican, Chinese, Arab, ultra-orthodox Jew, or simply the Israeli? This question is accentuated as part of the objective test of the provocation doctrine.

According to the objective test, the Court must ask whether a reasonable person would have likely lost his composure, in light of that same provocative incident, to such an extent that he would have responded as the defendant did. Limited and pedantic application of this test, without taking into account the culture of the defendant ("a reasonable person from the culture of the defendant") strengthens the claim that defendants belonging to minority cultures are discriminated against in criminal proceedings, and the test of the reasonable person, *inter alia*, perpetuates this discrimination.

⁶⁸ *Id.* at 156.

⁶⁹ OMER SHAPIRA, JURISPRUDENCE: INTRODUCTORY CHAPTERS 435–36 (2007) (in Hebrew).

⁷⁰ Ronen Shamir, *The Politics of Reasonableness*, 5 THEORY AND CRITICISM 7 (1994) (in Hebrew).

⁷¹ SHAPIRA, *supra* note 69, at 436. *See infra* note 90.

⁷² AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 249 (2003) (in Hebrew).

Omer Shapira notes that "recourse to the reasonable person is only a disguise for a specific person: the enlightened person who belongs to the enlightened public." In this context, Shapira's following questions and speculations are very relevant:

What really lies behind the expression "the enlightened public" in whose name the Court speaks? If there exists an enlightened public that is found in light, then there must also exist an unenlightened public that is found in darkness. And who belongs to the "dark" side of the public? Those different minorities, such as the Arabs or the ultra-orthodox Jews, who are regarded as a threat to the enlightened social order.⁷³

In my opinion, strict adherence to the doctrine of reasonableness, and to the test of the reasonable person, without accounting for identity, culture, or personality, socially and personally harms those same cultural minorities. It further expresses the problematic and strict adherence to a doctrine with dimensions deliberately small so that others who are different from "us" cannot enter it.

The Court's position in recognizing the defendant's cultural background as part of the provocation doctrine means shutting the door on it and leaving it outside the bounds of the Court. It may be assumed that the Court would fear recognizing cultural arguments, since in this way they are liable to undermine the judicial policy of the Court. The aim of the Court is to encourage the population to become Israelis of a single, very specific, kind that Supreme Court judges see as ideal.

Recognizing the defendant's culture might create a dichotomy that is unacceptable to the Court. Therefore, the Court wishes to dismiss it the same way it dismissed Garam's belief in demons and warlocks almost fifty years ago. At that time, the Court used the "melting pot" concept to dismiss Garam's beliefs, while today it would be dismissed by the modern (un)reasonable (super)man.

Professor Shachar is undecided and asks:

If the reasonable person does not kill because of provocation, what is the point of repeatedly asking in which circumstances will he kill because of provocation, and what is the point of trying to compare him to all those defendants who claim that they did in fact kill because of provocation? Has the time not come to say, after 34 years in which he served in this passive role, that the reasonable person in Israel never murders, and that it would be better for us to leave him alone without disturbing his peace every time that a killer who lost his self control wishes to be compared to him?⁷⁴

He asked this question, and it was answered by the former Chief Justice of the Supreme Court, Aharon Barak six years later in the *Azualus* case where the reasonable person was roused from his

⁷³ SHAPIRA, *supra* note 69, at 437.

⁷⁴ Yoram Shachar, *The Reasonable Person in Criminal Law*, 38 HAPRAKLIT 78 (1990) (in Hebrew).

slumbers. In *Azualus*,⁷⁵ the defendant shot and killed his wife and neighbor when he discovered they were having a romantic relationship. Azualus had suspected the relationship for some time, since there were rumors of it, although his wife and the neighbor denied it. Nonetheless, it affected Azualus' family life so much he left home. His wife sued for divorce. On the day of the incident, Azualus went out to find his wife and found her in the neighbor's car. Later on, when the neighbor hugged Azualus' wife in front of him and kissed her on the mouth, with the intention of clarifying the relationship between them, Azualus lost his composure, drew a gun he routinely carried, and shot both of them dead. The district court found him guilty of murder, and Azualus appealed to the Supreme Court with the argument that he had been provoked shortly before the act. The Supreme Court accepted this argument after it ruled he acted under the influence of the provocation.

Justice Barak noted he was prepared to examine the existing precedent while limiting or cancelling the objective test. However, he believed the court ruling in *Azualus* was not the appropriate place to do so, since this case also met the objective test. He said the blood of the common Israeli man or woman was liable to boil, when they see their partner in an act of betrayal.⁷⁶ Ultimately, the Court accepted the provocation argument and convicted Azualus of two acts of manslaughter instead of murder.

Reality demonstrated without doubt that, if during the period of existence of the State of Israel, the reasonable person lost his tranquility about three times.⁷⁷ Apart from being abstract, fictitious, paradoxical, and amorphous, as he is called in the legal literature, we now also know that he is made of Teflon.

Chief Justice Barak's ruling in *Azualus* left much requiring further study, including the question about limiting or cancelling the objective test. It again raised the dilemma of whether it is justified, for the sake of the social value or the sanctity of life, to introduce an objective dimension into the term personal criminal responsibility in

⁷⁵ CrimA 3071/92 *Azualus v. The State of Israel* 40(2) PD 573 (Isr.) (in Hebrew). For full discussion see Kamir, *supra* note 66. See also CA 30/73 *Shmulevitch v. The State of Israel* 27(2) PD 598 [1973] (Isr.). In the case of *Shmulevitch*, the defendant shot his estranged wife after he went to her new boyfriend's apartment. The court relied on the traditional English law, which states that when a person discovers his wife's betrayal, it may provoke him and cause him to kill her. While the English ruling referred to an event in which a husband finds his wife having sex with another person, Justice Haim Cohen expanded that ruling and applied it to an act of adultery. Justice Haim Cohen stated that the fact that the defendant arrived at his wife's new boyfriend's apartment and found her in her nightgown caused a trigger that would boil the blood of the ordinary Israeli husband.

⁷⁶ CrimA 3071/92 *Azualus v. The State of Israel* 40(2) PD 573, 580 (Isr.) (in Hebrew).

⁷⁷ This was seen first in *Shmulevitch* and again in *Azualus*. Later, there was another case where the Supreme Court recognized a killing under provocative circumstances, in CA 8332/05 *Issakov v. The State of Israel* (unpublished decision, 27.7.2007) (Isr.) (in Hebrew).

murder—a dimension generally alien in its nature to personal criminal responsibility.⁷⁸

Two professors point to the internal contradiction in the ruling that a person who has been subjectively provoked and committed an act of homicide after loss of self-control may still be regarded as a premeditated murderer if the objective test was not met (i.e., even if in actual fact he had no *mens rea* of premeditation as required to convict of murder). According to this criticism, the test for evaluating provocation must only be personal and subjective, not general or objective, since any integration of the objective element is alien to offenses of criminal intent, as it is a characteristic of negligent offenses only.⁷⁹

In the further criminal hearing of *Bitton*,⁸⁰ which was heard by seven justices in the Supreme Court, the question arose whether the existing precedents should deviate from the objective test. Chief Justice Barak presented the Feller and Kremnitzer's interpretation of the word "provocation," according to which it was unjust, offensive, insulting, and surprising behavior. These definitions, according to Barak, set a low threshold for provocation.⁸¹ The solution, in his opinion, was to raise the threshold by using an objective test. In other words, the defendant will not be liable for murder only if the provocation passes both the objective and subjective tests.⁸²

An additional question by Chief Justice Barak addressed how the subjective characteristics of the killer are part of the objective test. In his opinion, the objective test developed in the Israeli rulings, which does not account for subjective characteristics of the killer, is too extreme.⁸³ Consequently, he believed a number of subjective characteristics may be recognized while formulating criteria for the objective standard and locating "stopping points," as is customary in most judicial methods, which would be appropriately done by the legislator.

Judge Beinisch, the presiding Chief Justice of the Israeli Supreme Court, noted that the court ruling is liable to erode the existing precedent to some extent in light of the approach that strives to make the objective consideration subjective. In the current jurisprudence, such erosion is likely to lead to excessive subjectivity in the rulings, as it depends on the personal approach of each judge. According to Chief Justice Beinisch, when accounting for the social value protected by the objective consideration, the Court must maintain judicial restraint and preserve the stability of the precedent.⁸⁴

⁷⁸ CrimA 759/97 Aliavayev v. The State of Israel 55(3) PD 459, 476 [2001] (Isr.) (in Hebrew).

⁷⁹ FELLER, *supra* note 21, at 569, 571; Mordechai Kremnitzer, *Intent and Premeditation as Murder: The Lack of Provocation*, 1 CRIM. L. CRIMINOLOGY & POLICE 9 (1985) (in Hebrew).

⁸⁰ Further Criminal Hearing 1042/04 *Bitton* v. State of Israel (not published, Nov. 27, 2006) (Isr.) (in Hebrew).

⁸¹ *Id.* at ¶ 46–47.

⁸² *Id.* at ¶ 63.

⁸³ *Id.* at ¶ 68.

⁸⁴ *See id.* (discussing the ruling of Chief Justice Beinisch).

It may be shown that the importance of *Bitton* lies in its challenge of the provocation doctrine, as it currently exists in criminal law. It calls for reform of the ruling as part of a comprehensive and substantive reform to homicide law in general, and to murder in particular. In this ruling, the Supreme Court passed the reins to the legislator and expected to see a change in the judicial situation.

It seems that the time has indeed arrived to reform Israeli's murder law. After Chief Justice Barak fired the first shot in *Bitton*, and after Chief Justice Beinisch voiced the call for judicial restraint, the legislator is expected to take the reins and advance judicial proceedings in reforming murder law. If the legislator does not express an opinion, there is a possibility that, over time, we shall observe an erosion of the existing precedents in court rulings and the first appearance of subjective elements in the objective test.

III. THE INTEGRATION OF CULTURAL ARGUMENTS IN THE PROVOCATION DOCTRINE IN THE RULINGS OF THE ISRAELI SUPREME COURT.

A. NON-RECOGNITION OF CULTURAL ARGUMENTS AS PART OF THE PROVOCATION DOCTRINE IN ISRAELI LAW

The Court in *Segal* unambiguously rejected the test of the racial theory that was accepted in the period preceding the State of Israel's establishment. That theory had deep roots in the courts' rulings and established the objective test in a strict and conservative manner without taking into account the different communities, religions, sectors, and cultures in Israeli society. The reason was the Court's refusal to create a dual standard, or even a number of standards, for different people. If cultural dissimilarity were dismissed as a debt charged against the future, these defendants would assimilate themselves to the expected social "melting pot." Over time the metaphor of the melting pot disappeared, but there remained the same value-based rhetoric of the desirable, uniform Israeli, who, rather than being a product of the melting pot, was a product of the Supreme Court's aspirations.

The Supreme Court defined (and continues to define) desirable norms of behavior that are not those of the common Israeli, but rather represents a "fantasy" of the desirable Israeli. When the Court addresses the regular, average, or typical Israeli, it does not intend to recognize different kinds of people, just as it does not intend to recognize different standards or the fact that different persons who belong to different cultures are perhaps provoked differently by "triggers" that make it likely they will respond in a different way.

In *Tuma*,⁸⁵ the court addressed verbal provocation between two persons of Arab origin. Tuma's counsel argued that Tuma, as an Arab, could be influenced by certain provocations to a greater extent than a Jew. However, the Court, which decided *Segal*, ruled that Tuma's specific religious or ethnic community had no effect on the objective test.⁸⁶

⁸⁵ CrimA 553/77 Tuma v. The State of Israel 32(3) PD 141 (1978) (Isr.) (in Hebrew).

⁸⁶ *Id.* at 151.

The *Azam* case⁸⁷ dealt with a brawl in an Arab village, where the Azam slit the deceased's throat after a protracted quarrel that included cursing and blows exchanged between the parties. Justice Beisky ruled that the objective test does not permit classifying the provocation by specific sectors of the population or by sensitivity to customs of particular communities, such as an affront to a woman's honor.⁸⁸

The court in *El-Cazan*⁸⁹ addressed the case where two members of the Muslim community were involved in an incident where the victim called El-Cazan "a son of a bitch," cursed him, and threw a shoe at him, a harmful and insulting act in the Muslim community. The Court refused to consider these facts as provocation.

The *Katish* case⁹⁰ involved an Arab who attempted to murder his mother and her second husband after his mother left his father and married this other man. Katish did not claim provocation but appealed the gravity of the sentence (eight years imprisonment) to which the district court sentenced him. Katish argued that, from his standpoint, his mother violated the honor of his father and family by following another man whom she loved and abandoning her seven children. The Court said Katish's viewpoint was not unique to him but instead perpetuated by the society in which he lived and by the tradition of the community to which he belonged.⁹¹ Consequently, Katish's advocate argued that Katish acted like his own people, and the act he committed was no more than that expected from him. Justice Heshin rejected Katish's arguments and ruled that the viewpoint of an appellant, like that of his community, was improper and could not be accepted.⁹²

Justice Heshin adopted a pure value-based approach, according to which he set up the protected value in the crime of murder and derived the Court's role as a normative framework for preserving and sanctifying this value. However, two major difficulties exist in Justice Heshin's decision. The first is his view on punishment: that a criminal sentence is a deterrence, and the Court's voice will resonate from one end of the country to the other so everyone will know that anyone who tries to kill can expect a very long prison sentence.⁹³

However, in the same court ruling, Justice Heshin stated that deeply rooted customs in some communities would not be easily uprooted, even if everyone agrees that they ought to be.⁹⁴ An additional difficulty lies in the value-based consideration that is implicit in his ruling. Justice Heshin wished to say that the

⁸⁷ CrimA 139q86 *Azam v. The State of Israel* 41(3) PD 343 [1987] (Isr.) (in Hebrew).

⁸⁸ *Id.* at 349.

⁸⁹ CrimA 59/93 *El-Cazan v. The General Council* 13 PD (1998) (in Hebrew).

⁹⁰ CrimA 3352/94 *Katish v. The General Council*, Takdin Elyon 96(2) PD 98 [1996] (Isr.) (in Hebrew).

⁹¹ *Id.*

⁹² *Id.* at 99.

⁹³ *Id.*

⁹⁴ *Id.* at 98.

replacement of these deeply rooted values by other values is a virtually impossible task, and it is neither the Court's job nor responsibility to educate people as to how they are supposed to behave.

If this is true, then the value-based consideration is reduced to sending the message that anyone who kills or injures someone else will receive a severe sentence. This message is problematic given the target audience. In cases of "honor killing," the message will fall on deaf ears since we are speaking of such a deeply rooted practice, and it is doubtful anyone will be deterred by this message. However, if the message is intended for the entire public, then it is unnecessary since this practice is not usual amongst the general public but only amongst a specific community or sector. I therefore wonder to whom the Court intended to receive its message.⁹⁵ This is one of the difficulties in sentencing defendants who belong to minority cultures.

In *Taha Najar*,⁹⁶ the Supreme Court addressed the question of the objective test for provocation and examined the reasonableness of the criterion in the context of the defendant's Bedouin community. This case was one of the few that addressed the defendant's culture in depth and in the context of provocation precedent. In fact, the Court asked the same question it has asked more than once: what is a civilized person?

Taha Najar belonged to the Bedouin community and stabbed his forty-eight-year-old sister, Samia, eleven times with a knife (ten times in her back and once in her hand). Apparently Samia, who was unmarried and lived with her unmarried sisters in their mother's home, intended to travel alone for a holiday in Egypt. Taha Najar opposed the journey, convinced that this was "unacceptable behavior" according to the customs of the Bedouin community as it would be a journey made by an unmarried woman, and attempted to persuade her not to go.

On the day of the act, Taha Najar went to Samia's home and demanded that she forgo the planned trip. When she refused to do so, Taha Najar went to his home, grabbed a knife, returned to her home, and when she persisted in her decision, stabbed her to death.

The District Court in Nazareth convicted Taha Najar of murder, after ruling that evidence established premeditated murder, the decision to kill, and the element of preparation. Further, the Court said the sister's wish to travel to Egypt did not constitute subjective or objective provocation. To summarize, Taha Najar argued the provocation resulted from the affront to the family's honor, and especially to his personal honor after the deceased, as he claimed, had told him that he was not the father of his children.

The defense produced evidence by Sheikh Atrash A'akal, who argued that family honor is one of the most sensitive subjects amongst the Bedouins, especially in the Bedouin tribe. No Bedouin will accept an affront to his family honor, especially when speaking of sexual offenses. In his view, a journey made alone by a Bedouin girl is one of the bright lines regarding family honor that no member of the

⁹⁵ *Id.* at 99.

⁹⁶ CrimA 10828/03 Najar v. The State of Israel, Takdin-Elyon 2005(3) PD 1134 [2005] (Isr.) (in Hebrew).

Bedouin tribe would dare to cross. At the end of his testimony, he stated:

No one in the Bedouin society justifies the murder, but we fall inside the gap that exists between our mentality and customs, and the Israeli law, that is in our opinion a very honored and fair law, and we believe in it, but we are paying the price.⁹⁷

The Haifa district court ruled that the defendant was not subjectively provoked. Supreme Court Justice Rubinstein added that even if the defendant had been provoked subjectively, this does not mean a civilized person, in response to an insult expressed during a confrontation, would be liable to lose self-control and go so far as to stab his own sister to death.⁹⁸

The importance of *Taha Najar* is how it identified a civilized person. Justice Rubinstein asked, "Who is this 'civilized person' whose temperament we examine as part of the objective test? Does this term include individual in different groups and cultures who murder because of family honor?" Justice Rubinstein quotes Justice Shamgar's statements in *Jundi*, according to which the character of the reasonable person was created and formed by the Court; therefore, the Court does not have to accept averages of behavior or perverse practices of specific groups or persons of specific origin or temperament, and it is not entitled to include in these characteristics in the fundamentals of a desirable cultural norm.⁹⁹

Justice Rubinstein added the following:

With all due respect, in my opinion, the words of Chief Justice Shamgar are as relevant today as they were then. Indeed, in such variegated and multi-cultured society as Israeli society there will be fields in which regard will be paid to the various different types of the population. However, it is not appropriate to give this significance in criminal law, and certainly not its serious manifestations, and especially not when speaking of the taking of someone else's life against a background known as family honor. The consideration is first and foremost one of values: the sanctity of life...However, a lot has been written regarding the dilemmas presented by the cultural relativity approach. On the one hand, it is argued against the creation of universal values of morality and of human rights that this may make various groups in the population subservient to "enlightened" Western culture, as a symptom of the concept that does not recognize pluralism and multiculturalism. On the other hand, the debate that gives a place – legitimate as such – to the history and culture unique to each group, is liable to represent a magic formula, that sometimes blurs the real meaning, and permits

⁹⁷ *Id.* at 156–57.

⁹⁸ *Id.* at 1139, ¶ 4(6)(1).

⁹⁹ *Id.* at 1139 (citing CrimA 402/87 *Jundi v. The State of Israel* 42(3) PD 383 [1988] (Isr.) (in Hebrew)).

exploitation of that same relativity in order to reserve for itself values that fail to match the basic human rights that have been formulated at the present time; 'Honor Killing' is one of them.¹⁰⁰

We can see there is a rigid approach by the Supreme Court not to recognize the defendant's culture or consider it as part of the provocation doctrine in the crime of murder. Such an approach confirms the value of the sanctity of life and sends a clear message that the Court will not recognize the cultural background, whatever its influence, on the act of homicide. Consequently, the Court chooses the "easy" path, since it does not pretend to address substantive questions and issues such as the principle of culpability, the principle of equality, individual justice, and the right for a fair trial. Such an approach does not weigh the various justifications for taking into account the defendant's culture in criminal proceedings in general and the provocation doctrine in particular.

B. THE POSSIBILITY FOR CHANGE? THE SIGNIFICANCE OF THE COURT RULINGS OF JUSTICE HESHIN AND CHIEF JUSTICE BARAK IN THE CHAKULA AND BITTON CASES

In *Chakula*,¹⁰¹ the Supreme Court heard the appeal of a defendant who was convicted of murder in the Tel Aviv District Court Tel Aviv where members of the Ethiopian community were involved. Chakula hit his wife over the head seven times with an axe, causing her death. No one disputes he caused her death, but his defense counsel advanced several arguments, one of which referred to the fact that, in the act of killing the wife, the principle of "absence of provocation" did not exist.

The wife allegedly had a relationship with someone who was the wife's lover, which the defense argued provoked Chakula to commit the act. Purportedly, this provocation was accompanied by humiliating remarks the wife made to him prior to the homicide. The Court did not accept this argument because the provocation was not made immediately prior to the act. Chakula introduced an expert on the Ethiopian community who claimed members of the Ethiopian community are "hot blooded," and their exasperation threshold is very low, especially in respect to relations between a married woman and a man other than her husband. The conclusion from this, based on *Azualus*, is that the temperament and exasperation threshold of "the common Ethiopian" is different from that of "the common Israeli," and is thus more likely to lead a husband killing a wife who went astray.

Justice Heshin, when referring to this argument, said
Not only did the expert not testify to that which the appellant's advocate wished to put in his mouth, but if we had accepted this argument, even in part, we would have turned the criminal law here into complete chaos. We reject this concept of "the common Ethiopian" out of hand. A Jew who emigrated from

¹⁰⁰ *Id.* at ¶ 3–4.

¹⁰¹ CrimA Chakula v. The State of Israel, Takdin Elyon 00(2) PD 126 [2000] (Isr.) (in Hebrew).

Ethiopian and lives in Israel is an Israeli in all respects, and the question of whether or not he was provoked is one of the circumstances of the matter. Indeed, it is possible that the culture of an immigrant to Israel will be influenced by the place from which he came to Israel, but the question of whether or not someone was provoked relates to the specific circumstances. This expert who appeared in the Court was not present during the act of homicide, and evidence regarding the character of a "common Ethiopian" is irrelevant as long as it is not directed at the person standing trial before the Court. In this matter, this expert has told us nothing.¹⁰²

Even though the court did not recognize the cultural defense or provocation in *Chakula*, the innovation of the court in this matter cannot be ignored. Justice Heshin accepted that it is possible that the defendant's cultural background may influence how he is provoked; however, since the expert's testimony only discussed the Ethiopian community in general, and did not address the specific defendant being tried, the expert witness did not effectively explain how the culture dictated his reactions to certain provocative acts in committing the crime.

In *Bitton*, Chief Justice Barak addressed the question of whether it was appropriate not to consider the subjective characteristics of the killer as part of the objective test.¹⁰³ Barak noted that the Supreme Court ruling determined that personal or sub-group characteristics of the killer shall not be considered as part of the objective test, but the Court is capable of changing this ruling.¹⁰⁴ According to Chief Justice Barak, the proper objective criterion is that which takes into account a number of characteristics that are subjective to the killer, but not all of them. However, this change should be made by the legislature as part of an overall reform to the structure of the homicide offenses and to the crime of murder in particular.¹⁰⁵

Chief Justice Barak added that the objective test in Israel, which does not account for the subjective characteristics of the killer, is too extreme and that, in the overall balance, the view of those demanding the recognition of subjective considerations should prevail.

The difficulty lies in determining the criteria for "subjectivising" the objective standard. This may be overcome by means of determining criteria as is customary in most systems of jurisprudence, but it would be better for these criteria to be formulated by the legislator.¹⁰⁶ In fact, Chief Justice Barak left an opening for taking subjective characteristics into account as part of the objective test of provocation. The Court noted that it could deviate

¹⁰² *Id.* at 127.

¹⁰³ Further Criminal Hearing 1042/04 *Bitton v. State of Israel* ¶ 66 [not published, Nov. 27, 2006] (Isr.) (in Hebrew).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at ¶ 67 of Chief Justice Barak's ruling.

¹⁰⁶ *Id.* at ¶ 68 of Chief Justice Barak's ruling.

from the precedent that refused to consider the personal and subgroup characteristics.

CONCLUSION

In the first part of the Article, I addressed the principle of culpability as the major reason for taking into account the cultural background of a defendant who belongs to a minority culture as part of the provocation tests. The Israeli Supreme Court's strict approach, where it refuses to consider the defendant's culture as a potential factor in the provocation doctrine, ignores the principle of culpability in a place where a comprehensive discussion of this issue is needed. This strict approach is problematic since it is so narrow; it is one-dimensional in that it places the public interest on a scale but does not account for the subjective culpability of the defendant, which is the real justification for the provocation doctrine.

Cultural background is an integral subjective character that affects a defendant's culpability. If the legislator would agree to recognize the weakness of human nature as part of the provocation doctrine, courts could no longer ignore the defendant's culture since it forms an integral part of that same humanity. A person who belongs to a specific minority culture is more likely to be provoked by acts or words, which may not provoke a person who belongs to a different culture.

It seems the Supreme Court dismissed the defendant's cultural background as part of the provocation doctrine because of three principal fears. First, the fear of what social message is conveyed to that same cultural community and to society in general. Second, the fear that a message of forgiveness, consideration, or recognition for the act of homicide in a specific minority culture, while the majority culture regards the sanctity of life as a supreme value and will not forgive such an act. Third, the fear of sending a message that the blood of victims from a specific culture is less red than the victims who belong to the majority culture. Furthermore, a person who kills his victim after an incident of provocation will not bear the mark of shame of a murderer and serve a mandatory life sentence but rather will be released from prison after only a number of years. This result is incompatible with holding the sanctity of life as a supreme value in the State of Israel. It is even likely to lead to a slippery slope as such recognition is likely to remove the bar of the restraint expected from members of a specific culture when they encounter a provocative situation.

We should keep in mind that the court is not required to accept norms or values of minority cultures and justify their existence, but it might (or might not) find the defendant's anger excusable, and it might (or might not) find his degree of anger sufficiently understandable.¹⁰⁷ The provocation defense is about

¹⁰⁷ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 996 (2002). Dressler refers to the facts of the Stewart-Gibson case in Australia where Stewart, a member of an Aboriginal tribe, spoke about tribal secrets in the presence of women and young men in violation of tribal norms. Another tribesman, Gibson, unsuccessfully sought to stop Stewart from violating the norm and, when he failed to do so, killed Stewart. Gibson was tried before a jury of non-Aboriginals. Dressler argues that characteristics of the defendant (other than

human imperfection and, more specifically, impaired capacity for self-control.¹⁰⁸

I am convinced that it is only possible to overcome these fears and difficulties as part of a substantive reform in manslaughter and murder offenses in general. Some of these solutions are proposed by Chief Justice Barak in *Bitton*, and by Justice Matza in *Melisa*.¹⁰⁹ Such reform may include distinctions between different kinds of murder offenses, or it may be that specific murder offenses will not obligate a mandatory life sentence, but rather a maximum sentence of life imprisonment. This solution, as indicated by Justice Matza in *Melisa*, makes the objective test of provocation redundant, since a person committing murder after provocation will be convicted of premeditated murder, and his sentence will be determined while taking all the circumstances into account, including the gravity of the provocation immediately prior to the act, the limitations of the defendant, and the relative magnitude of his moral failure in comparison with that expected from a person who has a typical temperament and has basic moral recognition of the sanctity of life.¹¹⁰

As part of this solution, it will be possible to arrive at a just and proper result, and match the sentence to the degree of the defendant's culpability, whenever the cultural background is considered an integral and inherent component to the question of culpability, without fearing the social message sent to the general public and to the cultural community to which the defendant belongs. Such a defendant will bear the mark of shame of a murderer, and his sentence will be determined only after taking into account all the circumstances, interests, and principles.

This middle path allows the Court discretion to arrive at the proper, correct and just result. Considering the cultural background of the defendant as a relevant factor in provocation and restraint is not significantly different from considering the personal characteristics of the defendant; in each analysis, we recognize the existing weaknesses in human nature to which we are all subject.

The values to which the Court refers are proper, and without doubt, the country would become chaotic were it not for the protection given by the Court against harming these values. However, it appears the Court has adopted too extreme of an approach given the inflexibility of the objective element in the provocation doctrine out of

those excluded pursuant to the oxymoron principle or which would undermine the normative message of the criminal law) that would help the jury measure the gravity of the provocation to the defendant ought to be incorporated. Thus, Gibson's cultural beliefs would be considered by the jury, as would the race of the defendant if, for example, the decedent's words or actions would inflame a person of that race to a greater extent than others. *Id.* at 1000. Dressler cited Robert L. Misner, *The Awkward Case of Harry Gibson*, 1986 ARIZ. ST. L.J. 691 (discussing *Regina v. Gibson*, an unreported case decided by the Supreme Court of South Australia (1973) (on file with the Arizona State Law Journal)).

¹⁰⁸ *Id.* at 978.

¹⁰⁹ CrimA 2534/93 *Melisa v. The State of Israel* 51(2) PD 597, 614 [1999] (Isr.) (in Hebrew).

¹¹⁰ *Id.* at 614. *See also* Further Criminal Hearing 1042/04 *Bitton v. State of Israel* ¶ 68 [not published, Nov. 27, 2006] (Isr.) (in Hebrew).

a fear that its elimination or reduction would remove the self-restraint to which each of us is obligated.

The worst scenario is that the law will recognize that "release of restraint" as something natural that forms part of the weakness in human nature. It is necessary to point out that we are not speaking of giving an overall exemption from criminal responsibility, but rather a specific mitigation to a defendant whose judgment, or more correctly his lack of judgment, in the act of homicide was sincere, true, and perhaps unavoidable, and is the result of external and internal factors influencing his personality. At present, such mitigation has no place in the Court apart from the light sent by Justice Heshin in the *Chakula* case.¹¹¹

¹¹¹ CrimA Chakula v. The State of Israel, Takdin Elyon 00(2) PD 126 [2000] (Isr.) (in Hebrew).

DECISION-MAKING PATTERNS AT THE FIRST TRIAL OF INTERNATIONAL CRIMINAL COURTS: A PERSPECTIVE ON THE ICC

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The first trials of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) resulted in convictions of the accused. This Article seeks to understand this observation by applying new institutionalist perspectives to decision-making processes of international criminal courts and tribunals. This Article argues that the first trials of such courts are affected by a learning curve and should be differentiated from other trials because of, inter alia, the novelty of the proceedings, the absence of previous jurisprudence, and the need to develop modi operandi, often from scratch. It then discusses decision-making patterns at the first trial, with reference to logics of action, and posits that, at the first trial, the logic of consequentiality is dominant, as the court would still not have determined its bounds of appropriateness, a phenomenon it terms the “first trial syndrome.” The Article concludes by applying this perspective to the first trial of the International Criminal Court (“ICC”).

INTRODUCTION

International criminal courts and tribunals generally deal “with the most horrific, large-scale crimes human beings can commit.”¹ The horror of these crimes, as well as the intense suffering by victims, have to some degree put the international community, including the human rights movement, “on the horns of a dilemma: vindicate the due process rights of the accused or adequately punish the perpetrator?”²

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¹ Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 689 (2007).

² *Id.*

The framers of international criminal courts do not remain neutral and unaffected in the face of this dilemma but rather are guided by a preference for the overarching value of accountability. This value preference eventually crystallizes in the legal frameworks³ of the international criminal courts themselves, giving rise to a structural leaning towards retribution and deterrence. Such frameworks are, therefore, value-laden.

However, while the presence of these values is acknowledged, it is argued that they are not *per se* deterministic and do not operate to constrain judicial decision-making. Instead, the statutes of international criminal courts account for other relevant values, such as human rights and due process. Thus, in what one commentator considers the “interplay of meaningful acts and structural contexts,”⁴ acts of judicial decision-making remain relatively autonomous from any structural determinants.⁵

Several factors may influence the relative importance attached to varying, and frequently competing, sets of values. For instance, in respect of due process considerations, another commentator observed that “[w]hether or not sufficient due process protections exist within a system depends in part on the *priority* those protections are given relative to the consideration of other interests in the trial process, such as the right of victims or the interest of the judge in excluding hearsay evidence.”⁶ This clearly favors an approach that places stronger emphasis on due process protections for the accused. He posits that “it is better for the credibility of a budding international criminal common law to err on the side of stronger protections rather than weaker,”⁷ while decrying the fact that “in the early days of the ad hoc Tribunals for Yugoslavia and Rwanda, rules of evidence and procedure were considered largely ‘technical,’ and thus to some extent dispensable.”⁸

Another scholar goes one step further and attempts to identify the structural limits on the growth of international criminal procedure and, in particular, due process rights for the accused.⁹ He

³ The term “legal framework” refers to the collective of statutes, rules of procedure, and other regulations governing a particular international criminal court.

⁴ Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the future of Public Law*, 82 AMERICAN POLITICAL SCIENCE REVIEW 89, 101 (1988).

⁵ SUE DAVIS, THE CHIEF JUSTICE AND JUDICIAL DECISION-MAKING: THE INSTITUTIONAL BASIS FOR LEADERSHIP ON THE SUPREME COURT, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

⁶ Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1394 (2001) (emphasis added).

⁷ *Id.* at 1437.

⁸ *Id.* at 1383.

⁹ Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 637 (2007).

proceeds to identify three broad phenomena that limit the growth of international due process growth: “(1) fragmentation of enforcement; (2) integration of conflicting legal systems; and (3) gravity of the crimes involved.”¹⁰

When considered against the value of accountability, entrenched as it is in the legal frameworks of international criminal courts, the relative weakness of due process rights may bear upon the overall process of judicial decision-making; however, these factors alone may not fully explain or determine the outcome of such decision-making. The question, therefore, arises as to whether further factors influence the careful calibration and balancing of judicial decision-making.

This Article will attempt to answer this question in relation to the first trial of international criminal courts. The reasons for singling out the first trial of international criminal courts will be expanded below. The Article will first proceed by considering a possible answer to the question posed above, drawn from the behavioralist camp, which places emphasis on the pre-formed preferences and attitudes of the relevant actors.

In another article on this subject, the author evaluated and positioned the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) judicial decisions along conservative-statist¹¹ and progressive-cosmopolitanist¹² spectrums to shed more light on “the structural and cultural factors that influence judicial policy-making in national and international courts,” with a view to applying the lessons to the ICC.¹³

That author’s consideration of *Akayesu*, the first case addressed in the ICTR, is particularly illuminating. He describes the case as “a microcosm of the complex relationship between the professional norms of the community of judges, their past humanitarian advocacy, and progressive development [of International Humanitarian Law (“IHL”).]”¹⁴ In his analysis, the author attaches great weight to the pre-formed, professional norms of international criminal judges, arguing that these are more likely to favor robust judicial decision-making.

For instance, he believed Judge Navanethem Pillay’s presence on the bench was critical in the amendment of the indictment in *Akayesu* to include gender-based crimes. He cited concurring

¹⁰ *Id.* at 640.

¹¹ The conservative-statist view envisions international law as the product of a common *demos*.

¹² The progressive-cosmopolitanist view conceptualizes international law skeptically and in tension with norms of state security on the “right” and national democracy often on the “left.”

¹³ Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 377, 380, 384 (2006).

¹⁴ *Id.* at 391.

authority and said “crucial to [the amended indictment’s] inclusion [of the sexual violence charge] was the presence of Judge Navanethem Pillay of South Africa on the bench, a judge with extensive expertise in international human rights law and gender-related crimes.”¹⁵ He then proceeded to substantiate his view by making reference to Judge Pillay’s extensive record of advocating for women’s causes and “her reception of the 2003 Women’s Rights Prize in South Africa,” accompanied by a \$200,000 cash award.¹⁶

While the importance of the background and preferences of the individual judges at international criminal trials should not be discounted, it is difficult to concur with an assertion that, at international criminal courts, “checks and balances, as well as other background norms which shape the perception of the appropriate judicial role, are either absent or, at best, ill-fitted.”¹⁷

This Article seeks to explain patterns in judicial decision-making, not on the basis of behavioralism but rather on the basis of new institutionalist perspectives, which have been propounded by other scholars and authors on this subject.

NEW INSTITUTIONALISM

While writing about the United States Supreme Court, Howard Gillman observed that many behaviorists insisted for decades that “when deciding cases on the merits, [judges] were properly viewed as policy makers who were remarkably free to make decisions on the basis of their political preferences or ‘attitudes.’”¹⁸ Indeed, political scientists treated the judicial institutions, such as the Supreme Court of the United States, as little more than “a collection of individuals who were pursuing their personal policy preferences.”¹⁹

¹⁵ *Id.* at 391–92. See also Kelly D. Askin, *Stefan A. Riesenfeld: Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 318 (2003).

¹⁶ Wessel, *supra* note 13, at 392. Similarly, others argued that “this judgment...might not have come about, were it not for the intervention of Judge Pillay...” CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 168 (Philippe Sands ed., 2003).

¹⁷ Wessel, *supra* note 13, at 386.

¹⁸ HOWARD GILLMAN, THE COURT AS AN IDEA, NOT A BUILDING (OR A GAME): INTERPRETATIVE INSTITUTIONALISM AND THE ANALYSIS OF SUPREME COURT DECISION-MAKING, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 65 (Cornell W. Clayton & Howard Gillman eds., 1999).

¹⁹ HOWARD GILLMAN, SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 1 (Cornell W. Clayton & Howard Gillman eds., 1999).

However, thanks to a number of developments, scholars began “to shift their focus away from the long-standing [questions] of how institutions are affected by the personal characteristics of judges [toward] the question of how judges are affected by the institutional characteristics within which they are embedded.”²⁰ In political science, the origin of the shift to ‘new institutionalist’ thinking was traced to James G. March and Johan P. Olsen.²¹

In their 1989 book, March and Olsen first observed that “in most contemporary theories of politics, traditional political institutions, such as the legislature, the legal system” and, presumably, the courts of law, “have receded in importance from the position they held in earlier theories.”²² However, they also noted that “institutional perspectives have reappeared in political science,” reflecting an “empirically based prejudice,” which is essentially “an assertion that what we observe in the world is inconsistent with the ways in which contemporary theories ask us to think that the organization of political life makes a difference.”²³

The authors attributed this ‘re-discovery’ of institutions to the increasing importance and complexity of institutions in contemporary life. They noted this renewed interest in institutions was not peculiar to political science but was also a recent trend in other disciplines, including public law.²⁴ Another author agreed with March and Olsen in observing that “institutions appear to be ‘more than simply mirrors of social forces.’”²⁵ That author believed that institutions, such as international criminal courts, “have a kind of life of their own. They influence the self-conception of those who occupy roles defined by them in ways that can give [persons] distinctively ‘institutional’ perspectives.”²⁶ Further, he was mindful that moving the focus away from the attitudes of individual judges and towards institutions and structures might be too full of reification and anthropomorphism. However, there is no need for the new institutionalist approach to be taken so far. New institutionalism requires us only:

to stress how background structures *shape* values and interests, not to speak as if they have interests of their own. Most of our experience certainly suggests that human action such as judicial decisions are indeed influenced by a great range of structural contexts – by the actor’s position within state agencies

²⁰ GILLMAN, *supra* note 18, at 66.

²¹ CORNELL W. CLAYTON, THE SUPREME COURT AND POLITICAL JURISPRUDENCE: NEW AND OLD INSTITUTIONALISMS, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 30 (Cornell W. Clayton & Howard Gillman eds., 1999).

²² JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 1 (1989).

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ Smith, *supra* note 4, at 95, 101.

²⁶ *Id.* at 95.

or political parties, by economic relations, by ideological outlooks, by enduring ethnic alliances, and so on. But the result is often that actors are faced with so many conflicting imperatives that they retain significant room for choice....²⁷

New institutionalism seeks to explain what shapes these choices. New institutionalism embraces several different approaches. As Gillman and Clayton noted, “there are nearly as many ways to think about institutions as there are practitioners of institutional analyses.”²⁸

In a review of the literature on new institutionalism, one scholar identified at least three broad camps of new institutionalism: historical, rational choice, and ethnographic or social institutionalism.²⁹ Another scholar suggested the two major approaches of particular relevance to judicial institutions are historical-interpretive and rational-choice institutionalism. Both approaches emphasized the importance of “assigning a more autonomous role to social,” political and, in this case, judicial institutions, and of exploring the interplay between the institutional role and the behavior of actors.³⁰ As one author observed “[a]lthough the two versions of the new institutionalism overlap to the extent that they share the conviction that institutional arrangements matter, from there they take very different paths. To some extent it may be possible to develop a viable argument that there is room in law-and-courts scholarship for *both* approaches.”³¹ Indeed, other observers have called for a “‘general approach’ that would attempt to explain how both rules and anticipated consequences affect behavior and outcomes.”³²

It is precisely such an inclusive framework that March and Olsen set out to elaborate in their working paper “The Logic of Appropriateness.”³³ This framework will also constitute the basis

²⁷ *Id.* at 100.

²⁸ GILLMAN, *supra* note 19, at 6.

²⁹ Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 *COMPARATIVE POLITICS*, 231 (1995).

³⁰ SUE DAVIS, THE CHIEF JUSTICE AND JUDICIAL DECISION-MAKING: THE INSTITUTIONAL BASIS FOR LEADERSHIP ON THE SUPREME COURT, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 135 (Cornell W. Clayton Howard Gillman eds., 1999).

³¹ *Id.* at 152 (emphasis added).

³² Elinor Ostrom, *Rational Choice Theory and Institutional Analysis: Toward Complementarity*, 85 *AMERICAN POLITICAL SCIENCE REVIEW*, 239 (1991). See also Robert Nalbandov, *Battle of Two Logics: Appropriateness and Consequentiality in Russian Interventions in Georgia*, 3 *CAUCASIAN REVIEW OF INT’L AFFAIRS*, 36 (2009).

³³ James G. Marsh & John P. Olson, *The Logic of Appropriateness*, (Arena Centre for European Studies, University of Oslo, Working Paper No. 4, 2009), available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2004/wp04_9.pdf.

adopted by this Article for its analysis of judicial decision-making at international criminal courts.

In elaborating on this framework, March and Olsen described two main logical actions that underpin institutional decision-making: the logic of appropriateness and the logic of consequentiality. They noted that:

A theoretical challenge is to fit different motivations and logics of action into a single framework....If it is assumed that no single model, and the assumptions upon which it is based, are more fruitful than all the others under all conditions and that different models are not necessarily mutually exclusive, we can examine their variations, shifting significance, scope conditions, prerequisites and interplay, and explore ideas that can reconcile and synthesise different models....We may also specify through what processes different logics of action *may become dominant*....We may also study which settings in practice enable the dominance of one logic over all others, for example under what conditions rules of appropriateness may overpower or redefine self-interest, or the logic of consequentiality may overpower rules and an entrenched definition of appropriateness.

The authors proceeded to discuss the possible relationships between the logics of action and, after concluding that to subsume one logic as a special case of the other would be an unsatisfactory approach, argued that “the suggestion of a *stable* hierarchy between logics and between types of decisions and actors is, however, not well supported by empirical findings.”³⁴

March and Olsen observed that

[a] more promising route may be to differentiate logics of action in terms of their *prescriptive clarity* and hypothesize that a clear logic *will dominate* a less clear logic. Rules of appropriateness are defined with varying precision and provide more or less clear prescriptions in different settings and situations....In brief, rules and interests give actors more or less clear behavioral guidance and make it more or less likely that the logic of appropriateness or the logic of consequentiality will dominate.³⁵

In the context of international criminal courts, this Article posits that while there is no set hierarchy between the logics of consequentiality and appropriateness in any given trial, it is the logic that provides the greatest prescriptive clarity that would seem to dominate judicial decision-making. Since the bounds of appropriateness at the first trial of an international criminal court would still be evolving and would not afford sufficient prescriptive

³⁴ *Id.* at 20 (emphasis added).

³⁵ *Id.* at 20–21 (emphasis added).

clarity, it is the logic of consequentiality that would dominate decision-making. This logic would resonate with, and seek to actuate, the value of accountability entrenched in the legal framework of the court in question. The recurrence of this phenomenon in the course of the first trial of an international criminal court may be referred to as the “first trial syndrome.”

This Article now proceeds to discuss the logics of action, which include the logic of consequentiality and the logic of appropriateness. It will thereafter examine the question as to why it is important to differentiate between the first trial of international criminal courts and subsequent trials. It will then briefly discuss the application of these logics in the first trials of the ICTY and the ICTR. The Article concludes by commenting on the ICC and its first trial.

LOGICS OF ACTION

Logic of Consequentiality

According to the logic of consequentiality, behavior is preference-driven and focuses on expectations about consequences. Behavior is willful, reflecting an attempt to make outcomes fulfill values, to the extent possible. This may be contrasted with the logic of appropriateness, where behavior is intentional but not willful.³⁶

The logic of consequentiality also contends that decision-making is consequential and preference-based. It is consequential in the sense that behavior depends upon anticipations of future effects of current actions. Alternatives are interpreted in terms of their expected consequences. It is preference-based in the sense that consequences are evaluated in terms of personal values and preferences. “Alternatives are compared in terms of the extent to which their expected consequences are thought to serve” the values of the decision maker.³⁷

The following sequence characterizes the decision-making process within the logic of consequentiality:

1. What are my alternatives?
2. What are my values?
3. What are the consequences of my alternatives for my values?
4. Choose the alternative that best fulfills my values.

Logic of Appropriateness

The logic of appropriateness involves determining the situation, the role being fulfilled, and then the obligations of that role in that situation. Rules are understood to include both written rules, such as laws and regulations, as well as unwritten rules, such as conventions, beliefs, paradigms, and cultures of the institution.

³⁶ JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 160–61 (1989).

³⁷ JAMES G. MARCH & CHIP HEATH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN, 2 (1994).

Rules define relationships among roles in terms of what an incumbent of one role owes to incumbents of other roles. The terminology is one of duties and obligations rather than anticipatory, consequentialist decision-making. The institution defines what is appropriate for a particular person in a particular situation, and this is transmitted through a process of socialization. When individuals enter an institution, they try to discover, and are taught, the rules.

The following sequence characterizes the decision-making process within the logic of appropriateness:

1. What kind of situation is this?
2. Who am I?
3. How appropriate are different actions for me in this situation?
4. Do what is most appropriate.

Describing behavior as “rule-following” is only the first step in understanding how rules affect behavior, since rules and their applicability to particular situations are often ambiguous. The process includes the whole panoply of actions and constructions by which the logic of appropriateness is implemented in the face of conflict and ambiguity. Thus, “the criterion is appropriateness, but determining what is appropriate in a given situation is a nontrivial exercise.”³⁸ Moreover, “the logic of appropriateness is a logic attached to an ‘evolving conception of propriety.’”³⁹ “Decision makers follow rules,” but rules change and evolve through a number of different, intertwined processes.⁴⁰

Both logics require thoughtful action. They are, however, distinguished by the demands they make on the abilities of decision-makers. The logic of consequentiality makes great demands on the abilities of decision-makers to anticipate the future and to form useful preferences. The logic of appropriateness, on the other hand, makes great demands on the abilities of decision-makers to identify the situation and determine the appropriate response.

Both processes assume that decision-makers have relatively high reasoning skills. March underscored that “[e]ach logic is consistent with the glorification of the human estate and with high hopes for human action. *Both are plausible processes for reasoning, reasonable decision makers.*”⁴¹

WHY DOES THE FIRST TRIAL MATTER?

Having briefly described the logics of action that may influence judicial decision-making, it is important to return to the question of why the first trial matters and why it is important to distinguish the first trial from other international criminal trials—a distinction that is not often made in the literature.

³⁸ MARCH & OLSEN, *supra* note 36, at 25.

³⁹ MARCH & HEATH, *supra* note 37, at 77.

⁴⁰ *Id.*

⁴¹ *Id.* at 101 (emphasis added).

One author depicted a telling scenario that highlights some of the challenges the ad hoc Tribunals may have faced at their first trial:

Imagine you are a judge in a newly established jurisdiction where you are not bound by precedent and have only a set of procedures that tell you the accused shall have the right to remain silent and the right to be assisted by counsel. You then face a series of motions, all matters of first impression in your court. One is a motion to compel a handwriting sample, another is a motion to compel private papers, and a third is the introduction of an interview taken in the absence of counsel in another jurisdiction where the law prohibits counsel. The ad hoc Tribunals represent such a case study.⁴²

The first trial of an international criminal court is intrinsically connected with the maturation cycle of the court at issue. Parties and participants will be affected by the novelty of proceedings and will be occupied with developing norms and approaches for the court in question, bearing in mind its unique *sui generis* nature. This process must, moreover, be carried out in the absence of “international general rules on international criminal proceedings.”⁴³

Throughout the first trial, international criminal courts will be affected by a learning curve whereby they will develop and refine their working methods and approaches, gain invaluable experience, and eventually develop an indigenous sense of appropriate behavior, i.e. its “appropriateness.”

While this cycle of maturation appears like an inevitable feature of the first trial of such courts, the literature does not often acknowledge this. To the contrary, this feature is often disregarded, if not dismissed altogether, the assumption being that international criminal courts require no learning curve and have a fully-fledged sense of appropriateness from the word go, from the first trial.

In this respect, the available literature rarely makes reference to the need for a learning curve in the conduct of the first trial in international criminal courts. Perhaps, the reason for this is the tacit expectation that such courts ought to be capable of operating at full maturity and capacity from their inception.

For instance, writing about the ad hoc Tribunals, scholars observed that, unlike some national legal systems that have matured slowly and gradually over hundreds of years, “international tribunals

⁴² Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1431 (2001).

⁴³ GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 23 (2005) (quoting ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 389 (2003)). Although the ICTY “adopted the first ever comprehensive code of international criminal procedure,” this was not of universal application, but rather, it was “adapted to the special needs of the Tribunal....” See ILIAS BANTEKAS AND SUSAN NASH, INTERNATIONAL CRIMINAL LAW 518 (2007).

are expected to move from a standing start (consisting of a brief statute and little else) to develop an appropriate legal system and to hold trials delivering satisfactory results within a few years.” Making a similar point in relation to the ICC, another author noted that “[i]n terms of experience, [the ICC] would be, metaphorically, a *child*. But this child would—having regard to the seriousness of the crimes and their consequences—have to *be immediately capable of acting as an adult*.”⁴⁴

The expectation that international criminal courts may operate at full maturity from inception is empirically questionable. Thus, it is little wonder that authors have remarked that “[t]his asks a very great deal of them.”⁴⁵ I would argue that the experience gained from the first trial cycle is essential for international criminal courts to be capable of acting “as an adult,” that is, to gain a sense of how to act appropriately.

Various examples can be extracted from the literature that show the international criminal courts developing and refining their methods and approaches in their first trials to more ‘appropriate’ methods and approaches in other trials. At the first trial of the International Criminal Tribunal of the former Yugoslavia (“ICTY”), which involved the *Tadic* case, the court consulted extensively with the parties on a wide range of procedural issues. As this was the first trial conducted by the ICTY, “the Trial Chamber sought to involve the parties in discussion of the practical and procedural aspects of the trial,” including use of courtroom technology, pre-trial briefs, financial arrangements for the Defense counsel, and cooperation of State authorities.⁴⁶

With regard to the International Criminal Tribunal of Rwanda (“ICTR”), scholars undertook an extensive study of eight trials across the three chambers of the ICTR.⁴⁷ While the project itself did not specifically cover the first trial of the ICTR, it did demonstrate clearly that at least some of the working methods of the ICTR had in fact changed from the earlier to the later trials. For example, when confronted with oral motions on novel legal issues, the earlier trials of the ad hoc Tribunals tended to render written decisions informed by legal research. However, this practice quickly became impractical and, as “the administrative delays caused by the delivery of many formal written decisions” began to impair “the

⁴⁴ JAMES CRAWFORD, *THE DRAFTING OF THE ROME STATUTE*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 113 (Philippe Sands ed., 2003) (emphasis added).

⁴⁵ GEOFFREY NICE & PHILIPPE VALLIÈRES-ROLAND, *PROCEDURAL INNOVATIONS IN WAR CRIMES TRIALS*, in GIDEON BOAS & HIRAD ABTAHI, *THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY* 144 (Gideon Boas & Hiram Abtahi eds., 2006).

⁴⁶ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶19 (May 7, 1997).

⁴⁷ See Rosemary Byrne, *The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice*, 25 *CONN. J. INT'L L.* 243, 273 (2004).

efficient operation of the Tribunals,” later trials moved towards rendering oral rulings for many motions instead of written decisions.⁴⁸

Another scholar noted that “each international criminal tribunal (ICTY, ICTR and ICC) has its own Rules of Procedure and Evidence.”⁴⁹ Not infrequently, these “rules of procedure and evidence have the daunting task of creating, rather than reflecting, a shared and coherent conception of process and professional roles.”⁵⁰ Moreover, as there is no overarching procedure or hierarchy between international criminal courts, each court constitutes a distinctive, self-contained legal system that cannot be assessed in comparison with domestic criminal courts.⁵¹

Such international criminal courts, moreover, operate within the sphere of international humanitarian law and international criminal law, which are themselves still developing.⁵² International law is “decentralized,” in that “[t]here is no clear and uncontested authority in international law, no law-maker in the model of the ‘sovereign.’”⁵³ One author noted that the “absence of a supreme international criminal court means that [the work of international criminal courts] has occurred in a decentralized manner.”⁵⁴

The lack of a traditional source of authority blurs the threshold “between the non-legal and the legal.”⁵⁵ Referring to the ad

⁴⁸ *Id.*

⁴⁹ GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 23 (2005) (quoting ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 389 (2003)).

⁵⁰ Byrne, *supra* note 47, at 248.

⁵¹ Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569, 584 (2000). See also JAMES CRAWFORD, THE DRAFTING OF THE ROME STATUTE, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 154 (Philippe Sands ed., 2003) (stating that the ICC constitutes a “distinct and to a considerable extent an *autonomous* criminal justice system”).

⁵² “The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing...” Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 113 (March 24, 2000).

⁵³ Anne Orford, *The Destiny of International Law*, 17 LEIDEN J. INT'L L. 441, 443 (2004).

⁵⁴ Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, *European Journal of International Law*, 21 EUR. J. INT'L L. 543, 554 (2010). See also Emanuela Fronza, Commentary, in André Klip and Göran Sluiter, *The International Criminal Tribunal for Rwanda 2001-2002* 481 (2003).

⁵⁵ Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 415 (1983), quoted in Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 435 (2006).

hoc Tribunals, one author stated that “the normativity of international criminal law when these tribunals began their work was (and is) far from settled.”⁵⁶ Another calls attention to the “the absence of *clear* international standards for the rights of the accused.”⁵⁷ Against this background, international criminal courts, as *sui generis* systems, are thus occupied from their inception with the process of determining the bounds of appropriate conduct.

It is notable, for instance, that the Appeals Chambers of both the ICTY and the ICTR took the approach of interpreting their legal frameworks broadly to allow issues of general significance, even ones which were not strictly material to the judgment under appeal, to be raised to ensure the development of its jurisprudence.

As one author noted, “[t]his possibility of appeal, in fact, is not admitted in the text of the Statute.”⁵⁸ Nevertheless, in the *Akayesu* appeal judgment, the ICTR Appeals Chamber allowed, and indeed seemed to encourage, the raising of issues of general significance, noting that the Tribunal was still “at an early stage of its development” and the consideration of such issues would therefore be “appropriate” since their resolution could be important for the development of the Tribunal’s jurisprudence.⁵⁹

This is not to downplay the relevance of applicable laws and general principles of law “accepted by the world’s major legal systems,”⁶⁰ which impose restrictions and provide guidance in this process. However, the applicable laws are not always clear,⁶¹ and

⁵⁶ Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT’L L. 543, 547 (2010).

⁵⁷ DeFrancia, *supra* note 42, at 1437 (emphasis added).

⁵⁸ Emanuela Fronza Commentary, in André Klip & Göran Sluiter, *The International Criminal Tribunal for Rwanda 2001-2002* 484 (2003).

⁵⁹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 21 (June 1, 2001).

⁶⁰ KNOOPS, *supra* note 49, at 23. The precise delimitations of such fundamental values and norms are context-related. Writing in relation to regional human rights bodies, Barnidge observed that “[i]t should not come as a surprise that the work of the African Commission and the Inter-American Commission reflects, respectively, the human rights situation in Africa and the Americas” and consequently have interpreted such rights as that on the presumption of innocence, in accordance with their regional contexts. See Robert P Barnidge Jr., *The African Commission on Human and Peoples’ Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence*, 4 AFRICAN HUMAN RIGHTS. LAW JOURNAL 108, 120 (2004).

⁶¹ Robinson admits that the ICTY Statute “could have benefited from an express provision on applicable law,” particularly one that clarified the applicability of national laws. See Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 584 (2000), in GIDEON BOAS & HIRAD ABTAHI, *THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY* 173 (Gideon Boas & Hiram Abtahi eds., 2006).

even such fundamental notions as those of “fair trial” may be unclear.⁶²

Each international criminal court represents a separate, autonomous, and self-contained system⁶³—a *sui generis* system⁶⁴—in relation to other contemporary or historic⁶⁵ international criminal courts, as well as to other regional and domestic courts. Moreover, for a myriad of problems associated with collective action, States themselves fail on occasion to agree on appropriate rules, requiring the judges themselves “to create new, efficient norms of behavior.”⁶⁶

In their extensive analysis of the ICTY’s jurisprudence between 1993 and 1998, two scholars noted that:

[t]he Statute is only a very rudimentary instrument which was further supplemented by the International Tribunal’s own Rules of Procedure and Evidence. However, legal questions kept and keep coming up in the case before the Tribunal. In dealing with these issues, it needs to be borne in mind that there was no useful precedent that could guide the Tribunal in its work. Therefore, it was and is a major challenge to the Tribunal to come up with creative solutions to legal problems in a manner that enables the Tribunal to

⁶² Safferling’s discussion as to whether the right to “fair trial” emanates from treaty, custom, or general principles of international law and, further, whether it may be classified as a civil and political right, an economic and social right, or neither. See CHRISTOPHER SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 25–31 (2001).

⁶³ See ILIAS BANTEKAS & SUSAN NASH, *INTERNATIONAL CRIMINAL LAW* 515 (2007). With reference to the Appeals Chamber Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction at the ICTY, the authors note that the Appeals Chamber expressly confirmed the “inherent or incidental jurisdiction of any judicial body to determine its own competence, whether this is provided for in the constitutive instrument or not (that is, the so-called doctrine of ‘Kompetenz-Kompetenz.’”

⁶⁴ For instance, the ICTY held that the Statute “is a *sui generis* legal instrument and not a treaty...” See *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case IT-94-1-PT, ¶ 18 (August 10, 1995). International criminal courts constitute autonomous and self-contained legal systems. See Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 *EUR. J. INT’L L.* 569, 572 (2000).

⁶⁵ While the ICTY regarded the Nuremberg Tribunal as its “closest historical precedent,” with reference to crimes against humanity it held that it was not bound by the past doctrine of that Tribunal, but had to apply “customary international law as it stood at the time of the offences.” See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 654, 705 (May, 7 1997).

⁶⁶ Wessel, *supra* note 16, at 450.

function effectively and fully respects the rights of the accused.⁶⁷

This emerged clearly, for instance, in an ICTY decision on protective measures for witnesses, where the Tribunal emphasized that it had to “interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies....”⁶⁸ In this context, it was observed that “whilst [the ICTY] must follow existing rules of international law and domestic practice, those principles must be applied to the particular requirements of the Tribunal.”⁶⁹

One scholar underscored the “challenges” arising from the fact that “international law on [due process is] not well developed.”⁷⁰ He points out that on account of the *sui generis* system of international criminal courts, “domestic and international norms of due process” may have to undergo substantial transformation before they could be “incorporated in a new system.”⁷¹ This point was brought to the forefront in *Tadic* where the ICTY held

[a]lthough the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies. This lack of guidance is particularly troubling because of the *unique character* of the International Tribunal.⁷²

Indeed, the ICTY “could have benefited from an express provision on applicable law,” particularly one that clarified the applicability of national laws.⁷³

⁶⁷ André Klip & Göran Sluiter, *The International Criminal Tribunal for the Former Yugoslavia, 1993-1998* 9 (1999).

⁶⁸ Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 28 (August 28, 1995).

⁶⁹ Mark Mackarel Commentary in André Klip & Göran Sluiter, *The International Criminal Tribunal for the Former Yugoslavia, 1993-1998* (1999).

⁷⁰ DeFrancia, *supra* note 42, at 1393.

⁷¹ *Id.* at 1394. See also GEOFFREY NICE & PHILIPPE VALLIÈRES-ROLAND, *Procedural Innovations in War Crimes Trials*, in GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 144 (Gideon Boas & Hiram Abtahi eds., 2006) (noting that the ICTY Tribunal had to find a “‘Tribunal solution’ to some of its procedural problems”).

⁷² Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case IT-94-1-PT, ¶ 18 (August 10, 1995) (emphasis added).

⁷³ Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 584 (2000), in GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF

Similarly, the ICTR Appeals Chamber noted that the Tribunal's legal framework contained no specific provisions on the issue of leading questions. The Chamber referenced domestic law in this area, namely the United States Federal Rules of Evidence, on which the Tribunal's general rules on examination and cross-examination of witnesses appear to be patterned. The Chamber underscored that the Tribunal's rules "*take on a life of their own* upon adoption.... Interpretation of the provisions thereof may be guided by the domestic system it is patterned after, but under no circumstance can it be subordinated to it."⁷⁴

In "the absence of clear international [procedural standards],"⁷⁵ there is no universal understanding of what constitutes such basic principles as "fair trial." This principle has to be interpreted and developed by the international criminal court to which it applies.⁷⁶ What is considered "unfair" treatment will depend on the context of each individual international criminal court.⁷⁷ "It is by no means obvious what 'fair trial' really encompasses, and what the singular rights within the 'fair trial' concept stand for."⁷⁸

Scholars have different opinions as to what constitutes fairness. One author, for instance, said that expeditiousness is one right encompassed in a fair trial.⁷⁹ Another author noted that "the 'conventional wisdom' among policymakers, practitioners, and commentators [within and outside academia] is that war crimes prosecutions, particularly those at the [ICTY] and its counterpart for Rwanda ("ICTR"), have frequently been too slow and that it is essential for the future success of the ICC (and other ad hoc tribunals)" to be carried out more expeditiously.⁸⁰ However, some delay may arguably be "*beneficial* to the pursuit of justice."⁸¹ In this respect, "there is no *one* approach that will work for all cases. In each instance, the international community [and, particularly, the international criminal courts] must strike the right balance,

INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 173 (Gideon Boas & Hiram Abtahi eds., 2006).

⁷⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 323 (June 1, 2001) (emphasis added).

⁷⁵ See DeFrancia, *supra* note 42 (underscoring the "the absence of clear international standards for the rights of the accused...").

⁷⁶ *Id.* at 1395.

⁷⁷ CHRISTOPHER SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 42 (2001).

⁷⁸ *Id.* at 26.

⁷⁹ Robinson, *supra* note 73, at 171.

⁸⁰ Alex Whiting, *In International Criminal Prosecutions, Justice Delayed can be Justice Delivered*, 50 HARV. INT'L L. J. 323, 323-24 (2009).

⁸¹ *Id.* at 326 (2009). Thus, while it is true that "justice delayed, justice denied," it may be equally true that justice hurried, justice buried. *Id.* at 324 n.1.

depending on all of the circumstances, between the desire for expediency and the need for time.”⁸²

From the moment of their inception, international criminal courts set out to develop and determine their own bounds of appropriate behavior, whether in relation to such basic notions as a fair trial and what the appropriate due process safeguards for the court in question are, to appropriate working methods and approaches. In this process, the court in question could usefully draw on the lessons, experiences, and expertise of other courts and tribunals—whether international, regional, or domestic.⁸³ However, even here, it would have to determine which practices to adopt and to discard in accordance with its own specificities.⁸⁴ It would have to be vigilant not to adopt the approaches of other courts wholesale, unless warranted, as this may impact the autonomy and *sui generis* nature of its system. Indeed, there are several examples of different international criminal courts adopting different approaches to similar substantive and procedural matters.⁸⁵

An essential milestone in the maturation of international criminal courts is the conduct of the first trial. While much useful preparatory work may be carried out in advance, the bounds of appropriateness may not be effectively predetermined without the practical experience gleaned from the first trial. Throughout the first

⁸² *Id.* at 348. Not all commentators would agree with this approach. For instance, Nice and Vallières-Roland, who both worked at the ICTY Office of the Prosecutor, argued in favor of a twelve-month time limit for the determination of cases, including the biggest leadership cases. See GEOFFREY NICE & PHILIPPE VALLIERES-ROLAND, PROCEDURAL INNOVATIONS IN WAR CRIMES TRIALS, in GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 167 (Gideon Boas & Hiram Abtahi eds., 2006).

⁸³ “As a practical matter, donations from institutions such as the European Union have also been used to sponsor an exchange of technical assistance and experts between the ICTY, ICTR, ICC and Sierra Leone in order to ensure that each institutions [sic] is able to benefit from each other’s institutional experience and expertise.” GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 24 (2005).

⁸⁴ Authors noted that “in the absence of...explicit guidance, the judges of the ad hoc Tribunals have had cause to consider the value of different decisions and case law from international, regional, and national courts and tribunals.” See KARIM A. KHAN, RODNEY DIXON, ADRIAN FULFORD, AND CAROLINE BUISMAN, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 13 (3d ed. 2009).

⁸⁵ Unlike the ICTY, the ICTR disallowed complete witness anonymity at the trial by limiting nondisclosure to a period before the trial, generally not exceeding twenty-one days. As such “[t]he Rwandan Tribunal’s approach demonstrates that, despite the volatility in their country, effective approaches to witness vulnerabilities do not require that the identities of the witnesses be permanently withheld from the accused.” See Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1422 (2001).

trial, international criminal courts gradually build their own repertoire of appropriate behavior through the delivery of judicial decisions and judgments.

THE DOMINANT LOGIC AT FIRST TRIAL

At their first trials, international criminal courts will take forward the process of determining the bounds of their appropriate conduct, but the logic of appropriateness will not offer sufficient prescriptive clarity at that stage to guide judicial decision-making. The bounds of appropriateness at the first trial are evolving through the disposition of novel issues, the gradual accumulation of experience, and the repertoire of decisions and judgments defining such bounds. In the meantime, it is the logic of consequentiality that dominates judicial decision-making at the first trial. This logic, with its pre-eminent focus on values, readily resonates with, and seeks to give effect to, the value of accountability, a value that is embedded in the legal frameworks of international criminal courts.

The recurrence of this phenomenon during the course of a trial may be referred to as the “first trial syndrome.” Judicial decision-making at this point is primarily characterized by a consequential desire to give effect to the value of accountability, rather than by a primary concern with appropriateness. This being said, it is important to point out that, in line with March and Olsen’s view,⁸⁶ these two logics need not be mutually exclusive. Even though the logic of consequentiality would seem to dominate at the first trial, both logics may coexist and influence judicial decision-making. Therefore, while one would expect a number of judicial decisions at the first trial to be in line with the logic of consequentiality, it is possible, and indeed likely, that some decisions will instead follow the logic of appropriateness. In a sense, these may be considered the exceptions that prove the rule.

While it is not possible to undertake an extensive examination of the case law in this Article, the following examples are only intended to give an indication of the logic of consequentiality at the first trial.

Tadic trial at the ICTY

The *Tadic* trial at the ICTY was historic because it was “the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal...”⁸⁷ Although *Tadic* was not the first person

⁸⁶ James G. Marsh & John P. Olson, *The Logic of Appropriateness*, (Arena Centre for European Studies, University of Oslo, Working Paper No. 4, 2009), available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04_9.pdf.

⁸⁷ Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶1 (May 1, 1997) (emphasis added). In making this assertion, the ICTY Trial Chamber II noted that its predecessors, the international military tribunals

the ICTY sentenced,⁸⁸ as the Tribunal's first case, "[i]ts importance cannot be underestimated, also in symbolic terms: it is the first judgment of an international criminal tribunal since Nuremberg and Tokyo."⁸⁹

When *Tadic* sought to dispute the very legality of the ICTY, the Trial Chamber determined that this was a "non-justiciable" issue and that the "Tribunal was not competent to review the decision of the [UN Security Council]."⁹⁰ The Tribunal took the view that the ICTY was not a constitutional court with powers to review and scrutinize the legality of UN decisions by the Security Council, which had broad discretion in the exercise of its authority under Chapter VII of the UN Charter.⁹¹ As commentators observed, "[t]he importance of the jurisdiction cases for the Tribunal is self-evident. Had the Tribunal found it was improperly constituted or could not otherwise exercise jurisdiction, its continuing functioning would be seriously threatened."⁹²

It is telling that the Appeals Chamber⁹³ disagreed with the deferential approach of Trial Chamber, finding that the ICTY was indeed "empowered to pronounce upon the legality of its establishment," finding, however, that there was no defect therein.⁹⁴ In considering this challenge, one author observed that the Chamber responded essentially in two ways: "[with] the military tribunal analogy; and on the basis that the international arena is special, and is not subject to international standards applicable to national courts."⁹⁵

With regard to the military tribunal analogy, the ICTY expressly acknowledged that, in light of the specific nature of the Tribunal and the gravity of the crimes falling within its jurisdiction, rights of due process for the accused, such as Article 6 of the European Court of Human Rights ("ECHR"), had to be "limited." The

at Nuremberg and Tokyo, were multinational in nature, representing only part of the world community.

⁸⁸ The Tribunal's first sentencing judgment came from a guilty plea.

⁸⁹ André Klip & Göran Sluiter, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998* 11 (1999).

⁹⁰ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 15 (May 15, 1997).

⁹¹ Theo van Boven, *Commentary* in André Klip & Göran Sluiter, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 1993-1998* (1999).

⁹² André Klip & Göran Sluiter, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 1993-1998* 10 (1999).

⁹³ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 3-6 (October 2, 1995).

⁹⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 15, 16 (May 7, 1997).

⁹⁵ JAMES CRAWFORD, *The Drafting of the Rome Statute, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 129 (Philippe Sands ed., 2003).

Tribunal held that: “[the ICTY] is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.”⁹⁶

With regard to the lesser applicability of domestic due process standards, the Tribunal held:

[the] appellant has not satisfied this Chamber that the requirements laid down in these . . . conventions [the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights] must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court...⁹⁷

The logic of the Chamber’s decision in this case and, particularly, its readiness to accept a watered-down standard of due process protections for the accused at an international criminal trial, indicates a logic of consequentiality with its focus on the value of accountability for war criminals. One scholar protested that “[i]t seems wrong in principle to say that international criminal process is subject to a lesser standard than national criminal process...*How can my right to be tried by an impartial and independent tribunal established by law be abrogated because the tribunal is established at the international level?*”⁹⁸

Interestingly, a former President of the ICTY wrote an article subsequent to this statement and cautioned that

[c]are must be taken lest the modifications [of due process rights at international criminal courts] go so far as to curtail the rights of the accused under customary international law. There is no basis for interpreting the ICCPR [International Covenant on Civil and Political Rights] as though it provided for

⁹⁶ Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case IT-94-1-PT, ¶ 28 (August 10, 1995).

⁹⁷ Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, ¶ 42 (October 2, 1995).

⁹⁸ CRAWFORD, *supra* note 95, at 131 (emphasis added). The author notes that the Appeals Chamber went on to give reasons why it could be considered to be established by law, and he concludes that “we can accept the conclusion of the Appeals Chamber in the *Tadic* case, if not all of its reasoning.” *Id.* at 133. Another author argued that “there may be a bias toward taking actions that make it more likely that an individual will be found guilty and punished . . . [However, the author finds that] [c]ontrary to the expectations of ICTY critics, it does not appear that the judges’ verdicts are influenced by ‘political’ factors.” James Meernik, *Victor’s Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 JOURNAL OF CONFLICT RESOLUTION 140, 147, 153 (2003).

one set of rights applicable at the municipal level, and another at the international level.⁹⁹

As this was its first trial, the Tribunal at this stage had still not determined its bounds of appropriate conduct. It may well be argued that in reaching its decision the ICTY was guided by the logic of consequentiality, which sought to secure the prosecution of the accused and give effect to the value of accountability entrenched in the legal framework of the court, even at the cost of watered-down standards of due process protections.

Akayesu in the ICTR

*Akayesu*¹⁰⁰ was the first case heard before the ICTR and the first international decision to interpret the definition of genocide.¹⁰¹

Not only was it the first international war crimes trial in history to try and convict a defendant for genocide, it was also the first judgment in which the accused was found guilty of genocide for crimes which expressly included sexualised violence, as well as the first time that an accused was found guilty of rape as a crime against humanity.¹⁰²

In this case, the ICTR allowed and encouraged the prosecutor to charge the defendant with the crime of genocide based on the act of rape.¹⁰³ The prosecutor submitted the indictment against Akayesu on February 13, 1996, and it was confirmed on February 16, 1996. The trial on the merits then commenced on January 9, 1997.¹⁰⁴ However, the indictment was subsequently amended in June 1997 to incorporate, *inter alia*, gender-based crimes.¹⁰⁵

As has been discussed above, some scholars attach considerable importance to the background and preferences of Judge Navanethem Pillay in the subsequent amendment of the *Akayesu* indictment.¹⁰⁶ However, the decision to amend the indictment may also be seen as indicating the logic of consequentiality at this first trial. When Judge Pillay stated that she was “extremely dismayed

⁹⁹ Robinson, *supra* note 73, at 584.

¹⁰⁰ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 1 (September 2, 1998).

¹⁰¹ William Schabas, *Commentary*, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS VOLUME II (André Klip & Göran Sluiter eds., 2001).

¹⁰² CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 167 (Philippe Sands ed., Cambridge University Press: Cambridge 2003).

¹⁰³ Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment, ¶ 1 (June, 6 1997).

¹⁰⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Leave to Amend the Indictment, ¶ 1 (June 17, 1997).

¹⁰⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶6 (September 2, 1998).

¹⁰⁶ See *supra* notes 16–17 and accompanying text.

that we're hearing evidence of rape and sexual violence against women and children, yet it is not in the indictments,"¹⁰⁷ her statement may be seen as indicative of a desire to give effect to the value of accountability, as entrenched in the legal framework of the Tribunal. The Tribunal's decision to allow such an amendment may, therefore, be seen as consequential towards this end.

When the issue of the amended indictment was raised on appeal, the Appeals Chamber considered, in particular, the lack of notification to the accused of the prosecutor's intention to amend and, tellingly, it found it necessary to recall that "every accused is entitled to a fair hearing."¹⁰⁸ However, while the Appeals Chamber conceded that "had it been in the Trial Chamber's shoes it would have probably acted otherwise" in dismissing this ground of appeal, it concluded that because the defendant's right to be heard was not *totally* denied and the defense had not raised further objections, "even if the rights of the accused had been violated, there is cause to find that the Defense had renounced all right to invoke such violations before the Appeals Chamber."¹⁰⁹

CONCLUSION

The above examples are intended only to provide an indication of where the logic of consequentiality may have influenced decision-making at the first trial. The above cases can provide guidance for the International Criminal Court (ICC).

"The first trial at the ICC, the *Lubanga* case, began in early 2009 after numerous postponements."¹¹⁰ This case was significant both for the fact that it was the first test case for victims' participation before the ICC¹¹¹ and for the role it could play in helping to bring accountability to the Democratic Republic of the Congo (DRC). It "will also help to shape practices before the ICC...that could influence how [the Court] handles future trials."¹¹²

¹⁰⁷ CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 170 (Philippe Sands ed., 2003).

¹⁰⁸ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Appeals Judgment, ¶ 112 (June 1, 2001).

¹⁰⁹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Appeals Judgment, ¶ 113, 114 (June 1, 2001) (emphasis added).

¹¹⁰ Alex Whiting, *In International Criminal Prosecutions, Justice Delayed can be Justice Delivered*, 323–24, 325 (2009).

¹¹¹ See *Lubanga Case*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.coalitionfortheicc.org/?mod=drctimelinelubanga> (last visited Sept. 17, 2011) (noting "the trial marks a turning point for the Rome Statute, the ICC's founding treaty, which entered into force only six years ago. The Lubanga proceedings will be the first test of formal victim participation in an international criminal trial.").

¹¹² *The International Criminal Court Trial of Thomas Lubanga*, HUMAN RIGHTS WATCH, Jan. 23, 2009,

Since its opening, the *Lubanga* trial has been beset by various challenges, not least by the decision to stay proceedings against the accused *sine die* on two separate occasions, both due to an abuse of process on the part of the prosecutor.¹¹³ On both occasions, the Trial Chamber ordered an unconditional stay of proceedings and release of the accused from detention, subject to a five-day limit for the prosecutor to file an appeal, pending the judgment of the Appeals Chamber. On the second occasion, the Chamber held that the prosecutor's position constituted a "profound, unacceptable and unjustified intrusion into the role of the judiciary...[and while] these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done..."¹¹⁴

The Chamber earlier held that where the constituent elements of a fair trial are ruptured, "the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is *outweighed* by the need to sustain the efficacy of the judicial process as the potent agent of justice."¹¹⁵ However, on both occasions, Lubanga's release was averted. It may be noteworthy that, on previous occasions, requests for the interim release of Lubanga were refused on account of the great risk that he would flee the jurisdiction of the Court.¹¹⁶

The Appeal Chamber's decision to reverse the orders for the release of the accused on both occasions, despite the presumption of innocence¹¹⁷ and fair trial concerns expressed by the Trial Chamber, may have been inspired by the logic of consequentiality, which flowed from a desire to ensure the fulfilment of the value of accountability. Naturally, the value of accountability would have suffered a severe blow had Lubanga been released and evaded the Court's jurisdiction. This would have been particularly damaging for the ICC considering that this was its first trial and it was trying to develop acceptable norms in its trial practice.

Although it is still early, and the *Lubanga* trial is *pendente lite*, these various decisions may indicate the first trial syndrome,

http://www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_Why_is_the.

¹¹³ One occasion related to the non-disclosure of potentially exculpatory material and the other related to the non-disclosure of an intermediary's identity.

¹¹⁴ International Criminal Court, Trial Chamber I: Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06 at 21–22, July 8, 2010, http://www.worldcourts.com/icc/eng/decisions/2010.07.08_Prosecutor_v_Lubanga.pdf.

¹¹⁵ *Id.* at 20 (emphasis added).

¹¹⁶ *Id.* at 5. *See also* International Criminal Court, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, No. ICCICC-01/04-01/06-586-tEN at 6, October 13, 2006.

¹¹⁷ Rome Statute of the International Criminal Court, art. 66, Jul. 12, 1999, A/CONF. 183/9, available at http://www.c-fam.org/docLib/20080625_Rome_Statutes_Criminal_Ct.pdf.

whereby judicial decision-making is characterized by a consequential desire to give effect to the value of accountability, rather than necessarily by the dictates of “appropriateness,” which would still be evolving at the time of a first trial and, as such, would not afford sufficient prescriptive clarity. However, as cases proceed through international court systems, and courts mature, we will likely see a greater role for the logic of appropriateness, as this logic gains greater prescriptive clarity and becomes better able to inform and shape judicial decision-making within such courts.

THE REGULATORY POWERS OF THE FEDERAL RESERVE AND OF THE EUROPEAN CENTRAL BANK IN THE WAKE OF THE FINANCIAL CRISIS OF 2007–2009

MICHELE CEA¹

This paper examines the newly expanded functions of two of the world's major central banks: the Fed and ECB. After an introductory part that gives a brief presentation of the Fed and the ECB, the focus of this Article deals with the new role of these two players in ensuring financial stability, carrying out the so-called bank-stress tests and acting as "lender of last resort." The comparative analysis aims to emphasize the complexity of these banks' new duties.

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I. INTRODUCTION

The role of central banks has always been widely debated in legal and economic forums. Recently, such discussions became even deeper and more critical as central banks played a starring role in the global financial meltdown of 2007–2009. It is still not clear whether it was an evil role or not. On the one hand, the central banks' prolonged easy money policies² are listed as one of the main causes of the housing market bubble that eventually led to financial chaos.³ On the other hand, the central banks' role as lender of last resort—*i.e.* an institution ready to grant credit when no one else does—should not be disregarded as it avoided a dire recession that could have turned out to be a great depression.

However, rather than analyzing the alleged faults of central banks, the main goal of this Article is to examine the actual role of the two primary central bank systems in the world, the Federal Reserve System and the European System of Central Banks (“ESCB”), in the wake of the recent financial crisis. Specifically, the analysis will focus on the regulatory powers of the Federal Reserve (“Fed”) and the European Central Bank (“ECB”) and will try to highlight some fresh legislative shifts.

Before addressing the main issues in the analysis, the introductory section of this Article will give a brief presentation of the Fed and the ECB. In order to understand these bodies, readers will be offered selected ideas related to the origin, structure, goals, and tools of these two central banks. The second section of this Article will compare the extension of regulatory powers of the Fed and the ECB to their powers before the financial crisis. The following section will deal with a key and controversial topic: the role of the Fed and the ECB in bank stress tests.⁴ It will address the question as to whether such tests have been sufficiently effective and strict. Finally, the last section of this Article will examine the role of central banks as a lender of last resort, the contribution of the Fed in the American International Group (AIG) bailout, and the participation of the ECB in the rescue plans of Greece, Ireland, and Portugal.

II. ORIGIN, ORGANIZATION, AND FUNCTION

A. ORIGIN

While we can hardly imagine the global banking and financial industry without two major players such as the Fed and the ECB,

² The central banks' policies are described in this Article in the subsection dedicated to the functions of the Federal Reserve and the European Central Bank.

³ A thorough analysis of the economic faults of central banks in the financial crisis 2007-2009 is offered by JOHN P. CALVERLEY, FERNANDO RESTOY, JESPER ULRIKSEN THUESEN, ANDREA VIVOLI, SUSHIL WADHWANI, AXEL A. WEBER, MONETARY POLICY, REGULATION AND VOLATILE MARKETS, *available at* <http://www.suerf.org/download/studies/study20084.pdf>.

⁴ This term refers to a series of tests carried out on banks to evaluate their strengths in a “worst case scenario.”

they were established relatively recently and for different reasons. The Federal Reserve System was established in 1913 under the Federal Reserve Act after a prolonged dispute between the Hamiltonians and Jeffersonians.⁵ The severe banking panic of 1907, which triggered several “bank runs,”⁶ was the driving force⁷ that prompted Congress to craft a central banking authority to supervise bank activities. On the other hand, the younger European Central Bank (“ECB”), established by the Treaty of Amsterdam in 1998, was not intended to address issues stemming from a financial meltdown, but rather as a crowning achievement in the economic field of the European integration process, which began in the post-World War II era.

B. ORGANIZATION

There are some clear differences between the two central banks, which reflect opposite underpinning features in the countries’ organizational structure. For example, the United States is a federal republic, whereas the European Union is a political and economic union; therefore, European States manage to retain more power than American states. And yet the architecture of the two systems is considerably similar.

The decentralized structure of the United States Federal Reserve System includes a Board of Governors, twelve regional Federal Reserve Banks and the Federal Open Market Committee.⁸ The President appoints the Board of Governors, which is a federal government agency located in Washington, D.C. comprised of seven members; the Senate then confirms the Board of Governors for staggered fourteen-year terms.⁹ The President and Senate then designate and approve the Chairman for a four-year term that is renewable during his or her board-member term.¹⁰ “The FOMC

⁵ Alexander Hamilton was the first United States Secretary of the Treasury. He and his followers, the Federalists, strongly supported the establishment of a National Bank with branches in different parts of the country to promote industrial and commercial development. Thomas Jefferson was the third President of the United States who led the Anti-federalists, who rejected the idea of a National Bank and a strong Federal Government because they did not want to deprive American people of freedom.

⁶ A bank experiences a run when many customers suddenly withdraw their deposits in fear of the bank’s insolvency. The rush of withdrawals often leads the bank to face bankruptcy.

⁷ The present Chairman of the Fed, Ben Bernanke, has recently used the reason that led the Federal Reserve establishment to endorse his agency as a supervisor and regulator of firms that pose a systemic risk. Ben S. Bernanke, FINANCIAL REFORM TO ADDRESS SYSTEMIC RISK (Mar. 10, 2009), www.federalreserve.gov/newsevents/speech/bernanke2009310a.htm.

⁸ FEDERAL RESERVE BANK OF ATLANTA, <http://www.frbatlanta.org/pubs/frstructurefunctions/structure.cfm#bog> (last visited July 24, 2011).

⁹ *Id.*

¹⁰ *Id.*

[Federal Open Market Committee] comprises twelve members—the seven members of the Board of Governors and five Reserve Bank presidents, one of whom is the president of the Federal Reserve Bank of New York.”¹¹ The FOMC frames key monetary policy decisions; the Board of Governors monitors the implementation; and its Chairman maintains a close liaison with the Treasury Department and the President of the United States.

In opposition to the Federal Reserve System in the United States, a slightly different form of central bank took hold in Europe. In the Eurozone, where member states have been jealously protecting their sovereignty, a decentralized organization was devised. The Maastricht Treaty of 1993¹² provided “the legal basis for the formation of the European System of Central Banks (“ESCB”), which comprises the ECB and the national central banks (NCBs) of all the twenty-five Member States of the European Union,” even those that have not adopted the euro, such as the United Kingdom.¹³ “The term ‘Eurosystem’ denotes a subset of the ESCB that comprises the ECB and the [seventeen] NCBs of those EU Member States that have adopted the euro.”¹⁴ Such a complex structure was conceived because member states, loath to deprive themselves of authority, would hardly accept the convergence of all central bank businesses in one place.¹⁵ Unlike the ESCB, the ECB has a legal personality,¹⁶ and it therefore has authority to conclude international agreements and cooperate with organizations such as the International Monetary Fund (IMF) and the Bank for International Settlements (BIS).¹⁷

The decision-making bodies of the ECB are the Governing Council and the Executive Board. The Governing Council consists of the six members of the Executive Board plus the governors of the seventeen NCBs of the Eurosystem; it formulates monetary policy for

¹¹ *Id.*

¹² The Maastricht Treaty of 1993 created the European Union and built the basis of the single European currency, the Euro. It erected the pillar structure of the European Union, whereby the Union was divided into the European Community pillar, which is the most important and includes the Commission, the European Parliament and the European Court of Justice, the Common Foreign and Security Policy pillar, and the Justice and Home Affairs pillar.

¹³ Dieter Gerdesmeier, Francesco Paolo Mongelli and Barbara Roffa, *The Eurosystem, The US Federal Reserve and the Bank of Japan: Similarities and Differences*, ECB Working Paper Series No 742, at 8 (March 2007), available at <http://www.ecb.int/pub/pdf/scpwps/ecbwp742.pdf>.

¹⁴ *Id.*

¹⁵ HANSPETER K. SCHELLER, *THE EUROPEAN CENTRAL BANK, HISTORY, ROLE, FUNCTIONS*, 42 (2d ed. 2006), available at <http://www.ecb.int/pub/pdf/other/ecbhistoryrolefunctions2006en.pdf?4cf027277ec98f352983e37d17cbbc8>.

¹⁶ The Maastricht Treaty, art. 106, Feb. 7, 1992, available at <http://www.eurotreaties.com/maastrichtec.pdf>.

¹⁷ See Scheller *supra* note 15, at 43.

the euro area and adopts guidelines.¹⁸ The Executive Board, which includes the president of the ECB, the vice-president and four other members appointed by the European Council,¹⁹ implements monetary policy for the euro area and gives the necessary instructions to the NCBs.²⁰ Put in simpler terms, the latter resembles a political government body, the former a legislative body.

In sum, notwithstanding historical and political differences, the structural likeness of the two central banks is blatant in that the ECB's Governing Council mirrors the Federal Open Market Committee while the Executive Board resembles the Board of Governors. Further, the role of the European National Central Banks is parallel with that of regional Federal Reserve Banks. It therefore seems correct to view the younger Eurosystem as a duplicate of the Federal Reserve System.

C. FUNCTIONS

When the analysis turns to the objectives pursued by the two central banks, there is a paramount difference: while the Fed has been entrusted with a dual mandate, aiming at both stable prices and maximum employment, the ECB must only ensure price stability. Specifically, according to an amendment of the Federal Reserve Act in 1977, the Fed's mandate is "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."²¹ Since "long-term interest rates can remain low only in a stable macroeconomic environment, these goals are often referred to as the *dual mandate*."²²

Keeping prices stable is not an easy job. Further, promoting maximum employment makes things more complicated because, despite a general inverse relationship between the rate of unemployment and the rate of inflation,²³ the two targets might be antagonistic under certain circumstances. For instance, a calamitous supply of shock leads to both inflation and unemployment. Under such circumstances, known as stagflation, the dual mandate would cripple a central bank. Indeed, some experts believe that the Fed should focus only on the price stability objective.²⁴

¹⁸*The Governing Council*, EUROPEAN CENTRAL BANK, <http://www.ecb.int/ecb/orga/decisions/govc/html/index.en.html> (last visited July 24, 2011).

¹⁹ The European Council refers to the meetings of the heads of government in the European Union.

²⁰ See *The Governing Council supra* note 18.

²¹ Frederic S. Mishkin, MONETARY POLICY AND THE DUAL MANDATE (April 10, 2007), <http://www.federalreserve.gov/newsevents/speech/mishkin20070410a.htm>.

²² *Id.*

²³ In economics, the Philips Curve expresses such a relationship.

²⁴ In particular, the Fed has been recently criticized because of its extended purchases of government bonds from financial institutions in order to increase money supply. This is considered an unconventional monetary policy and it is named "quantitative easing." See, e.g., Sudeep Reedy,

On the contrary, the Treaty of the European Community put the ESCB²⁵ in charge of maintaining price stability, although the ESCB shall support these general economic policies without harming the price stability objective.²⁶ This is an evident hierarchical policy that diverges from the Fed's dual mandate. Furthermore, in 1998, the Governing Council of the ECB set forth the precise meaning of price stability as "a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below [two percent]."²⁷

"The ECB and the Fed use similar tools to implement monetary policy."²⁸ First, they both undertake open market operations ("refinancing operations" in Eurozone terminology), which are purchases or sales of government bonds carried out to align the market with the target interest rate.²⁹ This target rate is raised when central banks aim to cool inflation; on the other hand, the rate is decreased to prevent deflation.

In addition, both the Fed and the ECB may act as lenders of last resort³⁰ for firms unable to obtain funding in the market. Such activities occur in facilities called Discount Window in the United States and the Marginal Lending Facility in Europe.³¹

Finally, both entities can employ the reserve requirement ratio (or liquidity/cash requirement ratio), which is "the percentage of different types of deposits or eligible assets which member banks must hold with their central bank,"³² as a monetary policy tool. Indeed, a required higher ratio would lower the bulk of loans that member banks may offer and vice-versa.

Inflation Queries Ahead for Bernanke, WALL ST. J., Mar. 1, 2011, <http://online.wsj.com/article/SB10001424052748704293304576169302649189560.html>; George F. Will, *The Trap of the Federal Reserve's dual mandate*, WASH. POST, Nov. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/17/AR2010111705316.html> (illustrating the debate on quantitative easing and the Fed's dual mandate and bringing into question the Fed's dual mandate).

²⁵ See Gerdesmeier *supra* note 13 at 12. The Treaty refers to the ESCB rather than to the Eurosystem, since it was drawn up on the premise that eventually all EU Member States would adopt the euro.

²⁶ See The Maastricht Treaty *supra* note 16, at art. 105.

²⁷ See Scheller *supra* note 15, at 80.

²⁸ STEPHEN G. CECCHETTI, ROISIN O'SULLIVAN, *The European Central Bank and The Federal Reserve*, 10 (Dec. 2002), available at <http://people.brandeis.edu/~cecchett/pdf/cecchetti%20osullivan%202003.pdf>.

²⁹ OPEN MARKET OPERATIONS, <http://moneyterms.co.uk/open-market-operations/> (last visited July 24, 2011).

³⁰ The last section of this Article further explores this topic.

³¹ *ECB Policy – Understanding the European Central Bank*, FOREXFRAUD.COM, <http://www.forexfraud.com/forex-articles/ecb-policy-european-central-bank.html> (last visited July 24, 2011).

³² JRANK, <http://www.jrank.org/finance/pages/11749/reserve-requirements-reserve-asset-ratio-or-reserve-ratio.html> (last visited July 24, 2011).

III. REGULATORY AND SUPERVISORY POWERS

Monetary policy does not deplete duties required of central banks. Both the Fed and the ECB carry considerable regulatory responsibilities. Henceforward, this Article will go through the main regulatory tools employed by the two central banks. In particular, this third section is divided in two subsections: the first illustrates the traditional regulatory instruments that the Fed and the ECB already bore before the financial meltdown; the second discusses the means given to the two bodies to properly perform their new role of financial stability supervisors.

A. PRE-CRISIS REGULATORY AND SUPERVISORY TOOLS

1. *The United States*

Because of the dual banking system,³³ the banking framework in the United States is arguably puzzling, and its prudential organization is even more complicated. The United States' bank regulators are: the Federal Reserve Board ("FRB"); the Office of the Comptroller of the Currency ("OCC"), which is an office of the United States Treasury Department that charters, regulates, and supervises all national banks and the federal branches and agencies of foreign banks; the Office of Thrift Supervision ("OTS"),³⁴ which is another office of the United States Treasury Department that charters, regulates and supervises thrifts³⁵ and their holding companies; the Federal Deposit Insurance Corporation ("FDIC"), which supervises insured depository institutions; and the banking department of the relevant state, which charters, regulates and supervises banks that elect the state charter.

First, the Federal Reserve Board supervises all the banks that have elected to be a member of the Federal Reserve System.³⁶ In this case the Fed's supervision is in addition to that of others,

³³ The U.S. dual banking system means that banks may be chartered and regulated either at the federal or state level.

³⁴ The Dodd-Frank Act of 2010 provided that the OTS would be eliminated by July 21, 2011 and its responsibilities would be transferred to the FRB, OCC and FDIC. See U.S. Department of the Treasury, *Notice of Proposed Rulemaking: Dodd-Frank Act Implementation OTS Integration*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-20.html> (last visited September 12, 2011).

³⁵ A thrift is an organization, such as a savings bank or a saving and loan association, formed as depository for consumer savings that engages primarily in consumer lending (for instance, mortgages). See The Federal Reserve System, *All Institution Types Defined*, National Information Center, <http://www.ffiec.gov/nicpubweb/Content/HELP/Institution%20Type%20Description.htm> (last visited September 12, 2011).

³⁶ National banks are required to be member banks while state-chartered banks may elect to become members. Member banks are required to purchase stock in the Federal Reserve System and to follow the general safety and soundness guidelines provided under the FRB's Regulation H.

including: the FDIC, due to the fact that almost all banks' deposits are insured; the institution that chartered the bank; the OCC for national banks; the OTS for thrifts; and the banking department of the relevant state for state banks. It is blatant that such an overlapping system might lead, and indeed it has led, to a "race to the bottom" in terms of regulatory standards.³⁷ In fact, since banks can choose among many regulators, the regulators are prone to relax their standards in order not to be deprived of power.

In addition to supervising member banks, the Federal Reserve Board supervises foreign banking activities of member banks and banking activities of foreign banks in the United States. Finally, the Federal Reserve Board supervises and regulates Banking Holding Companies (BHC),³⁸ and it has been designated by the Gramm-Leach-Bliley Act ("GLB") as the "umbrella regulator" of the Financial Holding Companies ("FHC").³⁹ This legislation repealed provisions of the Glass-Steagall Act of 1933 and the Bank Holding Act of 1956 to allow banks that elect to become a FHC to "engage in certain securities, insurance and other activities" through financial subsidiaries ("FS").⁴⁰ The GLB set forth a regulatory design that would allow the regulatory experts, such as the Security Exchange Commission ("SEC") and state insurance regulators, "to regulate the activities of the FS engaged in their areas of expertise."⁴¹ The Federal Reserve Board, as an umbrella regulator, was established to ensure the FHC would operate properly, and the activities of the FHC and the FS would not "harm the insured depository institutions in the system."⁴² However, the GLB explicitly dictated the Fed was to rely on the reports and examinations of "the functional regulators so as not to 'double up' the functional burden."⁴³

³⁷ MARC LABONTE, *THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: SYSTEMIC RISK AND THE FEDERAL RESERVE*, 7 (Aug. 27, 2010), available at <http://www.llsdc.org/attachments/files/240/CRS-R41384.pdf>.

³⁸ The Bank Holding Company Act of 1956 defines bank holding company as "any company which has control over any bank or over any company that is or becomes a bank holding company..." 12 U.S.C. § 1841(a)(1) (2006).

³⁹ A FHC is a BHC or foreign bank that has certified to be "well capitalized" and "well managed" and that has been given a satisfactory Community Reinvestment Act (CRA) rating if it has an insured bank subsidiary or an insured U.S. branch.

⁴⁰ Clyde Mitchell, *Umbrella Regulation Under Gramm-Leach-Bliley*, N.Y.L.J., Oct. 18, 2000.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Clyde Mitchell, *Gramm-Leach Bliley at 11 Years: What Has Survived?*, N.Y.L.J., Dec. 9, 2010, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202475905831>.

Given the appalling condition of some financial conglomerates⁴⁴ in the aftermath of the recent meltdown, it is understandable to cast doubt over the effectiveness of the Fed's role as an "umbrella regulator" of the FHC. However, the GLB drew a role of coordinator for the Federal Reserve Board, and it "place[d] strict limits on the authority of the FRB to exercise prudential supervision, to issue regulations, or bring enforcement against functionally regulated subsidiaries of FHCs."⁴⁵ Therefore, it does not seem fair to blame the FRB for idleness in this field. After all, while it is appropriate to look into the causes of the crisis thoroughly, going after a scapegoat would only backfire on the entire system.

2. Europe

Figuratively speaking, "How dare you tell me what I should do or what I should not do," might be the response of a Eurosystem member state to an order of the ECB. As already underscored, the European political background is different from that of the United States. Pan-European bodies have difficulties in performing duties given member states' dominance. While far from being entrusted with supervisory authority over single banks, the ECB has been given some regulatory powers by Article 110 of the European Community Treaty (TEC).

In order to carry out the ESCB tasks, Article 110 enables the ECB to make regulations, decisions and recommendations, and deliver opinions.⁴⁶ In accordance with the style of various dispositions that grant regulatory powers to other European bodies,⁴⁷ these regulations have general application and are "binding and directly applicable in all Member States," while recommendations and opinions are not binding, and a final decision is binding "upon those to whom it is addressed."⁴⁸ Article 110 of the European Community Treaty extends the ECB's power to make regulations only

⁴⁴ For instance, Citibank, the bank subsidiary of the large FHC Citigroup, has been widely dubbed as "Zombie-Bank." See e.g. John Gapper, *Citigroup must recruit a zombie-slayer*, FINANCIAL TIMES, Jan. 14, 2009, <http://www.ft.com/cms/s/0/0cefa80e-e272-11dd-b1dd-0000779fd2ac.html#axzz1J8d62h50>.

⁴⁵ DAVID H. CARPENTER, M. MAUREEN MURPHY, *Permissible Securities Activities of Commercial Banks Under the Glass-Steagall Act (GSA) and the Gramm-Leach Bliley Act (GLBA)* at 18, available at http://assets.opencrs.com/rpts/R41181_20100412.pdf.

⁴⁶ Atilla Arda, *Regulatory Powers of the European Central Bank: A Commentary on Article 110 TEC*, in Christian Campbell, Peter Herzog, & Gudrun Zagel, SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION, (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926657.

⁴⁷ The European Parliament can act jointly "with the Council, the Council and the Commission [to] make regulations and issue directives, take decisions, make recommendations or deliver opinions." Treaty Establishing the European Community, art. 249, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

⁴⁸ See Arda *supra* note 46.

to implement certain basic tasks: (i) define the monetary policy of the European Community; (ii) require credit institutions to hold minimum reserves in accounts with the ECB and NCBs; and (iii) ensure sound clearing and payment system.⁴⁹ Aside from these tasks, the ECB might “impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.”⁵⁰

In sum, it seems proper to infer that the underlying meaning of these regulatory powers enables the ECB to “fulfill its mandate autonomously without relying on legal acts by the Community institutions or by the Member States.”⁵¹

B. POST-CRISIS REGULATORY AND SUPERVISORY TOOLS

Although this Article does not aim to address the causes of the global financial crisis of 2007–2009, a brief digression on systemic risk, widely considered as one of the biggest culprits of the recent fiasco, is necessary to deconstruct the context that has led policymakers to entrust the Fed and ECB with new responsibilities. First, when does a firm pose a systemic risk? The answer relies on the concepts of “size” and “interconnectedness.” A firm is systemically important when it is “too big or too interconnected to fail.” Put in simple terms, a firm poses a systemic risk when its failure would “cause instability for large parts of the financial system.”⁵² Nevertheless, the issue is anything but simple. Nobody has established criteria or thresholds to determine exactly when a firm poses a systemic risk, nor will anybody do so. Secondly, even assuming one timely identified a firm posing a systemic risk, who will be in charge of regulating and supervising such a firm? The relevant firm might be a bank, an insurance company, a securities brokerage firm, etc. Therefore, firms threatening the financial system as a systemic risk are not subject to the same regulator, which may create delays in addressing critical issues.

The Article next analyzes how lawmakers chose to expand the Fed and ECB’s responsibilities to address this issue.

1. *The Financial Stability Oversight Council*

One of the most significant provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 is the one embedded in Title I (“Financial Stability”). Title I addresses issues brought about by firms that pose a systemic risk by broadening the Federal Reserve Board’s competences. In addition to surveillance of state member banks, FHCs and their subsidiaries, and foreign banks with branches in the United States, the Fed will engage in prudential

⁴⁹ *Id* at 7.

⁵⁰ *Id* at 10.

⁵¹ *See* SCHELLER *supra* note 15, at 68.

⁵² *See* LABONTE *supra* note 37, at 1.

supervision of non-bank companies⁵³ that are “predominantly engaged in financial activities.”⁵⁴ However, in order to commence such a prudential activity, the Fed needs to be put in charge by a new federal agency: the Financial Stability Oversight Council (the “Council”).⁵⁵ Therefore, lawmakers chose to create a new federal agency to spot firms threatening the financial system instead of trusting one already in existence. On the one hand, it seems appropriate to create a specific agency since the required duties are considerably intricate. On the other hand, there is a real risk it will further complicate a system where many, perhaps too many, supervisors and regulators co-exist.

Voting members of the Council are ten individuals: the United States Secretary of the Treasury Department, who is the Chairperson of the Council; the Fed’s Chairman; the Comptroller of the Currency; the Director of the Bureau of Consumer Financial Protection; the Securities and Exchange Commission (“SEC”), the Commodity Futures Trading Commission (“CFTC”) and the FDIC’s Chairmen; the Director of the Federal Housing Agency; the Chairperson of the National Credit Union Administration Board; and an independent member with insurance expertise who is appointed by the President of the United States.⁵⁶ The Office of Financial Research (“OFR”) assists the Council by performing studies and examinations and gathering other information.⁵⁷

Importantly, Title I of the Dodd-Frank Act encompasses an “anti-evasion” provision, which aims to punish those companies that are organized in a manner as to evade the application of Title I. In such cases, the Council might make a determination to subject any company that poses a threat to the financial stability of the United States to the supervision of the Fed.⁵⁸ While exerting this role, the

⁵³ A company is a “nonbank financial company” if 85 percent of its gross revenues or consolidated assets are related to activities that are financial in nature. H.R. 4173, 11th Cong. § 102(a) (2010). “Financial in nature” is defined in accordance with the Bank Holding Company Act of 1956. In addition to some activities specified as financial in nature by this act, the Board of Governors is authorized to determine what activities are financial in nature. 12 U.S.C. § 1843(k).

⁵⁴ *Dodd-Frank Wall Street Reform and Consumer Protection Act, Systemic Nonbank Financial Companies*, CLIENT ALERT (White & Case, New York, N.Y.), July 2010, at 1, available at <http://events.whitecase.com/fmd/alerts-Systemic-Nonbank-Financial-Companies.pdf>.

⁵⁵ *Id.* at 2.

⁵⁶ *More than just financial reform: analysis and observation of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, WHITE PAPER (Jones Day, New York, N.Y.), Aug. 2010, at 8, available at <http://www.jonesday.com/files/Publication/d7d71bc5-6ee4-4144-9a0b-91b6d95cb2a9/Presentation/PublicationAttachment/24bcecbc-dc1f-4863-9204-93fdcb9bcc8e/Financial%20Reform%20Dodd-Frank%20White%20Paper.pdf>.

⁵⁷ Clyde Mitchell, *Regulatory restructuring-What’s Up for the Banks?* N.Y.L.J., June 9, 2010.

⁵⁸ See CLIENT ALERT *supra* note 55 at 10.

Fed “must use information [and reports of examination] from other supervisors/regulators.”⁵⁹

The enhanced supervision by the Fed means that firms deemed systemically important are likely to be subjected to harsh measures, such as a mergers and acquisitions limitations, termination of one or more activities, restriction on the ability to offer certain financial products, and forced sales or transfers of assets to unaffiliated entities.⁶⁰

In an analysis of Title I in the Dodd-Frank Act, it is appropriate to point out that lawmakers, far from holding the Federal Reserve culpable of the regulatory loopholes recently surfaced, extended the roles and responsibilities of the Board. Given the expertise, professionalism, integrity and “bench strength”⁶¹ of the latter, the choice seems reasonable. Hopefully, facts will confirm it.

Finally, while examining the new Fed’s shape under the Dodd-Frank Act, it is critical to mention Title X of this Act, which creates a Bureau of Consumer Financial Protection (“Bureau”) within the Federal Reserve. The Dodd-Frank Act establishes safeguards to

enable it to function...as an autonomous agency, [and therefore] the Fed is barred from: intervening in any matter being handled by the Bureau; directing, appointing or removing any officer or employee of the bureau; merging...the Bureau...with any part of the reserve system; and interfering with the issuance of any rule or order of the Bureau.⁶²

Title X empowers the new body to supervise “covered persons,” *i.e.* “any person offering or providing ‘a financial product or service’” for compliance with “consumer financial laws.”⁶³ The goal of this legislation is to offer strengthened protection to consumers without hampering the financial services industry.⁶⁴ After all, a congressional mandate to regulate wild fields, such as the highly blamed mortgage industry, was more than foreseeable. Whether this mandate will turn out to be weak or effective depends on whether the Bureau will be able to act properly.

2. *The European Systemic Risk Board*

Recently, European institutions also have endowed themselves with a body aimed at addressing issues stemming from firms that pose systemic risk. Regulation No. 1092/2010 established

⁵⁹ See *supra* note 54 at 4.

⁶⁰ See CLIENT ALERT *supra* note 55 at 10.

⁶¹ Clyde Mitchell, *The State of the Fed*, N.Y.L.J., Feb. 18, 2010.

⁶² Clyde Mitchell, *Dodd-Frank: A New Consumer World*, N.Y.L.J., Oct. 14, 2010.

⁶³ *Id.*

⁶⁴ *Id.*

the European Systemic Risk Board (ESRB).⁶⁵ Similar to the eminence of the Fed in the Financial Stability Oversight Council, the ECB plays a starring role in the ESRB. However, as discussed below, the similarities between the two bodies are more formal than substantial.

The ESRB is embedded in the European System of Financial Supervision (ESFS), an institutional body pointed at ensuring supervision of the EU financial system.⁶⁶ Here are some of the most important provisions of the Regulation: the President of the ECB is the Chairman of the ESRB;⁶⁷ the decision-making body is the General Board, which is comprised of the President and the Vice-President of the ECB, the governors of all the EU national central banks, a member of European Commission—*i.e.* the executive body of the European Union—the Chairpersons of the other authorities within the ESFS, plus a significant number of non-voting members.⁶⁸ In order to achieve its goals, the ESRB is entitled to provide warnings and to issue recommendations to the Union as a whole or to one or more Member States.⁶⁹ Subsequently, if the ESRB decides that its recommendation has not been followed, the addressees have to provide adequate justification for their inaction.⁷⁰

Although the ESRB performance cannot be fully evaluated since the first meeting was held only in January 2011, it is already possible to take away some preliminary considerations. First and foremost, while it is fundamental to exploit the expertise of the ECB, its prominent role entails a “weak” ESRB because non-member countries of the Eurosystem, such as the powerful United Kingdom,⁷¹ would hardly accept a secondary role in the decision-making process. And after all, the conspicuous deal of power granted to the Fed to address systemic risk is balanced by the participation of many other

⁶⁵ *Safeguarding financial stability in Europe*, EUROPEAN SYSTEMIC RISK BOARD, <http://www.esrb.europa.eu/home/html/index.en.html> (last visited July 26, 2011).

⁶⁶ Besides the ESRB, the ESFS includes: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA) and the Joint Committee of the European Supervisory Authorities (ESAs). See CMS Cameron McKenna, *The New European System of Financial Supervision – Institutional Reform Within the EU*, <http://www.law-now.com/cmck/pdfs/nonsecured/neweuropeanreform.pdf> (last visited Oct. 1, 2011).

⁶⁷ Council Regulation 1092/2010, art. 5, 2010 O.J. (L 331/1) (EU), available at: <http://www.esrb.europa.eu/shared/pdf/ESRB-en.pdf?ca00f4a4e41852f08300dd6561a7a345>.

⁶⁸ *Id.* at art. 6.

⁶⁹ *Id.* at art 16.

⁷⁰ *Id.* at art. 17.

⁷¹ Reports regarding this discussion might be found at John W. Miller and Christopher Emsden, *ECB Official Faults New EU Regeulation*, WALL ST. J., June 20, 2009, <http://online.wsj.com/article/SB124541961471231443.html>.

federal agencies in the United States' Financial Stability Oversight Council.

In addition, the General Board, which is the main decision body of the ESRB, numbers more than fifty members. It seems unlikely that it will turn out to be an effective entity. Finally, the process of implementing ESRB recommendations deserves some words as well. Essentially, Member States will be required to justify their actions if they do not follow ESRB's recommendations. Is it reasonable to expect that addressees, who managed to evade binding pieces of legislation in the recent past, will have a hard time disregarding recommendations and justifying their (in)actions? Unfortunately not.

IV. BANK STRESS TESTS

A. WHAT IF...?

In 2008, the failures or quasi-government take-overs of major players, such as Lehman Brothers, Bear Stearns, and AIG, triggered a widespread panic. Some may have believed since Lehman went bust no institution would be safe. Essentially, this belief led banks not to trust anyone and to stop lending. This resulted in what is popularly known as a "credit crunch." In order to restore confidence in the markets and to determine who was trustworthy, policymakers came up with the so-called bank stress tests ("stress tests"). Given this response, then next question is what is going to happen if the economic and financial circumstances get even worse? The underpinning purpose of these stress tests was to "determine whether [banks] had enough capital to weather a steeper-than-projected downturn and still have enough funds to continue lending."⁷²

The idea in these stress tests is the same for "car crash tests" in the automobile industry. In order to put cars on the markets, companies must carry out "crash tests" that show how their products would perform in car accidents. To put their financial products on the markets and maintain their clients' confidences, banks must now show how they would perform in case of a relatively bad economic scenario.

A heated debate has arisen over the stress tests' reliability, as some commentators⁷³ pointed out that these tests were too lax. As car drivers would not rely on crash tests conducted under soft standards, i.e. tests conducted only at very low speeds, bank customers would not believe in the results of stress tests if the measures are too tolerant. Thus, most importantly, the stress tests

⁷² *Bank Stress Tests (Supervisory Capital Assessment Program)*, N.Y. TIMES, May 8, 2009, http://topics.nytimes.com/topics/reference/timestopics/organizations/f/federal_reserve_system/supervisory_capital_assessment_program/index.html.

⁷³ See, e.g., *Ten Reasons Why the Stress Test Are "Schmess" Tests and the Current Muddle-Through Approach to the Banking Crisis May Not Succeed* (NOURIEL ROUBINI'S GLOBAL ECONOMONITOR), 2009, at 2, available at <http://www.mccoole.net/nr-10reasons.pdf>.

under the current standards would likely lead to a prolonged credit crunch.

The following Section illustrates the criteria employed and highlights the crucial role of the Fed and the ECB in carrying out stress tests in the U.S. and in Europe.

B. SUPERVISORY CAPITAL ASSESSMENT PROGRAM

The crisis hit severely in the United States before unfolding worldwide. Accordingly, American policymakers were supposed to take the field before everyone else. And they promptly did so by implementing the Supervisory Capital Assessment Program (“SCAP”) in 2009.

SCAP was a macro-prudential exercise, which put nineteen bank holding companies, each with assets in excess of \$100 billion and “covering approximately 66% of total US banking sector assets,” through stress tests.⁷⁴ It was a program run jointly by the Board of Governors of the Fed, the FDIC, and the Comptroller of the Currency over a two-year period (2009 and 2010).⁷⁵ However, the Fed’s role was overwhelmingly more significant, especially in the phase of cooperation—which has been classified as bargaining⁷⁶—with the nineteen bank holding institutions.

SCAP was structured in three steps. First and foremost, the Fed, FDIC and OCC came up with two economic scenarios that utilized real GDP growth, the unemployment rate, and changes in residential housing prices for 2009 and 2010: (1) a “baseline” scenario, which represented the consensus outlook of forecasters, and (2) a “more adverse” scenario, which painted a deeper and longer recession in the United States.⁷⁷ In the second step, BHCs under scrutiny could conduct their analyses and calculate expected losses under both scenarios.⁷⁸ Finally, “supervisors reviewed the data with each institution” and established the amount of capital needed “in order to remain well-capitalized under the more adverse scenario as capital is drawn down.”⁷⁹

BHCs deemed in need of additional capital at the end of stress tests were given six months to raise it. Had a BHC not been able to attract private capital, it would receive an “injection through

⁷⁴ *Stress-Testing Banks in a crisis*, FIN. STABILITY REVIEW, 117, 118 (Dec. 2010), available at <http://www.ecb.int/pub/pdf/other/financialstabilityreview201012en.pdf>

⁷⁵ *Id.*

⁷⁶ *See Bank Stress Tests supra* note 73 at 5.

⁷⁷ Andru E. Wall, *The 2009 Stress Tests: A model for Periodic Transparent Examinations of the Largest Bank Holding Companies* (April 2010) at 10, available at <http://www.law.harvard.edu/programs/about/pifs/llm/select-papers-from-the-seminar-in-international-finance/llm-papers-2009-2010/wall.pdf>.

⁷⁸ *Id.*

⁷⁹ *Id.* (citing Board of Governors of the Federal Reserve System, *The Supervisory Capital Assessment Program: Design and Implementation* 3 (Apr. 24, 2009)).

the Capital Assistance Program—via [Troubled Asset Relief Program] (TARP) —in exchange for mandatory convertible preferred shares.”⁸⁰ SCAP final results showed that if the “more adverse” scenario had occurred, ten out of the nineteen BHCs would have needed “to raise about \$75 billion in additional common equity ‘to ensure adequate capital cushions.’”⁸¹

As previously anticipated, stress tests under SCAP were singled out for harsh criticism. Among other objections,⁸² the alleged excessively optimistic economic outlook, the capital requirements, and the collaboration phase between the Fed and BHC were thrown into doubt. Notably, Nouriel Roubini argued that the forecasts employed, even those in the “more adverse” scenario, were too optimistic and would be disproven by a more severe economic downturn.⁸³ However, although the unemployment rate hit a temporary peak higher than the one forecast in the worst scenario,⁸⁴ the baseline scenario turned out to be closest to the actual economic condition in that the real GDP growth rate has been steadily increasing, the house prices stopped plummeting, and even the job market has been slowly improving.⁸⁵

Other doubts were cast on the Fed’s choice to use Tier 1 capital⁸⁶ instead of Tangible Common Equity⁸⁷ (TCE) as the standard to evaluate whether a BHC had a sufficient capital buffer.⁸⁸ However, it should be pointed out that the Fed was not actually lenient because it required 6% of Tier 1 total capital and 4% of Tier 1 common capital,⁸⁹ while banks were traditionally required to only hold 4% of Tier 1 total capital in the past. The difference is substantial because Tier 1 *total capital* is comprised of common equity, retained earnings and also preferred shares and non-controlling interests. Tier 1 *common capital* includes only common equity and retained earnings. Accordingly, determining criteria with Tier 1 common capital in lieu of Tier 1 total capital make cushions stronger and banks safer.

⁸⁰ *Id.* at 11.

⁸¹ *Id.* at 14 (citing Ben S. Bernanke, *The Supervisory Capital Assessment Program*, Address at the Federal Reserve Bank of Atlanta 2009 Financial Markets Conference (May 11, 2009), *available at* <http://www.federalreserve.gov/newsevents/speech/bernanke20090511a.htm>).

⁸² *See Bank Stress Tests supra* note 73, at 3.

⁸³ *Id.*

⁸⁴ *See supra* note 77 at 18–20.

⁸⁵ *See, e.g.*, News Release, Bureau of Economic Analysis, Gross Domestic Product: Fourth Quarter and Annual 2010 (Advance Estimate) (Jan. 28, 2011), *available at* www.bea.gov/newsreleases/national/gdp/2011/gdp4q10_adv.pdf.

⁸⁶ Tier 1 capital is a bank’s core capital. It includes equity capital and retained earnings, but it may also be consisted of preferred stocks.

⁸⁷ Tangible Common Equity is equal to total equity minus intangible assets, goodwill and preferred stock equity.

⁸⁸ *See Bank Stress Tests* note 73 at 9.

⁸⁹ *See* note 77 at 24.

This Article does not want to address the issue of the liaisons between the Fed and BHCs. Commentators would need specific facts in order to determine whether it was a sound collaboration or inappropriate bargaining. It is like expressing opinions about insider trading cases: people might have suspicions, but they cannot be sure. These matters are province of other bodies and authorities.

Finally, it should be mentioned that the Fed conducted a second round of stress tests throughout the first three months of 2011. The criteria were the same employed in the SCAP. This time, however, the nineteen banking holding institutions were put through a review of their financial soundness “to determine whether they were strong enough to start returning capital to their shareholders.”⁹⁰ The results showed that the Fed took a harder line with certain players than it did in 2009 because only thirteen out of nineteen institutions were allowed to spend capital freely.⁹¹

C. EU-WIDE STRESS TESTING

Not surprisingly, European policymakers came up with a stress test program soon after SCAP results. Conceived in late 2009, the first European tests were conducted in 2010 on ninety-one European banks representing “65% of the total assets of the EU banking sector.”⁹² Although the Committee of European Banking Supervisor (“CEBS”)⁹³ was the main body entrusted with carrying out the tests, the European Commission, the EU national supervisory authorities and the ECB cooperated with it.⁹⁴ In particular, the latter provided all the necessary data to undertake the exercises.

In accordance with the American stress tests, two economic scenarios were contemplated over a period of two years (2010–2011) to weather how banking institutions would perform: a “baseline” hypothetical, grounded on public forecasts, and a “more adverse” hypothetical, in which the ECB set forth the conditions typical of a

⁹⁰ Eric Dash, *With Fed Consent, Banks Raise Dividends and Buy Back Stock*, N.Y. TIMES, Mar. 19, 2011, <http://dealbook.nytimes.com/2011/03/18/fed-to-release-results-of-bank-stress-tests/>.

⁹¹ Dan Fitzpatrick, *BofA Steps to Back of Bank Class*, WALL ST. J., Mar. 24, 2011, http://online.wsj.com/article/SB10001424052748703362904576219064240273324.html?mod=rss_whats_news_us_business&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fxml%2Frss%2F3_7014+%28WSJ.com%3A+US+Business%29.

⁹² Committee of European Banking Supervisors, *Aggregate outcome of the 2010 EU wide stress test exercise coordinated by CEBS in cooperation with the ECB 2* (July 23, 2010), available at <http://stress-test.cebs.org/documents/Summaryreport.pdf>.

⁹³ The Committee of European Banking Supervision was an independent advisory group on banking supervision in the European Union whose tasks were taken over by the European Banking Authority (EBA) by January 1, 2011.

⁹⁴ See Fitzpatrick *supra* note 92 at 1.

“double dip”⁹⁵ recession.⁹⁶ Essentially, the criteria employed were those utilized by the Fed in the United States. However, some differences need to be pointed out. While European bodies also used both real GDP growth rate and unemployment rate to gauge the two scenarios, they took into account “an EU-specific shock to the yield-curve,⁹⁷ originating from a postulated aggravation of the sovereign debt crisis,”⁹⁸ instead of considering house prices as Americans did.

As a result of the exercise, only seven banks out of ninety-one needed to raise additional capital.⁹⁹ However, loud protests developed against the tests. Before the results were published, bank analysts identified an aggregate capital shortfall of forty billion Euro, while the exercises concluded that only 3.5 billion Euros needed to be raised.¹⁰⁰ A harsh criticism addressed the yardstick used to evaluate Tier 1 capital in that this was not meant as Tier 1 common capital ratio. As pointed out in the comparison between the Financial Stability Oversight Council and the European Systemic Risk Board, some substantial differences between European and American policies put the similarities in the background.

New stress tests are scheduled in 2011. The European Banking Authority seems to be committed to employ stricter criteria to address the previous year’s critics and not to undermine credibility of the supervisory system.¹⁰¹ However, the standards that will be employed have not been released yet. While supervisors are leaning towards Tier 1 common capital ratio, banks are pressing to add hybrid tools such as “silent participations,” which are a type of subordinated debt that state governments have provided to some lenders.¹⁰² As enemies of opaqueness, the highest strictness is desirable. But, not surprisingly, laxity is likely to trump.

V. LENDER OF LAST RESORT

⁹⁵ A double dip recession (or W shaped recession) means a recession followed by a short recovery, followed by another recession.

⁹⁶ See Fitzpatrick *supra* note 92 at 3.

⁹⁷ The yield curve illustrates the relation between the interest rate and the time to maturity. The widening of bond yield spreads between some economically weak countries, such as Portugal, Ireland, Greece and other stronger countries, such as Germany, shows a crisis of confidence over the former.

⁹⁸ See Fitzpatrick *supra* note 92 at 41.

⁹⁹ *Id.* at 6.

¹⁰⁰ Patrick Jenkins and Brooke Masters, *Bank watchdog sets out to square the circle*, FIN. TIMES, Feb. 14, 2011, <http://www.ft.com/cms/s/0/d70dd886-3865-11e0-959c-00144feabdc0.html#axzz1JVlqVBwb>.

¹⁰¹ *Id.*

¹⁰² David Enrich and Geoffrey T. Smith, *Details Given on EU ‘Stress Tests’*, WALL ST. J., Apr. 9, 2011, <http://online.wsj.com/article/SB10001424052748704503104576250540103406106.html>.

Last, but definitely not least, the Article provides a brief analysis of the Fed and ECB's role as lender of last resort, which turned out to be crucial at the height of the crisis. Central banks act as lenders of last resort when they offer lines of credit to institutions that are experiencing financial difficulty so extreme that they are unable to obtain credit elsewhere.

This extraordinary lending facility spawns some unpleasant side effects. First, institutions have perverse incentives to take huge risks because they expect to receive assistance if serious problems should arise.¹⁰³ Commentators claim that policy makers should let markets rule without bailing out firms that are on the verge of failure: “[c]apitalism without bankruptcy is like Christianity without hell.”¹⁰⁴ Central banks, therefore, have to restrain their intervention only in extreme situations, when the bust of a firm would trigger a systemic shock. Another inconvenience is tied to a borrower's standpoint. Borrowing directly from central banks is a beacon of weakness.¹⁰⁵ In other words, it may bring about a negative stigma in that other banks or other investors may fear that such a firm is not able to carry on business and honor obligations.¹⁰⁶ Therefore, it seems appropriate that a certain degree of confidentiality be implemented. However, this necessity needs to be balanced with the taxpayers' absolute right of knowing how their money is used.

Below, the Article illustrates the last resort lending background in the United States and Europe.

A. THE DISCOUNT WINDOW

The facility that allows institutions to borrow directly from the Fed is called the “Discount Window.”¹⁰⁷ It was conceived not to strictly support individual banks, but rather “to prevent a rapid fall in the money stock and to support the financial system as a whole” in

¹⁰³ ERLEND WALTER NIER, FINANCIAL STABILITY FRAMEWORKS AND THE ROLE OF CENTRAL BANKS: LESSONS FROM THE CRISIS, IMF Working Paper WP/09/70 at 12, available at <http://www.imf.org/external/pubs/ft/wp/2009/wp0970.pdf>.

¹⁰⁴ NOURIEL ROUBINI AND STEPHEN MIHM, CRISIS ECONOMICS – A CRASH COURSE IN THE FUTURE OF FINANCE 155 (The Penguin Press, New York, 2010) (citing Frank Borman).

¹⁰⁵ Cullen Roche, *The Discount Window, Its Stigma and Full Disclosure*, Pragmatic Capitalism, Mar. 31, 2011, available at <http://pragcap.com/the-discount-window-its-stigma-and-full-disclosure>.

¹⁰⁶ Renee Courtois and Hurberto M. Ennis, *Is There Stigma Associated with Discount Window Borrowing?*, ECONOMIC BRIEF (The Federal Reserve Bank of Richmond), May 2010, at 1, available at http://www.richmondfed.org/publications/research/economic_brief/2010/pdf/eb_10-05.pdf.

¹⁰⁷ The term stems from the practice of sending a bank representative to a reserve bank teller window when a bank needed to borrow money.

bad times.¹⁰⁸ In order to make use of this facility, borrowers bear the cost of higher interest rates than the Federal Reserve rate, and they are required to pledge collateral. The “Discount Window” program is divided into primary credit, secondary credit, seasonal credit and emergency credit.¹⁰⁹

While the primary and secondary credits are available on a short-term basis for depository institutions that meet certain criteria of soundness, seasonal credit is “designed to assist small depository institutions in managing significant seasonal swings.”¹¹⁰ Emergency credit, in accordance with Article 13(3) of the Federal Reserve Act, allows “the Board of Governors [to] authorize a Reserve Bank to provide emergency credit to individuals, partnerships, and corporations that are not depository institutions,” under unusual and exigent circumstances.¹¹¹ Such a power was employed in the historical bailout of the insurance giant American International Group (AIG) in September 2008. All AIG assets collateralized the \$85 billion loan, and “the U.S. government received a 79.9% equity interest in AIG.”¹¹² Indeed, “the Board determined that a failure of AIG could add to already significant levels of financial market fragility.”¹¹³ In other words, had AIG gone bust, chaos would have ensued.

Nationalization in the land of capitalism, though necessary in this case, sparked massive protests. Hence, lawmakers were forced to address the issue with the passage of the Dodd-Frank Act of 2010 (“Dodd-Frank Act”). Section 1101 of the Dodd-Frank Act amended Section 13(3) of the Federal Reserve Act, enabling the Fed, with Treasury Secretary’s approval, to bailout large institutions pursuant to a broad-based eligibility program of the facility, rather than assisting a specific company.¹¹⁴ Also, the Dodd-Frank Act requires the Board to periodically report and update the Senate’s Committee on Banking, Housing, and Urban Affairs and the House Committee

¹⁰⁸ Joao Santos and Stavros Peristiani, *Why Do Central Banks have Discount Windows?*, Liberty Street Economics (Federal Reserve Bank of New York) (Mar. 30, 2011, 10:03 AM), http://libertystreeteconomics.newyorkfed.org/2011/03/why-do-central-banks-have-discount-windows.html#_ftn1.

¹⁰⁹ *The Federal Reserve Discount Window*, FEDERAL RESERVE (Jul. 21, 2010), <http://www.frbdiscountwindow.org/discountwindowbook.cfm?hdrID=14&dtID=43>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Press Release, Board of Governors of the Federal Reserve System (Sep. 16, 2008), *available at* <http://www.federalreserve.gov/newsevents/press/other/20080916a.htm>

¹¹⁴ *The Dodd-Frank Act, Commentary and Insights*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, July 12, 2010, at 15, *available at* http://www.skadden.com/Cimages/siteFile/Skadden_Insights_Special_Edition_Dodd-Frank_Act1.pdf.

on Financial Services regarding any financial assistance authorized under Section 13(3).¹¹⁵

Finally, the Dodd-Frank Act made a compromise between the risk of stigma on borrowers and the taxpayers' right of full disclosure. On this point, the Act "requires the disclosure of details of loans made under traditional discount window programs on a two-year lag from the date on which the loan is made."¹¹⁶ This is a reasonable compromise that should satisfy the taxpayer's right while the borrower's fear of a negative stigma has faded.

B. THE MARGINAL LENDING FACILITY

The European Marginal Lending Facility works similarly. To satisfy temporary liquidity needs, credit institutions may use the marginal lending facility to obtain overnight liquidity from the ECB, which delegates such duties to NCBs.¹¹⁷ The NCBs provide liquidity either in the form of overnight repurchase agreements, *i.e.*, the ownership of the asset is transferred to the creditor, while the parties agree to reverse the transaction through a re-transfer of the asset to the debtor on the next business day, or as overnight collateralised loans, *i.e.*, an enforceable security interest is provided over the assets but, assuming fulfillment of the debt obligation, ownership of the asset is retained by the debtor.¹¹⁸

In order to have access to the marginal lending facility, credit institutions must be financially sound, *i.e.* subject to supervision by a competent national authority, subject to the Eurosystem's minimum reserve system, and pledge collaterals that satisfy certain criteria.¹¹⁹ However, the ECB showed flexibility by loosening "its collateral rules to help euro-area member state [banks] in distress."¹²⁰

Although the Marginal Lending Facility hit a peak on February 2011,¹²¹ individual Eurozone institutions have not suffered such a severe liquidity crisis that required the ECB to extend bulky lines of credit as the Fed did in the United States. Nevertheless, Europe has been experiencing a different critical situation: a sovereign debt emergency, which is the failure by one or more States

¹¹⁵ *Id.*

¹¹⁶ *The Discount Window*, FEDERAL RESERVE BANK OF NEW YORK (March 2011), <http://www.newyorkfed.org/aboutthefed/fedpoint/fed18.html>.

¹¹⁷ EUROPEAN CENTRAL BANK, *The Implementation Of Monetary Policy in The Euro Area* 27 (Feb. 2011), available at <http://www.ecb.int/pub/pdf/other/gendoc2011en.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 15.

¹²⁰ Christian Vits, *ECB Suspends Minimum Credit-Rating Threshold for Irish Debt*, Bloomberg, Mar. 31, 2011, available at <http://www.businessweek.com/news/2011-03-31/ecb-suspends-minimum-credit-rating-threshold-for-irish-debt.html>.

¹²¹ Tom Fairless, *ECB Says Marginal Lending Borrowings Remain Near 19-Month High*, MARKETBEAT (Feb. 21, 2011, 3:55 AM), <http://blogs.wsj.com/marketbeat/2011/02/21/ecb-marginal-lending-borrowings-remain-near-19-month-high/>.

to pay back the debt in full. The crisis has not been handled directly by the ECB, but rather by the EU, which created the European Financial Stability Facility (EFSF) in May 2010.¹²² The EFSF is a special purpose vehicle¹²³ owned and capitalized by Euro-area Member States and empowered to guarantee rescue packages for those Member States, such as Ireland in 2010 and Portugal in 2011,¹²⁴ that need to be bailed out.¹²⁵ In order to finance its activities, the EFSF issues bonds guaranteed by Member States.¹²⁶

Although the ECB does not have the starring role in this process, it does carry out some important duties. Notably, it is responsible for determining how each State Member participates in the EFSF.

VI. CONCLUSION

At the end of April 2011, “Ben Bernanke did something that previous Federal Reserve chairmen considered a terrible idea: he [held] a news conference,”¹²⁷ and this decision came after the announcement made in March 2011 that he would hold press conferences four times per year after the meeting of the Federal Open Market Committee. Although this is consistent with the personal beliefs of Mr. Bernanke, who has wanted the Fed to be more transparent in its actions,¹²⁸ the underlying reason of such a historical shift lies in the new role of the Fed, which has become, to all intents and purposes, a political body and, as such, an accountable one. As sharply pointed out by a February 2011 article published in *The Economist*, “central banking is now a more complicated game.”

Since the financial crisis in 2007 central banks have expanded their remits, either at their own initiative or at governments’ behest, well beyond conventional monetary policy. They have not only extended the usual limits of monetary policy by buying government bonds and other asset, but they are also taking on more responsibility for the supervision of banks and the stability of financial systems. Their new duties require new “macroprudential” policies: in essence, this means regulating banks with an eye on any

¹²² *About EFSF*, EUROPEAN FINANCIAL STABILITY FACILITY, available at <http://www.efsf.europa.eu/about/index.htm>.

¹²³ A special purpose vehicle (or entity) is a legal entity established to achieve specific objectives.

¹²⁴ The Greek rescue of 2010 was organized directly by EU Member States because the EFSF had not yet been formed.

¹²⁵ See *supra* note 122.

¹²⁶ *Id.*

¹²⁷ David Leonhardt, *Holding Bernanke Accountable*, N.Y. TIMES, Apr. 26, 2011, http://www.nytimes.com/2011/04/27/business/27leonhardt.html?_r=1&hp.

¹²⁸ *Id.*

dangers for the whole economy. And their old monetary-policy tasks are not getting any easier to perform.¹²⁹

Since the new policies have been put into action, it is difficult and even pointless to say whether such a shift has been effective or not. Doubtless, the shift has been reasonable. Central banks are endowed with the expertise and the prominence required to carry out certain complicated duties, such as overseeing firms “too big to fail.” Neither other regulators nor political bodies seem fit for such a purpose due to a lack of prestige and of independence.

The new duties, however, also bring new risks: “financial stability is politically a more treacherous mission than price stability.”¹³⁰ While it is fair to require a certain degree of accountability upon the Fed and the ECB, there is a serious risk that one of their fundamental features, the independence from government, will be impaired. This, however, might be considered an inescapable side effect. The two central banks are the only institutions equipped to tackle the new issues posed by the recent financial meltdown. When the going gets tough, the tough get going.

¹²⁹ *Central Banks: A more complicated game*, THE ECONOMIST, Feb. 17, 2011, http://www.economist.com/node/18178251?story_id=18178251.

¹³⁰ *Id.*

FISHING TRIPS: A LOOK AT THE HISTORY OF THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY

EMIR ALY CROWNE*

INTRODUCTION

The Agreement on Trade-Related Aspects of Intellectual Property¹ (“TRIPS”) is the new worldwide playing field for standardized intellectual property. Since 1995 TRIPS has set out the minimum standards required from members of the World Trade Organization. In practical terms, these members represent most of the countries in the world.²

This Article examines the history of TRIPS and the factors that account for its modern existence and pervasiveness. In passing, the Article addresses the issue of patentable subject matter.

PRE-TRIPS STANDARDS FOR INTELLECTUAL PROPERTY

Intellectual property standards were historically imposed on developing countries and others as a result of empire-building and colonization.³ For example, England’s copyright laws were extended to include ‘his Majesty’s dominions’ in 1911.⁴ Article 19 of the Berne Convention originally provided the colonial powers⁵ the right to accede to the Convention “at any time for their colonies or foreign possessions.” As a result, colonies were drawn into the Berne Convention but not on their own volition. The Berne Convention, which presumably served the interests of literate, wealthy Europeans, became the copyright standard for most colonies. Therefore, even after colonies gained independence, they were still

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¹ Marrakesh Agreement Establishing the World Trade Organisation: Agreement on Trade-Related Aspects of International Property Rights, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

² As of July 23, 2008, there are 153 members. *See Understanding the WTO: The Organization – Members and Observers*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Aug. 15, 2011).

³ Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 765, 766 (2002).

⁴ *Id.*

⁵ Major colonial powers (France, Germany, Spain the United Kingdom, the Netherlands and Portugal) all ratified the Berne Convention.

beholden to copyright systems that reflected the interests and priorities of their former masters.

Indeed, long before TRIPS, patents, trademarks and copyrights were the primary focus of international intellectual property rights. The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works were concluded at the end of the 19th century to provide international frameworks for the protection of certain intellectual property laws.⁶ However, these conventions lacked ‘teeth.’ They provided no effective sanctions for non-compliant signatories, nor did they provide binding dispute resolution mechanisms to address such non-compliance.⁷ Membership to these conventions did little to eliminate the inconsistent patchwork of intellectual property standards that existed worldwide.

In 1988, WIPO conducted a study for the TRIPS Negotiating Group during the Uruguay Round, which revealed that of the ninety-eight (98) signatories to the Paris Convention, from both developing and developed countries,

forty-nine excluded pharmaceutical products from protection, forty-five excluded animal varieties, forty-four excluded methods of treatment, forty-four excluded plant varieties, forty-two excluded biological processes for producing animal or plant varieties, thirty-five excluded food products, thirty-two excluded computer programs and twenty-two excluded chemical products.⁸

This suggests the Paris Convention did nothing to harmonize standards of industrial property protection; in fact, the WIPO Study suggests the complete opposite.⁹

As with other international conventions, an obstacle to widespread acceptance and adoption were the needs of the ‘latecomers,’ most notably the developing countries. During the 1960s and the 1970s, developing countries sought to update these conventions to secure greater access to foreign technologies with a

⁶ These treaties are administered by the World Intellectual Property Organization (“WIPO”), which replaced the United International Bureau for the Protection of Intellectual Property in 1971. For a full list of WIPO-administered agreements, see *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/treaties/en/> (last visited Aug. 15, 2011). For a full list of WIPO-administered agreements, see *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/treaties/en/> (last visited Aug. 15, 2011).

⁷ See DANIEL J. GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (3d ed. 2008).

⁸ Drahos, *supra* note 3, at 768 (citing WIPO, EXISTENCE, SCOPE AND FORM OF GENERALLY INTERNATIONALLY ACCEPTED AND APPLIED STANDARDS/NORMS FOR THE PROTECTION OF INTELLECTUAL PROPERTY (1988), available at http://www.wto.org/gatt_docs/English/SULPDF/92050186.pdf [hereinafter WIPO Study]).

⁹ See Drahos, *supra* note 3, at 765.

view towards promoting their own development.¹⁰ Like all powerless latecomers, they were unsuccessful.

For example, signatories started to revise the Paris Convention in 1980, but such revisions were never completed. Developing countries sought to include provisions relating to the compulsory licensing of any patented technology.¹¹ The United States opposed this proposed revision because it “amounted to little more than expropriation of U.S. intellectual property rights.”¹² So while the developing countries pursued strategies “for the adoption of lower and more flexible standards of intellectual property protection”; the developed world pursued the opposite agenda.¹³ Dissatisfied with the progress of their agenda, the developed world, initially represented almost exclusively by the United States, looked elsewhere to promote and further its cause.

PREPARING THE FIELD: PLANNING FOR TRIPS

The United States’ disappointment with the World Intellectual Property Organization (“WIPO”), and the conventions it administered, led to a forum shifting strategy in the 1980s. In particular, the United States feared that developing countries would defeat its desire for higher standards for intellectual property in forums like the United Nations Conference on Trade and Development (“UNCTAD”), the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), and WIPO.¹⁴ The General Agreement on Tariffs and Trade (“GATT”), on the other hand, “was a forum in which the United States was the single most influential player.”¹⁵ There the United States began to pose the problem of intellectual property protection as a ‘trade-related’ issue with its solution lying in the GATT. And in September 1986, contracting parties to the GATT meeting in Punta del Este, Uruguay, agreed to include trade-related aspects of intellectual property rights, including trade in counterfeit goods, as a subject for negotiations in the forthcoming trade round referred to as the “Uruguay Round”; until this time, intellectual property rights were considered an obstacle to free trade.¹⁶

GATT proved seductive to the United States and other developed countries for several reasons. First, worldwide intellectual property standards could be promulgated more efficiently through the

¹⁰ Drahos, *supra* note 3, at 768.

¹¹ *Id.* at 769.

¹² *Id.*

¹³ See Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 7 (Carlos M. Correa and Abdulqawi A. Yusuf eds., 2d ed. 2008).

¹⁴ See generally Drahos, *supra* note 3, at 769.

¹⁵ *Id.*

¹⁶ See generally, Drahos, *supra* note 3, at 773–74.

GATT than in WIPO administered conventions.¹⁷ Through the GATT, all of the important intellectual property rights could be incorporated into a single document; a document that could also be incorporated by reference in other conventions or agreements between countries. Indeed, because ratification of TRIPS is a requirement for membership in the World Trade Organization (“WTO”),¹⁸ any country seeking easy access to the international markets must enact the minimum standards set out in TRIPS. Opting out of TRIPS is simply not an option.

The economic advantage gained through WTO membership furthered the political and legal agenda of globalizing intellectual property laws through TRIPS. Indeed, developing countries were already endeared to the WTO because of its “promis[e] to lower trade barriers and eliminat[e] regimes of unilateral trade sanctions.”¹⁹ TRIPS was simply the additional wrapping to a wanted gift. Even developed nations, such as Russia and China, that were hesitant or unwilling to join other international conventions found the prospect of WTO membership a more powerful economic incentive than their own political pride.

Second, the Uruguay Round’s broad agenda allowed for linkage-bargain diplomacy, as opposed to WIPO, which exclusively focused on intellectual property rights.²⁰ At the Uruguay Round, the United States and other developed countries could negotiate intellectual property rights, satisfying the industries that were heavily dependent upon such rights, like pharmaceuticals and brand name goods, in exchange for concessions in textiles and agriculture, which are industries central to the economies of developing countries.

Third, and perhaps a bit indelicately, GATT provided a more “developed world-friendly agency as compared with the UNCTAD.”²¹ The UNCTAD was the United Nation’s most prominent forum for analyzing and promoting trade and intellectual property rights. This forum was designed in part to help developing countries negotiate international intellectual property norms that would have been more responsive to their needs, like technology transfers. However, strong opposition from the developed world brought an end to these noble motives.²² Commentators rightly note that the UNCTAD “found itself deliberately marginalized in the 1980s and the victim (as was WIPO)

¹⁷ GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCES INDUSTRIES: A TWENTIETH CENTURY HISTORY* 198 (2003).

¹⁸ It was during the Uruguay Round that the GATT framework was turned into the World Trade Organization, which is discussed in greater detail later in this Article.

¹⁹ Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 Minn. L. Rev. 249, 249 (2003).

²⁰ Dutfield, *supra* note 17.

²¹ *Id.* at 199.

²² Abdulqawi A. Yusuf, *supra* note 13, at 6.

of a successful forum-shifting strategy led by the USA²³ in their quest for strengthening intellectual property interests that favored developed nations at the expense of others.

And finally, as suggested earlier, GATT had well-established enforcement and dispute resolution mechanisms that were not available in WIPO.²⁴

PICKING THE TEAM: THE PLAYERS BEHIND TRIPS

The United States culminated its program of intense lobbying at the Uruguay Round by including intellectual property rights; in its pursuit for such rights, the United States received support from the European Union, Japan, Canada and other developed nations. As early as the GATT's 1973–1979 Tokyo Round, which preceded the Uruguay Round, trade in counterfeit goods was a serious issue. The Levi Strauss Corporation and other trademark holding firms formed the 'Anti-Counterfeiting Coalition' and wanted to include an anti-counterfeiting code in the Tokyo Round's agenda.²⁵ Although parties failed to agree upon rules to stop trade in counterfeit goods, they continued to pursue a discipline provision for trading counterfeit goods.

In 1984, the Group of Experts on Trade in Counterfeit Goods was created to further examine the matter of counterfeit goods.²⁶ The group agreed that "joint action was probably necessary," although it could not "agree on whether GATT was the appropriate forum."²⁷ The Group raised concerns as to whether additional standards were necessary, whether these standards would impede legitimate trade, and whether WIPO, as opposed to GATT, was the appropriate forum for the issues.²⁸ Regardless of these concerns, the item "trade-related aspects of intellectual property rights, including trade in counterfeit goods" eventually made it to the GATT negotiating table in the Uruguay Round, primarily due to the economic influence of several major players present at the table.

Prior to the Uruguay Round, the United States government aggressively promoted higher intellectual property standards on behalf of domestic groups. These domestic groups, which included key governmental agencies and other institutions, wanted to pursue their trade policy agendas. The most important entities dealing with trade are Congress, the Office of the United States Trade Representative ("USTR"), and the United States International Trade Commission ("ITC"). Each entity serves an important purpose in the United States' trade relations. The USTR incorporated intellectual property rights into the country's international trade diplomacy, which

²³ Dutfield, *supra* note 17, at 199.

²⁴ *Id.*

²⁵ *Id.* at 197.

²⁶ Gervais, *supra* note 7, at 8–9.

²⁷ *Id.* at 9.

²⁸ *Id.* at 9–10.

reflected demands made by producer interest groups.²⁹ The ITC provided trade expertise to the government and “determine[d] the impact of imports on U.S. industries.”³⁰ Additionally, the 1974 Trade Act established the Advisory Committee on Trade Policy and Negotiations (“ACTPN”) “to enable the private sector to advise the government on trade policy and multilateral negotiations.”³¹

Pfizer’s CEO, Edmund Pratt, and IBM’s CEO, John Opel, lead the ACTPN in recruitment efforts that resulted in the Pharmaceutical Manufacturers Association and the Chemical Manufacturers of America joining the ACTPN and giving their perspectives on trade policy and negotiations.³² The ACTPN educated members of Congress and USTR officials on intellectual property rights and their significance and importance for the United States’ economy. The Committee also sought to persuade the USTR that it was in the United States’ interest “to pursue [intellectual property] demands coming from the ACPTN at the GATT.”³³ The ACPTN sought to make intellectual property rights the main priority for United States trade policy.

The United States then formed an international alliance with other developed countries. The parties established the Intellectual Property Committee (“IPC”) in 1986 to garner the support of the European and Japanese governments and businesses.³⁴ Executives of United States-based multinational corporations were the primary base for IPC’s membership as they had sizeable intellectual property portfolios to protect.³⁵ Between 1986 and 1996, IPC corporate membership fluctuated from eleven to fourteen participants.³⁶ “In 1986, the IPC included Bristol-Myers, CBS, Du Pont, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto and Pfizer.”³⁷ In 1994, CBS, Du Pont and General Motors withdrew from membership, but Digital Equipment Corporation, FMC, Procter & Gamble, Rockwell International and Time Warner all joined the IPC.³⁸

The IPC enjoyed a close relationship with the USTR, Congress, the Union of Industrial and Employers’ Confederations of Europe (“UNICE”), and Keidanren, which are two international business associations; given these relationships, the IPC was able to

²⁹ Dutfield, *supra* note 17, at 200.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 200–01.

³³ *Id.* at 201.

³⁴ *Id.* at 202.

³⁵ SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 96–108 (2003).

³⁶ *Id.* at 96, n.1.

³⁷ *Id.* at 2 n. 1.

³⁸ *Id.* at 96 n. 1.

package intellectual property as a ‘trade-related’ issue.³⁹ This package would eventually evolve into the TRIPS Agreement.

However, even with the support of the European Community and Japan, the IPC and the United States had to minimize resistance from the developing countries.⁴⁰ “The countries most active in their opposition to [this U.S.-led] agenda were India, Brazil, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia”—the Group of Ten.⁴¹ The next section outlines how the United States dealt with this opposition.

PRACTICE MAKES PERFECT: REFINING THE TRIPS NEGOTIATION STRATEGY

Although the Group of Ten initially resisted the GATT forum, political pressures led to eventual acquiescence. The United States employed “a coercive trade-based strategy, threatening trade sanctions and the denial of trade benefits for countries whose IP regimes were deemed unacceptably weak.”⁴² Through Section 301 of the Trade Act of 1974 (“Trade Act”),⁴³ the United States specifically included the failure to protect intellectual property as one of the “unfair trade practices” that could result in an investigation by the United States Trade Representative (“USTR”) and possible sanctions. Section 301 also authorized the USTR to initiate its own investigations so as to protect U.S. firms from retaliatory action by foreign governments.⁴⁴ The United States used Section 301 to link “its negotiating objectives on the protection of high technology to intellectual property trade barriers.”⁴⁵ A recent WTO Dispute Settlement Panel Report found that Section 301 did not violate the provisions of the Agreement establishing the WTO or its annexed agreement—at least not in principle.⁴⁶

The United States further strengthened the authority of the USTR through other changes to the Trade Act, most notably the ‘Special 301’ report.⁴⁷ By design, this annual report was intended to help the USTR “identify those foreign countries that [] deny adequate and effective [protection of] intellectual property rights, or deny fair

³⁹ Dutfield, *supra* note 17, at 198, 202.

⁴⁰ *Id.* at 202.

⁴¹ Drahos, *supra* note 3, at 773; SELL, *supra* note 35, at 108.

⁴² SELL, *supra* note 35, at 13.

⁴³ Trade Act of 1974, 19 U.S.C. § 2411 (2006) [hereinafter *Trade Act*].

⁴⁴ SELL, *supra* note 35, at 133-34.

⁴⁵ Drahos, *supra* note 3, at 772.

⁴⁶ WTO PANEL ON UNITED STATES, UNITED STATES - SECTIONS 301-310 OF THE TRADE ACT OF 1974 350 (Dec. 22, 1999, adopted Jan. 15, 2000), *available at* http://www.wto.org/english/tratop_E/dispu_e/dispu_settlement_cbt_e/a1s1p1_e.htm.

⁴⁷ See Omnibus Trade and Competitiveness Act (1988), 19 U.S.C. § 2242 (2006).

and equitable market access to United States persons that rely upon intellectual property protection.”⁴⁸

Then there were the Generalized System of Preferences (“GSP”), initially developed under GATT, which permitted certain developed countries to reduce or eliminate tariffs for goods emanating from developing countries. It was intended to be a relaxation of the ‘most favored nation’ principle whereby GATT members are obliged to treat imports from all members, including tariffs, levies, etc., the same as they would treat imports from their ‘most favored’ trading partners. However, “in deciding whether a developing country’s products were to gain preferential treatment under the [GSP] system,” the President of the United States was required to give ‘great weight’ to that country’s protection of foreign intellectual property rights.⁴⁹

With these new powers, the United States used the Special 301 reports to target developing countries that were either resisting its intellectual property agenda at the GATT or leading the developing world in terms of intellectual property goods. For example, the United States targeted South Korea and Brazil’s patent laws.⁵⁰ South Korea’s patent laws only permitted process patents on foods, chemicals and drugs with a twelve-year period of protection from the date of publication. Similarly, the United States targeted Brazil’s laws because it excluded pharmaceutical products and processes entirely from patentability. In the Korean case, the United States threatened sanctions and removal of trade benefits provided under the GSP system.⁵¹ In the Brazilian case, the United States imposed actual sanctions.⁵² These countries were effectively coerced into changing their patent laws to conform to the United States’ demands. Five out of ten developing countries that resisted the inclusion of intellectual property in GATT were targeted for Special 301 treatment.⁵³ The two leaders in this group, Brazil and India, were placed on the “Priority Watch List,” while other countries, Argentina, Egypt and Yugoslavia, were put on the less serious—though implicitly nefarious—“Watch List.”⁵⁴

Indeed, bilateral agreements were not unique to these countries. The United States successfully formed bilateral copyright agreements with Indonesia and Taiwan, protected computer software within Colombia’s copyright law, and had Saudi Arabia adopt laws governing patents.⁵⁵ With the USTR actively pursuing complaints by American firms and businesses pursuant to the Special 301 provision,

⁴⁸ *Id.* at § 2242(b)(1)(A).

⁴⁹ Drahos, *supra* note 3, at 773.

⁵⁰ SELL, *supra* note 35, at 109.

⁵¹ *Id.*

⁵² *Id.* at 108.

⁵³ Drahos, *supra* note 3, at 774.

⁵⁴ *Id.*

⁵⁵ *Id.*

developing countries lessened their solidarity and resistance to TRIPS.

The United States effectively bullied the developing countries, and others, to the GATT negotiating table.⁵⁶ They each knew that resisting the United States could result in further Section 301 sanctions.⁵⁷ Yet the countries had little say on what items would be included at the GATT negotiating table. The primary purpose of their presence at GATT was to insure they complied with standards set forth by the United States.

In 1984 the European Community also enacted its own version of Section 301 in the Council Regulation 264/84.⁵⁸ However, unlike the United States, the European Commission found it difficult to agree upon the use of this tool.⁵⁹ Nonetheless, the regulation facilitated the European Commission's pursuits against those violating intellectual property rights, such as record piracy in Indonesia and Thailand.⁶⁰ Furthermore, it allowed the European Commission to suspend South Korea's GSP privileges when they "fail[ed] to provide satisfactory intellectual property protection."⁶¹ During this time, the United States targeted Japan when it sought to adopt a "*sui generis* form of protection for computer software"; this may help explain why Japan itself shied away from exerting pressure on developing countries in intellectual property issues.⁶²

In addition to the above incidents, there are other multilateral or regional trade agreements where the United States contributed to the standard setting agenda.⁶³ For example, the United States, Canada and Mexico successfully negotiated the North American Free Trade Agreement ("NAFTA") that provided for heightened awareness of intellectual property rights and more consistent standards. NAFTA, having been completed two years prior to the conclusion of the Uruguay Round, helped the ratification of TRIPS not only by drawing to attention to intellectual property rights as a 'free trade' issue, but also by undermining the cohesion of the Latin American opposition.⁶⁴ Latin American countries considered these intellectual property standards as an 'admission price' for becoming members of NAFTA.

Countries that were not targeted by the United States were nonetheless concerned that the increasing number of free trade agreements, such as NAFTA, would severely hinder them from

⁵⁶ Dutfield, *supra* note 17, at 202.

⁵⁷ See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242(b)(1)(C).

⁵⁸ Drahos, *supra* note 3, at 773.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 776.

⁶⁴ SELL, *supra* note 35, at 110.

obtaining access to the intellectual property market.⁶⁵ Supporting the TRIPS Agreement was perceived as a method to obtain broader market access.⁶⁶

GAME DAY: NEGOTIATING TRIPS

The inclusion of intellectual property standards at the Uruguay Round was a masterfully orchestrated coup. At the Ministerial Conference, which launched the Uruguay Round in September 1986, the Ministers included “trade-related aspects of intellectual property rights, including trade in counterfeit goods” as a subject for negotiation.⁶⁷ The entire agenda item reads as follows:

In order to reduce the *distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights*, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.⁶⁸

In addition to the above agenda items, the parties also established the ‘Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods’ negotiating group under the Group of Negotiation on Goods.⁶⁹ In 1987, the Ministers decided that the initial phase of the Uruguay Round would cover:

identification of relevant GATT provisions and examination of their operation on the basis of suggestions by participants for achieving the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Gervais, *supra* note 7, at 11 (internal quotations omitted). The expression “including trade in counterfeit goods” was included to address the (unsuccessful) work carried out in the Tokyo Round. *Id.* at 12.

⁶⁸ *Id.* at 11 (emphasis added).

⁶⁹ General Agreement on Tariffs and Trade, Sept. 20, 1986, Doc. MIN.DEC ,7-8, available at: http://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf. Saying that the negotiations sought to “clarify” existing GATT provisions was a bit disingenuous. It was clear the negotiations were intended to give rise to a new set of standards relating to intellectual property.

Negotiating Objective and of factual information by the secretariat as required. Initial examination of the specific suggestions and of the procedures and techniques that might be used to implement them.

Examination of the matters to be dealt with in this area on the basis of the report of the Group of Experts..., of other work already undertaken in the GATT and of papers by participants setting out their suggestions for achieving the negotiating objectives. Other factual information as required.

Consideration of the relationship between the negotiations in this area and initiatives in other fora. Collection of information from relevant sources.⁷⁰

The negotiations initially focused on identifying the existing intellectual property norms and the trade-related gaps therein.⁷¹ Negotiations progressed slowly between 1987 and 1989; by the end of 1988, a number of parties, including the United States, Switzerland, the European Community, Japan, the Nordic countries and Canada, wanted a far-reaching agreement.⁷² Several “developing countries [including Thailand, Mexico and Brazil] expressed serious concern about the possible over-protection of intellectual property rights.”⁷³ In their view, over-protection of intellectual property rights could impede the transfer of technology and increase the cost of agricultural and pharmaceutical products. The developing countries “argu[ed] for a narrow interpretation of the Ministerial mandate.”⁷⁴

Despite the efforts of the developing countries, the Ministers agreed that future discussion on TRIPS should encompass:

- (a) the applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
- (d) the provision of effective and expeditious procedures for the multilateral prevention and

⁷⁰ General Agreement on Tariffs and Trade: The Uruguay Round – Decisions of 28 January 1987, Feb. 5, 1987, GATT/1405, at 21, *available at* http://www.wto.org/gatt_docs/English/SULPDF/91260225.pdf.

⁷¹ Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 *Fordham L. Rev.* 505, 507–08 (2005).

⁷² Gervais, *supra* note 7, at 14. *See also* Drahos, *supra* note 3, at 771.

⁷³ Gervais, *supra* note 7, at 13.

⁷⁴ Drahos, *supra* note 3, at 773.

settlement of disputes between governments, including the applicability of GATT procedures;
(e) transitional arrangements aiming at the fullest participation in the results of the negotiations.⁷⁵

Most notably, the mandate of the TRIPS negotiation group included coverage of the “availability, scope and use” of intellectual property rights. This meant that all substantive aspects of intellectual property law could be discussed by this group. The Ministers further agreed the TRIPS Agreement would also cover enforcement and dispute settlement mechanisms for intellectual property issues. However, consideration would be given to “concerns raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including developmental and technological objectives.”⁷⁶

The Ministers emphasized the “importance of reducing tensions in [the area of intellectual property] by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures.”⁷⁷ One commentator rightly views this statement as an implicit reference to the unilateral coercion mechanisms employed by the United States.⁷⁸ Lastly, the Ministers decided that “negotiations should be conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organizations.”⁷⁹

Following the mid-term meeting, the TRIPS negotiation group discussed “national treatment, most-favored nation, dispute settlement, non-discrimination and reciprocity.”⁸⁰ Australia proposed, for the first time, the “Berne-plus” and “Paris-plus” approach—namely, that the standards contained in the principle intellectual property conventions⁸¹ be incorporated by reference in a GATT agreement.⁸² India proposed that GATT rules should only apply when a party could prove a trade distortion.⁸³ India also “requested more

⁷⁵ Multilateral Trade Negotiations: The Uruguay Round, Apr. 21, 1989, MTN.TNC/11, at 21, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92070013.pdf.

⁷⁶ *Id.*

⁷⁷ *Id.* at 22.

⁷⁸ *Id.*

⁷⁹ *Id.* at 22.

⁸⁰ Gervais, *supra* note 7, at 16.

⁸¹ Specifically, the Paris Convention, the Berne Convention, the International Convention for the Protection of Performers, the Rome Convention for Producers of Phonograms and Broadcasting Organisations, and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms. *See id.*

⁸² *See generally* Multilateral Trade Negotiations: The Uruguay Round – Communication from Australia, Jul. 10, 1989, MTN.GNG/NG11/W/35, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92070118.pdf.

⁸³ *See* Multilateral Trade Negotiations: The Uruguay Round – Standards and Principles Concerning the Availability Scope and Use of

favorable treatment for developing countries,” since national treatment and most-favored nation treatment principles only applied to trade in material goods.⁸⁴ Another major item on the negotiating table was the compulsory licensing of patents. Whereas Brazil and South Korea were in favor, Austria and Hong Kong argued for restrictions in the licensing procedures.⁸⁵

The next stage of the negotiation involved a number of developed countries presenting what they envisioned the TRIPS Agreement would encompass. “[Draft texts emanated] from the European Community, the United States, Japan, Switzerland, and Australia.”⁸⁶ The proposal submitted by the European Community was closely followed by the United States, the common structure of which served as the basis for the final agreement, subject to a few changes.⁸⁷ The proposals detailed the acquisition and enforcement of intellectual property rights and the application of basic principles such as national treatment and most-favored nation.⁸⁸ Additionally it included “provisions regarding the enforcement of those rights before national courts and custom authorities.”⁸⁹ The proposals also brought future TRIPS disputes under the GATT/WTO dispute-settlement mechanism.⁹⁰

In reaction to the drafts proposed by the developed countries, more than a dozen developing countries proposed their own draft agreement.⁹¹ This draft focused on the need to “maintain flexibility to implement economic and social development objectives.”⁹² It contained two separate agreements: one dealt with “rules on counterfeit goods and border measures” and the other dealt with broader policy objectives of intellectual property rights.⁹³

Trade-Related Intellectual Property Rights, Jul. 10, 1989, MTN.GNG/NG11/W/37, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92070115.pdf.

⁸⁴ Gervais, *supra* note 7, at 16.

⁸⁵ *Id.* These States wanted restrictions such as procedures for judicial review, a limitation to the domestic market, non-exclusivity and “appropriate compensation for the right holder whose industrial property was subject to the compulsory licence.” *Id.*

⁸⁶ Gervais, *supra* note 71, at 508.

⁸⁷ Gervais, *supra* note 7, at 17.

⁸⁸ *See* Multilateral Trade Negotiations: The Uruguay Round – Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, Mar. 29, 1998, MTN.GNG/NG11/W/68, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92100042.pdf.

⁸⁹ Gervais, *supra* note 71, at 508.

⁹⁰ *Id.*

⁹¹ *Id.* The countries include, namely, Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, Uruguay, Pakistan and Zimbabwe. *Id.*

⁹² *Id.*

⁹³ Abdulqawi, *supra* note 13, at 9–10.

There remained a wide gap between developed and developing countries, with important divisions also existing among developed countries. To put the negotiations on a single track, the Chairman crafted a document that identified the main proposals by the author's country and set out the substantive differences between the proposals.⁹⁴ Following these discussions, the Chairman drafted his report for the Group of Negotiation on Goods.⁹⁵ This report adopted the proposals drafted by the United States and European Community and ultimately created a composite text. Proposals put forth by the developed countries became the "A" text of the draft, while the proposal put forth by the developing countries became the "B" text of the draft.⁹⁶ The Chairman expected parties to negotiate within the scope of this collated text.

At this juncture, the Chairman convened regular, but informal, sessions with the main stakeholders; these informal sessions were in addition to the formal monthly sessions already in place. Among these informal groups, the most notable was the group of "10+10" which consisted of both developed and developing countries. These informal groups were key in ensuring that negotiations progressed despite political agendas and stalemating. It was within these informal groups, especially the first three listed below, where the real negotiations took place.⁹⁷

A list of these informal groups are as follows:

1. The US and the European Community.
2. The US, the European Community and Japan.
3. The US, the European Community, Japan and Canada (Quad).
4. Quad "plus" (membership depended on issue, but Switzerland and Australia were regulars in this group).
5. Friends of Intellectual Property Group (larger group included the Quad).
6. "10+10" (and variants thereof such as "5+5" and "3+3"). The United States and the European Community were always part of such group if the issue was important. Other active members included Japan, the Nordic States, Canada, Argentina,

⁹⁴ Uruguay Round Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Jun. 12, 1990, GATT/AIR/3022, *available at* http://www.wto.org/gatt_docs/English/HTM/3022.RFT.HTM. *See also* Gervais, *supra* note 7, at 18.

⁹⁵ Multilateral Trade Negotiations: The Uruguay Round - Chairman's report to the Group of Negotiation on Goods, Jul. 23, 1990, MNT.GNG.NG11/W/76, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92110034.pdf.

⁹⁶ Gervais, *supra* note 71, at 508.

⁹⁷ Drahos, *supra* note 3, at 771-72.

Australia, Brazil, Hong Kong, India, Malaysia, Switzerland and Thailand).

7. Developing Countries. For example, the Andean Group—Bolivia, Colombia, Peru and Venezuela; Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay combined to submit a draft text in 1990.

8. Group 11: the entire TRIPS negotiating group. About forty (40) countries were active in this group.⁹⁸

In most cases, TRIPS negotiators incorporated existing international norms by reference. These norms were modified by consensus when necessary to account for modern situations.⁹⁹ By October 1990, the updated draft “contained standards in all fields of intellectual property and a provision that stated that [these standards] constituted the ‘minimum requirements.’”¹⁰⁰

During the Brussels meeting of the Uruguay Round, negotiators made progress on TRIPS under Minister Anita Grandin, the Chairperson of Swedish Trade. The major issues included “the protection of pharmaceutical products by patents; dispute settlement; the nature and duration of transitional arrangements for developing nations; [and] the protection of geographical indications.”¹⁰¹ Although all parties disagreed on some issues,¹⁰² powerful developed countries made few concessions.¹⁰³ For example, since the United States could not accept the Rome Convention because it protects neighboring rights, which the United States does not recognize, the TRIPS Agreement was worded to create an exception to the Rome Convention.¹⁰⁴ Apparently, when in Rome, don’t do as the Romans do.

Developing countries also opposed including trade secrets in TRIPS and reiterated the need to account for developing countries’ developmental and technological objectives.¹⁰⁵ They also argued in favor of compulsory patent licensing and exceptions to patentability.¹⁰⁶ Despite these concerns, developing countries were

⁹⁸ *Id.*

⁹⁹ Gervais, *supra* note 71, at 509.

¹⁰⁰ Gervais, *supra* note 7, at 22.

¹⁰¹ *Id.* at 23.

¹⁰² Including moral rights, the protection of biotechnological inventions, plants varieties and geographical indications. However, as noted by Gervais, these issues “were solved either by introducing exceptions (as in Article 9 on moral rights or Article 27 on biotechnology) or by vague undertakings to negotiate further, as in Article 24 (concerning geographical indications).” Gervais, *supra* note 71, at 509 n.23.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Multilateral Trade Negotiations: The Uruguay Round – Meeting of Negotiating Group of 10-21, Oct. 8, 1990, MTN.GNG.NG11/25, at 2, *available at* http://www.wto.org/gatt_docs/English/SULPDF/92110158.pdf.

¹⁰⁶ Multilateral Trade Negotiations: The Uruguay Round – Meeting of the Negotiating Group of 1 November 1990, Nov. 14, 1990,

generally forced to accept and implement a completely new set of intellectual property norms into their national laws. TRIPS' Articles Seven and Eight allegedly address the concerns of the developing countries; furthermore, these concerns could be addressed in the transitional period provided to implement TRIPS. The developing countries accepted TRIPS after significant concessions in other topics of negotiation, "such as tariffs on tropical fruit or textiles."¹⁰⁷ They accepted TRIPS as part of the total package even though it required such concessions.

Another key issue was the protection of existing intellectual property. Although the Chairman proposed that intellectual property existing at the time of entry into force of the agreement should be protected, the United States' pharmaceutical industry was concerned with protecting pending patents.¹⁰⁸ The parties could not reach an agreement on this point. Furthermore, certain "North-North" issues also made their way into the spotlight. For example, Japan disagreed with an "exclusive long-term rental right on sound recordings," as Japanese law prohibited rentals for a maximum of one year.¹⁰⁹

Following these discussions, the Chairman and Secretariat prepared a new version of a draft TRIPS Agreement, titled "Draft Final Act embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations."¹¹⁰ This draft eliminated the alternatives and summarized the results of the negotiations. In effect, the final agreement mirrored the "A" text of the previous draft—embodying the norms that were accepted by developed countries.

In sum, the drafters chose to:

- grant national treatment, which is unusual in the field of intellectual property, and most-favored nation treatment subject to a number of limitations and exceptions;
- exclude moral rights (art. 6) of the Berne Convention;
- provide a rental right, but allow Japan and others to maintain a system combining a short exclusive right followed by a remuneration right;
- protect "new or original" industrial designs;
- provide special protection under geographical indications) for wines and spirits, thus allowing for a separation of these appellations;
- provide patent protection of 20 years from filing, in line with practice in a majority of countries, with the

MTN.GNG/NG11/27, at 1, *available at*
http://www.wto.org/gatt_docs/English/SULPDF/92110262.pdf.

¹⁰⁷ Gervais, *supra* note 71, at 509.

¹⁰⁸ Gervais, *supra* note 7, at 25.

¹⁰⁹ *Id.*

¹¹⁰ *See generally* Multilateral Trade Negotiations: The Uruguay Round – Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 20, 1991, MTN.TNC/W/FA, *available at*
http://www.wto.org/gatt_docs/English/SULPDF/92130093.pdf.

notable exception of the United States (17 years from grant);

- impose patentability of inventions in all fields, with a possible exclusion for plants and animals; and,
- impose a general transitional period of one year from entry into force, with an additional four years for developing countries and another five for least-developed participants.¹¹¹

The text received positive reactions for the most part. However, the United States' pharmaceutical industry expressed concern about the transitional period afforded to developing countries. In their view, it would be difficult to obtain bilateral agreements since such transitional periods (or delays, according to them) have now been 'officially' condoned in this multilateral instrument.¹¹² India remained concerned about restrictions on compulsory licensing of patents despite the transitional period, "in particular where a patent was not 'worked' in another country."¹¹³

The Uruguay Round formally concluded in Marrakesh, Morocco in April 1994.¹¹⁴ And from this, the TRIPS Agreement materialized.

¹¹¹ Gervais, *supra* note 7, at 26.

¹¹² *Id.* at 26–27.

¹¹³ *Id.* at 27.

¹¹⁴ A review of TRIPS would be incomplete without mention of the Doha Development Round, which began in Qatar in November 2001 and is still ongoing

There are three main concerns with respect to TRIPS this time around:

First, paragraph 17 stressed TRIPS should be implemented and interpreted "in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration." Doha WTO Ministerial 2001: Ministerial Declaration, Nov. 20, 2001, WT/MIN(01)/DEC/1, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. *See also* Doha WTO Ministerial 2001: Declaration on the TRIPS Agreement and Public Health, Nov. 20, 2001, WT/MIN(01)/DEC/2, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

Second, the Declaration seeks to address "North-North" issues concerning geographical indications on wines and spirits. Lastly, TRIPS council will "examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments..." Doha WTO Ministerial 2001: Ministerial Declaration, Nov. 14, 2001, WT/MIN(01)/DEC/1, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

The Doha Round is intended to address the concerns of developing countries, but with the collapse of talks in 2008, "progress" may be nothing more than a mirage in the deserts of Doha.

THE MVP: TRIPS AND PATENTABLE SUBJECT MATTER

Aside from the concerns discussed above, the TRIPS provisions relating to patentable subject matter reveals considerable ambiguity. For example, Article 27(1) of TRIPS states that:

[P]atents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application... patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.¹¹⁵

One commentator argues that TRIPS creates a subject matter eligibility threshold: there must first be an invention, then it must be new, involve an inventive step, and be capable of industrial application.¹¹⁶ However, I do not read TRIPS as creating this threshold. I read Article 27(1) as striving to grant patents over ‘anything’ insofar as it is new, inventive and industrially applicable. To be an invention under TRIPS it must be new, inventive and industrially applicable; there is no subject matter eligibility threshold. TRIPS establishes minimum thresholds. It cannot, by design, establish a subject matter eligibility threshold.

If we accepted that TRIPS did indeed establish a subject matter eligibility threshold, it would mean that inventions could only be protected in a “field of technology.” The dictionary definition of “technology” is “the application of scientific knowledge for practical purposes” or “the branch of knowledge concerned with applied sciences.”¹¹⁷ Therefore on this understanding, TRIPS appears to confine subject matter eligibility to the ‘hard’ sciences. This would seemingly preclude inventions in the useful arts and perhaps even fields like computer science, agriculture, applied mathematics and engineering.

¹¹⁵ Uruguay Round Agreement: TRIPS – Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights, WTO, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Aug. 26, 2011).

¹¹⁶ Luigi Palombi, *Patentable Subject Matter, TRIPS and the European Biotechnology Directive, Australia and Patenting Human Genes*, 9 UNSW L.J. Forum Genetics & Law, 26, 26 (2003). See also Daniel J. Gervais, *The TRIPS Agreement: Interpretation and Implementation*, 21 European Intellectual Property Review, 156, (1999).

¹¹⁷ See *Oxford Dictionaries* (2011), <http://www.askoxford.com> (last visited Aug. 26, 2011). The Cambridge Advanced Learner’s Dictionary also defines “technology” as the “the practical, especially industrial, use of scientific discoveries.” See *Cambridge Dictionaries Online* (2011), <http://dictionary.cambridge.org/> (last visited Aug. 26, 2011).

Articles 27(2)¹¹⁸ and 27(3)¹¹⁹ list additional permissive exclusions from patentability. Both of these sub-sections state that “Members *may* exclude [certain inventions] from patentability...”¹²⁰ There is nothing mandatory about the exclusions.

TRIPS intended to set out the minimum requirements for intellectual property, albeit in the economic and political guise of promoting an even playing field in international trade. It is arbitrary to create a subject matter eligibility threshold that denies protection to an invention in one country, while permitting it another. Where domestic legislation codifies few exceptions to patentability, it is not the task of the courts to second-guess that legislative intent. If the subject matter in question can be made to fit within definition of invention, even if slightly uncomfortably, then the courts should aim to breathe life into the bare, and sometimes dated, words of the patent statute. Inventions should be rejected on the traditional grounds of novelty, inventiveness and utility. And even where domestic legislation provides for exceptions to patentable subject matter, these exceptions must be construed narrowly if patent law is to further its own aims of protecting innovation, promoting public disclosure and competitiveness in the global market.

¹¹⁸ Article 27(2) states that “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.” Uruguay Round Agreement: TRIPS – Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights, WTO, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Aug. 26, 2011). I have always found it curious that patents could be allowed for inventions which, when exploited, would be contrary to domestic law. How could such inventions be industrially applicable?

¹¹⁹ Article 27(3) states that “Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.” Uruguay Round Agreement: TRIPS – Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights, WTO, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Aug. 26, 2011).

¹²⁰ *Id.* (emphasis added).

**WARMING DOWN WITH DEEP STRETCHES: STANDARD SETTING
POST-TRIPS**

The permissive exclusions of plant and animal varieties, or the biological processes for their production, from patentable subject matter in TRIPS arose at the behest of the European Community negotiators—as did the permissive exceptions to patentability for morality or public policy concerns.¹²¹ Unsurprisingly, the United States is not satisfied with this state of affairs given its liberal approach to patentable subject matter and the limited role that morality plays, if any, on determinations of patentability. Enter Section 301 and Special 301 which resume their significance in bilateral negotiations with countries whose intellectual property standards may be TRIPS-compliant but still lower than those of the United States, which are so-called TRIPS-Plus standards.¹²² In many ways, TRIPS-Plus agreements usurp the role that the world's trading community played in setting agreeable minimum intellectual property standards. It is nothing more than economic and political coercion in the guise of trade.

For example, the United States–Jordan bilateral trade agreement indicated that “Jordan shall take all steps necessary to clarify that the exclusion from patent protection of ‘mathematical methods’ in Article 4(B) of Jordan’s Patent Law does not include such ‘methods’ as business methods or computer-related inventions.”¹²³ Here, the United States asked Jordan to adopt a definition of “methods” that constitutes more than the minimum standard set out in TRIPS. This effectively forced Jordan to recognize business methods and computer software as patentable subject matter, despite the fact that, until recently,¹²⁴ even law in the United States questioned the patentability of business methods, as seen in *Bilski*.¹²⁵

Another example is the United States–Bahrain Free Trade Agreement, which provides that “each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances,

¹²¹ SELL, *supra* note 35, at 111.

¹²² Dutfield, *supra* note 17, at 203.

¹²³ Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area, at 1, paragraph 5, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset_upload_file120_8462.pdf.

¹²⁴ *Bilski v. Kappos*, 561 U. S. ____ (2010) [hereinafter *Bilski*]. See also, Emir A. Crowne, and Francesco [Frank] Santaguida, *Scotus Denies Bilski Patent Application, Leaves Door Open for Business Method Patents* (July 26, 2010), available at <http://ssrn.com/abstract=1836044>.

¹²⁵ *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008). See also Emir A. Crowne-Mohammed *Can You Patent That? A Review of Subject Matter Eligibility in Canada and the United States*, 23 Temple Int'l and Comparative L.J., 311 (2009).

and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).¹²⁶ Article 14 of TRIPS, on the other hand, provides that “in respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation.”¹²⁷ It further states that “producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.”¹²⁸ Whereas TRIPS limits the rights of performers to performances fixed on phonograms, the United States–Bahrain Free Trade Agreement provides performers with a much broader right. Under this bilateral agreement, the performer has the right to “authorize and prohibit all reproductions... in any manner or form, permanent or temporary.”¹²⁹

One author suggested that these agreements are perfectly lawful under the WTO. He said that a WTO panel would likely conclude that the demand of TRIPS-Plus norm in trade agreement would be a violation of TRIPS.¹³⁰ He observed that traditionally WTO or GATT laws allowed for flexibility in negotiations, and therefore there is also room for ‘Plus’ agreements to be negotiated within the TRIPS framework.¹³¹

Even in the absence of economic coercion, developing countries are often put on the TRIPS-Plus path with the help of WIPO. Two resolutions passed by the General Assembly of WIPO in 1994 and 1995 now require the International Bureau of WIPO to provide assistance to WIPO Members on TRIPS-related issues.¹³² Additionally, a Cooperation Agreement between the WTO and WIPO in 1995 allowed the latter to provide its intellectual property expertise to developing country WTO members, irrespective of whether those countries were members of WIPO.¹³³

Article 4 of the WTO-WIPO Cooperation Agreement states as follows:

¹²⁶ United States and Bahrain Sign Free Trade Agreement, Jan. 11, 2006, at Article 14.4, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf.

¹²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), *available at* <http://www.worldtradelaw.net/uragreements/tripsagreement.pdf>.

¹²⁸ *Id.*

¹²⁹ United States – Bahrain Free Trade Agreement, *Article 14.4: Obligations Pertaining to Copyright and Related Rights*, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf.

¹³⁰ Gervais, *supra* note 71, at 526.

¹³¹ *Id.*

¹³² Drahos, *supra* note 3, at 776.

¹³³ Gervais, *supra* note 71, at 506.

The International Bureau shall make available to developing country WTO Members which are not Member States of WIPO the same legal-technical assistance relating to the TRIPS Agreement as it makes available to Member States of WIPO which are developing countries. The WTO Secretariat shall make available to Member States of WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPS Agreement as it makes available to developing country WTO Members.¹³⁴

One commentator noted that the demand for these services has been high. "From 1996 to 2000, 214 draft laws on intellectual property were prepared by the International Bureau for 119 developing countries...During that same period, [the International Bureau] also commented on or drafted amending provisions for 235 drafts laws received from 134 developing countries."¹³⁵

In addition to drafting laws for developing countries, the International Bureau provides workshops aimed at helping developing country draft their own legislations and provide other meetings, seminars, and training courses.¹³⁶ It is interesting to note that WIPO officers are careful about providing advice and drafting laws on TRIPS-related issues.¹³⁷ WIPO does not provide advice or laws that are aimed at helping developing countries develop their economies, but rather focus on keeping it out of trouble.¹³⁸ The best way to avoid a dispute is to put the developing country on the TRIPS-Plus path.¹³⁹ Moreover, bilateral agreements with the United States has brought some developing countries to WIPO seeking TRIPS-Plus laws so as to satisfy the demands made by the United States.¹⁴⁰ These factors all combine to provide the International Bureau with a strong incentive to provide advice and laws that are of a TRIPS-Plus nature.¹⁴¹

CONCLUSION

This Article illustrated that TRIPS itself does not set a subject matter eligibility threshold. TRIPS cannot say that an invention means a new machine, manufacture, process, etc., because TRIPS is only designed to set out the minimum standards for intellectual property rights. The lack of a subject matter eligibility

¹³⁴ TRIPS: Agreement - WTO-WIPO Cooperation Agreement, *available at* http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm.

¹³⁵ Drahos, *supra* note 3, at 776-77.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

threshold at an international level should serve as further evidence of the need to assess patents against other hallmarks of patentability, such as novelty, inventiveness and utility. To echo the words of the Supreme Court of Canada's dissent in *Harvard College v. Canada (Commissioner of Patents)*:

The check on the indiscriminate grant of patents lies in the established criteria of utility, novelty and non-obviousness. Those are the criteria judged by Parliament to be relevant to its statutory purpose, which is to encourage ingenuity by rewarding its disclosure...The definition of invention should be read as a whole and expansively with a view to giving protection to what is novel and useful and unobvious.¹⁴²

From an economic and political perspective, this trend of regulating and permitting increased worldwide intellectual property standards may be troubling. But from a subject matter eligibility perspective, it merely reinforces the notion that judicial constrictions of the term "invention" will lead to inconsistent approaches to patentable subject matter between trading partners, which will ultimately give rise to trade disputes and unequal treatment.

¹⁴² *Harvard College v. Canada*, [2002] 4 S.C.R. 45, at ¶ 40, 59. A similar sentiment was also echoed by Justice Kennedy in *Bilski*, he writes:

in order to receive patent protection, any claimed invention must be novel, §102, nonobvious, §103, and fully and particularly described, §112. These limitations serve a critical role in adjusting the tension, ever present in patent law, between stimulating innovation by protecting inventors and impeding progress by granting patents when not justified by the statutory design. *Bilski v. Kappos*, 561 U.S. ___ (2010).