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Yahli Shereshevsky

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Kevin Crow

Bordering Migration/Migrating Borders
Ayelet Shachar
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Back in the Game: International Humanitarian Lawmaking by States

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This Article is the first to identify and analyze the recent tendency of States to use unilateral, non-binding lawmaking initiatives in the context of international humanitarian law (IHL), also known as the law of armed conflict. While there was minimal direct State involvement in IHL-making initiatives in the first decade of the twenty-first century, in recent years States have taken an active part in IHL making. This Article analyzes the policies of two States that stand in the middle of this debate—the United States and Israel—to provide a detailed account of contemporary State-led IHL making. This Article argues that these new initiatives are an attempt by States to regain their influence over IHL from non-State actors. This suggests three broad implications for international lawmaking by States. First, unilateral lawmaking documents might be adopted more often as an alternative to traditional lawmaking and soft law initiatives when contracting costs are high. Second, the new lawmaking initiatives tend to adopt non-State actors' strategies to influence the debate, as an expression of States' internalization of the horizontal nature of contemporary international lawmaking. Third, States often cooperate with non-State actors that share their interpretive positions in the international lawmaking process.

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INTRODUCTION

Contemporary asymmetric armed conflicts have created constant pressure to reshape international humanitarian law (IHL), also referred to as the law of armed conflict (LOAC).\(^1\) This Article discusses the role of States in the debate over the regulation of contemporary armed conflicts, exploring their recent attempts to regain influence in the creation and interpretation of IHL.

\(^1\) For brevity, I use IHL throughout this Article rather than “the law of armed conflict.”
The significant role of non-State actors in international lawmaking, and specifically in IHL making, has been widely recognized. The International Committee of the Red Cross’ (ICRC) Customary International Law Study is one example of significant non-State contributions to contemporary IHL. In contrast to the increasing participation of non-State actors, Michael Schmitt and Sean Watts argue that States are currently reluctant to directly participate in the process—that “the guns of State IHL opinio juris have fallen silent.” This reluctance does not mean that States are failing to assume legal positions on contemporary issues. Instead, it suggests a reluctance by their executive branches to offer an official, elaborate, and comprehensive legal analysis of these positions, and to actively participate in the debate over IHL. While States were indeed reluctant to directly engage in the making of IHL in the first few years of the twenty-first century, States have recently begun to directly (re)engage in the making of IHL.

There are several ways to view this story. One explanation suggests that the Obama administration engaged with IHL more deeply than its predecessor. Another sees it as an attempt by IHL and international human rights lawyers to maintain relevance in the executive decision-making process. This Article offers a broader insight into international lawmaking. It explains the ability of non-binding non-State actors’ initiatives to influence international law and argues that States have internalized the ways in which the lawmaking efforts of non-State actors are effective. The new direct engagement in the lawmaking process is of a different nature than previous efforts. First, it is based on unilateral lawmaking initiatives rather than on multilateral lawmaking efforts. Second, it manifests through active conversations over the interpretation of IHL norms in asymmetric conflicts. States realized that without direct engagement they would lose the battle over contemporary IHL. They understood that they are only one player, although a prominent one, in the battle of persuasion, and decided to play the game rather than try to disqualify other actors. By following these non-traditional lawmaking initiatives—by acting like non-State actors—the gap between State and non-State lawmaking has narrowed dramatically.

The Article suggests that, under the following conditions, States are incentivized to engage in significant unilateral lawmaking initiatives. First, States acknowledge that there are (or expect that there will be) lawmaking initiatives by non-State actors. Second, the State has a significant interest in the issue. Third, the substance of these non-State actors’ initiatives contrasts with the State’s

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position on the issue. Fourth, there are no competing influential legal accounts by non-State actors that exist or are expected to be created. Fifth, the costs of traditional lawmaking methods or soft law initiatives are high and as a result the creation of unilateral outputs is more efficient. If these conditions are met, it is reasonable to expect that individual States will invest in unilateral lawmaking initiatives.

It is yet to be seen whether States will successfully regain their influence over the direction of contemporary IHL. Nevertheless, this novel form of engagement tells an important story about the relationship between State and non-State international lawmaking and its potential transformation from a hierarchical to a more horizontal model.

This Article proceeds as follows: Part I describes the influence of non-State actors’ lawmaking initiatives on IHL, addressing the main non-traditional methods that are used and the different actors that take part in the lawmaking effort. Part II discusses the reluctance of States to directly engage in active IHL-making initiatives in the first decade of the twenty-first century and demonstrates the recent direct engagement of States in the making of IHL. In doing so, it focuses on two key States in this area: the United States and Israel. This Part first describes the indirect involvement of States in IHL making prior to the new lawmaking initiatives and then discusses the unique nature of the new initiatives. Finally, it offers rational and psychological explanations for the influence of non-State actors’ initiatives despite their non-binding nature, suggesting that contemporary State engagement in IHL making is a result of States’ internalization of the ability of non-State actors to significantly influence the law.

Part III offers three insights into international lawmaking based on recent State IHL-making initiatives. The first applies the soft law theory regarding the costs of unilateral lawmaking initiatives. This theory suggests that while the impact of non-binding sources might be less than that of hard law, such initiatives are attractive when the contracting costs of passing binding laws are higher than the expected difference in the ability to influence the behavior of relevant actors. This Article argues that unilateral outputs reduce the costs of international lawmaking even more than joint soft law initiatives. As a result, when contracting costs are high, unilateral outputs become an increasingly attractive avenue for international lawmaking.

The second insight addresses the growing similarities between State and non-State lawmaking projects, suggesting that the gap between State and non-State lawmaking initiatives has dramatically narrowed. This Article discusses various examples of such similarities, including features such as heavy footnoting, reliance on significant (and sometimes continuous) review by external experts, publishing the initiatives as online open access documents, and conducting and participating in workshops and conferences that relate to the documents.

The third insight relates to the role of interpretive communities in the new lawmaking process. This Article demonstrates how States and the community of
lawyers that this Article refers to as “LOAC lawyers”⁶ cooperate to promote their preferred interpretation of IHL. The Article suggests that when a non-State actor publishes an initiative, it is seen as more impartial than when a State does. Therefore, the State would rather disseminate its preferences through non-State actors because of the facade of impartiality that a non-State actor is assumed to provide. In any case, when the initiative of a non-State actor does not pose a significant threat to the State’s preferences, there is no strong incentive for the State to actively engage in these initiatives—although non-State actors that share the interpretive positions of States wish for States to actively engage in lawmaking to increase the impact of such positions. In this regard, the Article focuses on IHL-making initiatives in the context of cyber operations. This third insight provides a discussion beyond lawmaking as State versus non-State actors, and considers the battle over IHL in which State and non-State actors cooperate on both sides of the debate.

I.

NON-STATE ACTORS IN INTERNATIONAL HUMANITARIAN LAWMAKING

The idea that international lawmaking is a State-centric endeavor has long been the subject of debate.⁷ Even authors who continue to stress the key role of States in international lawmaking also recognize the growing influence of non-State actors.⁸ This Section focuses on the increasingly acknowledged influence of non-State actors’ lawmaking initiatives on IHL during the past two decades.⁹ This Article adopts a broad definition of non-State actors that includes all international actors that are not States. This includes international governmental organizations, which are often distinguished from non-State actors.¹⁰

Not all non-State actors are the same. They include international tribunals, international organizations, NGOs, expert groups, and individual academics. These actors differ in their international legal status and relative influence on international lawmaking. In some contexts, there are good reasons to analyze them separately. For example, Sandesh Sivakumaran has recently argued that there

⁶ See infra Part III.C.1; see also David Luban, Military Necessity and the Cultures of Military Law, 26 LEIDEN J. INT’L L. 315, 316 (2013) (referring to this community as “military lawyers,” although there are also civilians who share a similar vision).
⁸ See, e.g., Jean d’Aspremont, International Lawmaking by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 171, 176 (Math Noortmann & Cedric Ryngaert eds., 2010) [hereinafter FROM LAW-TAKERS TO LAW-MAKERS].
⁹ See Math Noortmann & Cedric Ryngaert, Introduction: Non-State Actors: International Law’s Problematic Case, in FROM LAW-TAKERS TO LAW-MAKERS, supra note 8, at 1, 2.
¹⁰ For a discussion that refers to international organizations as non-state actors in the context of international lawmaking, see generally Hollis, supra note 7.
should be three categories of actors: States, State-empowered entities, and non-State actors.11 State-empowered entities are defined as “entities that States empowered to carry out particular functions,” such as the International Court of Justice (ICJ), the International Law Commission (ILC), the ICRC, and the UN Human Rights Committee (HRC).12 There are important differences between such entities and other non-State actors in the sense that usually State-empowered entities’ participation in international lawmaking is both more justified and influential than other non-State actors’ participation.13 Nonetheless, this Article maintains the binary distinction between States and non-State actors. Being a State-empowered entity is merely one of the many factors that affects the level of influence of the entity on international law. Indeed, Sivakumaran recognized the potential influence of specific “pure” non-State actors such as the International Law Association (ILA).14 Such pure non-State actors and State-empowered entities often share the same methods of treaty interpretation, identification of customary law, and the creation of soft law.15 Specifically, as Part I.C demonstrates, in the context of IHL making, all types of non-State actors can usually be associated with the “humanitarian” side of the tension between military restraint and military necessity. Thus, the direct engagement of States in IHL making is to a large extent a response to the aggregated effort of this diverse group of non-State actors.

Despite its broad discussion of non-State actors, this Article will not address non-State armed groups. Even though armed groups are clearly relevant to the discussion of contemporary IHL, and a growing body of literature addresses a potential increased role for armed groups in IHL making,16 this discussion lies outside the scope of the Article for two reasons. First, armed groups have led very few significant lawmaking initiatives. Second, State lawmaking initiatives have focused to a large extent on State conduct rather than on non-State armed groups’ conduct. For example, the debate over detention and targeting has focused mainly on detention and targeting by States. As a result, the States’ initiatives that this Article discusses are not a reaction to armed groups’ lawmaking efforts, but rather a reaction to other non-State actors’ lawmaking initiatives.

12 Id. at 346.
13 See infra Section I.A.
15 See Sivakumaran, supra note 11, at 358–62.
A. State and Non-State IHL and the Rise and Decline of Traditional IHL Making

The tension between State and non-State IHL dates back to the emergence of modern IHL in the mid-nineteenth century. Two competing narratives can be traced regarding the birth of the modern regulation of war. One narrative starts with Henry Dunant, then a Swiss businessman, as the main protagonist. The formative event of this narrative is Dunant’s experience witnessing the aftermath of the battle of Solferino in 1859, which inspired him to write A Memory of Solferino and to establish the International Committee for Relief to the Wounded in the Event of War in 1863. This later became the ICRC. The basic legal document emerging from this narrative is the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. In the second narrative, Francis Lieber, a professor at Columbia University, is the main protagonist. The formative event of this narrative is the American Civil War, and its basic legal document is Army General Order 100, more famously known as the Lieber Code.

These two different narratives not only represent a battle between Eurocentric and American visions of the regulation of warfare, but also the battle over the role of State and non-State actors in such regulation. The first narrative celebrates the role of non-State actors in the regulation of warfare. The story of

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17 See Rotem Giladi, Rites of Affirmation: Progress and Immanence in International Law Historiography (unpublished manuscript) (on file with author). These narratives, naturally, are not the only possible description of the emergence of the modern regulation of warfare, nor do they present the only two founding documents of the codification of warfare. See, e.g., Eyal Benvenisti & Doreen Lustig, Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856–1874 (2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985781 (suggesting that the codification of the laws of war was mainly an effort by European governments to maintain their authority and pointing to the Paris Declaration of 1856 as the “first important initiative in the codification of the laws of war”).


19 See, e.g., Marco Sassoli, Antoine A. Bouvier & Anne Quintin, 1 How Does Law Protect in War chs. 1, 3 (3d ed. 2011) (“It is commonly agreed that modern, codified international humanitarian law (IHL) was born in 1864, when the initial Geneva Convention was adopted.”). The book then describes Henry Dunant’s experience in Solferino and the creation of the 1864 Geneva Convention.


21 War Dept., General Orders 100: Instructions for the Government of Armies of the United States in the Field (1863); see, e.g., Gary D. Solis, The Law of Armed Conflict 50 (2d ed. 2016) (“Much of LOAC that has followed—the Hague Regulations of 1899, the first Geneva Convention of 1864, even the 1949 Geneva Conventions—owes a substantial debt to Francis Lieber and his 1863 code.”). The book starts with a discussion of the Lieber Code and only then discusses the first Geneva Convention. Id. at 44–52. See also John Fabian Witt, Lincoln’s Code—The Laws of War in American History 2–3 (2012) (describing the Lieber Code as “the foundation of the modern laws of war”).

22 Giladi, supra note 17, at 8–9, 15.
the battle of Solferino emphasizes the prominent role of neutral voices who visit the battlefield as impartial actors who aim to decrease the calamities of war. The second narrative emphasizes the prominence of States in this process. The story of the Lieber Code highlights State-made laws of war as being key to the effective regulation of State conduct. Indeed, arguably more than any other branch of international law, IHL involves continuing engagement and interaction between State and non-State actors. These narratives also represent competing views on the balance between military necessity and humanitarian considerations in the regulation of armed conflicts.

In both histories, the modern regulation of warfare was achieved primarily through treaty law.\(^{23}\) The Geneva Conventions are one of the main symbols of international law as a whole, and the existence of a Hague Law and a Geneva Law, named after the relevant conventions, is another indication of the prominence of treaty law in modern IHL. The story of modern IHL is to a large extent a story of its main treaties, from the 1864 Geneva Convention, to the Hague Regulations and the Four Geneva Conventions, to the two Additional Protocols. The prominence of IHL treaty law led to significant cooperation between non-State actors (especially the ICRC) and States. The lawmaking efforts of non-State actors focused on influencing the processes that led to the creation of the main IHL treaties and to some extent on the work that analyzes these treaties, such as the commentaries to the Geneva Conventions and the Additional Protocols.\(^{24}\) Since only States can create such treaties, this focus on treaty law also maintained the perception of States as the main—and perhaps the only—actors that create IHL.

However, in recent decades, there has been a significant decline in the role of treaty law in the regulation of armed conflicts. Except for several treaties that focus on narrow subjects or the amendment of existing treaties,\(^{25}\) there has been


no significant treaty-making effort since the creation of the two Additional
Protocols in 1977. And the prospects for new IHL treaties are minimal. The main
IHL treaties are mostly focused on international armed conflicts, while
contemporary conflicts mostly involve States and non-State armed groups.26 The
ability to create treaties to regulate such conflicts has proven time and again
extremely difficult due to the clear differences in interests among actors. As a
reflection of this difficulty, Common Article 3 to the Geneva Conventions and the
Second Additional Protocol are the only IHL treaty protections in non-
international armed conflicts.27 The prominence of conflicts between State and
non-State actors, and specifically the emergence of transnational armed conflicts
between State and non-State armed groups at the beginning of the twenty-first
century, initiated a widespread debate over the ability of IHL norms to account
for this new reality.28 Despite different positions regarding the need for a new
treaty, there was a near consensus on the practical impossibility of creating a new
IHL treaty to regulate such conflicts.29

The absence of a specific treaty to address the new reality of conflicts and
the vagueness regarding the applicable norms in such conflicts opened the door
to alternative lawmaking efforts. As further explained in the next Section,
terpretation of existing treaty norms, identification of customary law, and soft
law became central to the discussion regarding the regulation of contemporary
conflicts. A variety of actors played a significant role in the battle over the
desirable interpretation and application of IHL norms in this challenging context.
While the role of States in making treaty law is clear and prominent, their role in
interpreting existing law and in identifying customary IHL is more ambiguous.
Indeed, as Schmitt and Watts argue, in contrast to the creation of IHL treaty law,
the vast majority of the actors who took part in the contemporary debate were
non-State actors.30 The contribution of these actors to the development of the law

26 See, e.g., CHRISTINE CHINKIN & MARY KALDOR, INTERNATIONAL LAW AND NEW WARS 242
(2017); Marco Sassoli, Taking Armed Groups Seriously: Ways to Improve Their Compliance with
27 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12,
1949, 6 U.S.T. 3516, 3518–20; Protocol Additional to the Geneva Conventions of 12 August 1949,
and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8,
28 See generally Harold Hongju Koh, The Emerging Law of 21st Century War, 66 EMORY L. J. 487,
489 (2017); Charles J. Dunlap Jr., Do We Need New Regulations in International Humanitarian Law?
One American’s Perspective, 25 J. OF INT’L L. OF PEACE AND ARMED CONFLICT 121 (2012) and Anna
Di Lellio & Emanuele Castano, The Danger of “New Norms” and the Continuing Relevance of IHL
in the Post-9/11 Era, 97 INT’L REV. RED CROSS 1277 (2016); see also Benvenisti, supra note 23, at
344.
29 See, e.g., W. H. BOOTHBY, CONFLICT LAW 72 (2014); John B. Bellinger III & Vijay M.
Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva
Conventions and Other Existing Law, 105 AM. J. INT’L L. 201, 205 (2011); Emily Crawford, From
Inter-state and Symmetric to Intrastate and Asymmetric: Changing Methods of Warfare and the Law
of Armed Conflict in the 100 Years Since World War One, 17 Y.B. INT’L HUMANITARIAN L. 95, 112
(2014).
30 Schmitt & Watts, supra note 3, at 191–92.
of transnational conflict was dramatic, well recognized, and widely discussed.\(^{31}\) It is one of the clearest symbols of the rise of non-State actors in the international lawmaking process. The next Section briefly describes how these alternative lawmaking methods enable a greater role for non-State lawmaking efforts.

### B. The Main Methods of Non-State IHL Making

This Section focuses on three main lawmaking methods that non-State actors use to influence IHL making. It addresses the actual effect of non-State actors on IHL making, regardless of their formal ability to create international law,\(^{32}\) since non-State actors’ influence on IHL discourse lies at the heart of the recent direct State engagement in IHL making.

#### 1. Treaty Interpretation

Even with a conservative reading of the role of non-State actors in treaty making, their influence on international lawmaking through treaty interpretation should be taken into account. Although positivists will argue that treaty interpretation only discovers relevant law, and does not create law by itself,\(^{33}\) scholars today generally agree that the interpretive process shapes the law.\(^{34}\) For example, where there are several reasonable interpretations available, the decision to interpret a treaty in one way or another is similar to creating the treaty obligation. When the obligations in a treaty are vague, there is greater opportunity to influence the interpretative process. In many areas of international law, taking into account the lack of interpretive hierarchy and the absence of an authoritative interpretive institution, the interpretive process is open to many actors and not only to States.\(^{35}\) It becomes an arena for a battle of persuasion. Sometimes, actors who are perceived as less invested in the specific question, or who possess significant legitimacy and prestige, enjoy an advantage in promoting their interpretations of the law. A paradigmatic example in this regard is the ICJ; its interpretations have gained much force in the international legal community and actively shape the understanding of specific treaty obligations even though it has no formal interpretive authority beyond binding the parties to the specific case.\(^{36}\)

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\(^{31}\) See, e.g., Hakimi, supra note 23, at 149; Schmitt & Watts, supra note 3, at 192–93 (discussing the various non-state actors that have a significant role in shaping IHL).

\(^{32}\) For a normative discussion of the desirability of non-state actors’ participation in the making of IHL, focusing specifically on the role of armed groups, see Sivakumaran, supra note 14 (arguing for a limited role of armed groups in the making of IHL).

\(^{33}\) See INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW 16 (2012); Gleider Hernandez, Interpretive Authority and the International Judiciary, in INTERPRETATION IN INTERNATIONAL LAW 166, 176 (Bianchi et al. eds., 2015).

\(^{34}\) VENZKE, supra note 33, at 16; Hernandez, supra note 33, at 166.

\(^{35}\) For an elaborated account of the different non-state interpretive actors, see, e.g., VENZKE, supra note 33, at 64–71; Michael Waibel, Interpretive Communities in International Law, in INTERPRETATION IN INTERNATIONAL LAW 146, 155 (Bianchi et al. eds., 2015).

The role of the treaty bodies in the interpretation of international human rights law (IHRL) provides another notable example of such influence.\textsuperscript{37}

2. Identifying Customary International Law

The international legal community is engaged in a continuous debate over the methods of identifying international customary law. It seeks to define and establish the appropriate balance between State practice and \textit{opinio juris}. An abundance of recent scholarship on these questions suggests that this debate is here to stay.\textsuperscript{38} As with treaty interpretation, even though it is accepted that the scope of customary law is restricted to State practice that is followed out of a sense of legal obligation, the identification of State practice and \textit{opinio juris} in a non-hierarchical legal world enables different actors, including non-State actors, to shape the scope of international legal obligations.\textsuperscript{39} Here again, the ICJ and other international tribunals serve as paradigmatic examples of non-State actors defining the scope of existing customary law.\textsuperscript{40} The role of the ILC with respect to the identification and creation of customary law is also widely recognized.\textsuperscript{41}

\footnotesize{(Christian J. Tams and James Sloan eds., 2013).}

\textsuperscript{37} See Kasey L. McCall-Smith, \textit{Interpreting International Human Rights Standards - Treaty Body General Comments as a Chisel or a Hammer}, in \textit{TRACING THE ROLE OF SOFT LAW IN HUMAN RIGHTS} 27 (Stéphanie Lagoutte et al. eds., 2017).


\textsuperscript{39} See, e.g., Hakimi, supra note 23, at 163 (Curtis A. Bradley ed., 2016) (“Because CIL finding and CIL making are intertwined, non-state actors who are charged with finding CIL sometimes play a significant role in making CIL.”); Curtis A. Bradley, \textit{Customary International Law Adjudication as Common Law Adjudication, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD} 34 (Curtis A. Bradley ed., 2016).

\textsuperscript{40} See, e.g., Bradley, supra note 39, at 36; Stephen J. Choi & Mitu Gulati, \textit{Customary International Law: How Do Courts Do It?, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD} 117, 135 (Curtis A. Bradley ed., 2016) (demonstrating that in a large number of cases, international courts refer to previous case law as evidence of the scope of customary international law); Tams, supra note 36, at 385–86; Roobeh (Rudy) B. Baker, \textit{Customary International Law in the 21st Century: Old Challenges and New Debates}, 21 EUR. J. INT’L L. 173 (2010) (suggesting that the jurisprudence of the international criminal tribunals is perceived to represent customary international law).

3. Soft Law

Soft law is a vague concept. Although it has been discussed in the international law literature for decades, its exact scope and definition remain controversial. Definitions of soft law range from binary distinctions between binding and non-binding sources to a spectrum of softness and hardness along the lines of precision, obligation, and delegation. Specifically, when it comes to the role of non-State actors in international lawmaking, it is not clear to what extent documents that are solely created by non-State actors are part of the common understanding of soft law. Nonetheless, while significant segments of the literature focus on soft law that was directly created by States or intergovernmental institutions—for example, the 1992 Rio Declaration on Environment and Development—there is also much discussion regarding the creation of soft law by non-State actors. This latter discussion addresses, inter alia, the role and influence of international organizations, treaty bodies, industry groups, NGOs, and decisions from international tribunals.

In addition, the notion of soft law lessens the force of strict positive accounts of international lawmaking, blurring the scope of binding and non-binding norms. Indeed, it becomes more difficult to maintain a strict, formalist approach to the sources of international law, including the scope of actors that can take part in international lawmaking. As Christine Chinkin recognized, the “acceptance of normative standards articulated through soft forms of lawmaking entails recognition that the rigid control of States over the process is weakening.” In

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46 See Guzman & Meyer, supra note 44, at 201; Kenneth W. Abbott, Commentary: Privately Generated Soft Law in International Governance, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 166, 175 n.8 (Thomas J. Biersteker et al. eds., 2007) (“Some definitions of ‘soft law’ encompass a role for privately generated norms, although few analyze the phenomenon in detail.”).
48 BOYLE & CHINKIN, supra note 7, at 213.
50 See, e.g., Guzman & Meyer, supra note 44.
this regard, it should be noted that it is not always possible to distinguish between expansive definitions of soft law, treaty interpretive projects, and customary law studies. The discussion of non-State IHL making that follows does not attempt to do so.

The following Section briefly describes the different non-State actors that take part in this debate. The discussion does not necessarily address the different non-State actors in order of their relative influence on IHL making.

C. The Role of Different Non-State Actors in Contemporary IHL

The contemporary involvement and influence of non-State actors in IHL making has been extensively discussed in recent years. The discussion primarily involves the three methods of lawmaking referenced in the previous Section: treaty interpretation, the identification of customary international law, and the creation of soft law. In order to avoid merely rehashing that discussion, this Section briefly describes different non-State actors’ initiatives, focusing mainly on aspects that have not received sufficient attention in the existing literature. As a result, the length of the discussion does not necessarily represent the relative importance of the specific non-State actor. For example, the role of IHL scholars is discussed in depth, while their actual influence on IHL is clearly less significant than other actors, such as the ICRC or international tribunals.

1. The ICRC

The ICRC has always been a significant player in the creation of IHL norms. It has a unique role, different from all other non-State actors, and is often described as the guardian of IHL. While its key contributions to IHL are mostly related to its role in facilitating the creation of the main IHL treaties, its own publications gained much influence, to the extent that the ICRC Commentary on
the Geneva Conventions was mistakenly referred to by the US Supreme Court as “The Official Commentaries” of the Geneva Conventions.57

However, it seems that there is something new about ICRC projects developed over the past two decades. Although using different methodologies, forms, and substances, these projects share a main characteristic: they are all unilateral ICRC documents that aim to provide a comprehensive (and maybe even authoritative) account of IHL. Each of the three main projects58 has had, or will soon have, a significant influence on IHL and enhances the role of the ICRC as a key actor in the making of IHL.

The first of these projects, the ICRC Customary International Humanitarian Law Study,59 is perhaps the most influential project by a non-State actor on contemporary IHL. In 2005, the ICRC published a two-volume study containing its analysis of existing customary IHL norms in international and non-international armed conflicts. While the study, as discussed below, was the subject of methodological and substantive criticism, it is widely recognized as having a significant influence on the accepted view of existing customary IHL norms.60 In fact, it is one of the primary examples used in the literature on non-State actors’ influence on customary international law.61

The second project is the ICRC Interpretive Guidance on Direct Participation in Hostilities. Beginning as a project with active participation from a diverse group of experts and ending as a unilateral ICRC publication, the ICRC Interpretive Guidance is one of the most influential interpretive projects on one of the most debated areas of asymmetric conflicts: the targeting of non-State armed groups’ members. The contemporary debate over this subject started soon after the United States and Israel began to deploy a policy of targeted killings in 2002. In 2003, the ICRC began its work on the Interpretive Guidance. Since its publication in 2009, it has become the main reference point for any discussion of the subject.62 Even prominent critics of the project recognize its significant influence over the debate, including the introduction of new concepts that govern

58 I focus here on the three main ICRC projects of recent years. There are other important projects that are of relevance to this paper, such as the series of reports entitled “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts.” INT’L COMM. RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2015), https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.
59 ICRC CUSTOMARY STUDY, supra note 2.
60 See, e.g., Hakimi, supra note 23, at 160 (describing the influence of the ICRC Customary Study on states and on international and national courts).
61 See, e.g., Sivakumaran, supra note 11, at 358; Tullio Treves, CUSTOMARY INTERNATIONAL LAW, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 62 (November 2006) (referring to the ICRC Customary Study as an example of a particularly authoritative codification).
62 The Israeli Supreme Court’s Targeted Killings case was the main document in this regard until the creation of the Interpretive Guidance. See HCJ 769/02 Public Comm. against Torture in Isr. v. Gov’t of Isr. IsrSC 62(1) (2006) (Isr.) [hereinafter Targeted Killings case].
discussion of the subject. These include the notion of organized armed groups and the concept of continuous combat function (CCF).  

The new commentaries on the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 are the third and most recent project. It is a huge project that is expected to be completed by 2021. The two commentaries that have already been published on the first two Geneva Conventions consist of thousands of pages. It is too soon to determine the future impact of the project, but the significant attention that the project is already receiving is a clear sign of the importance and potential effect of the commentaries.

2. International Tribunals

International tribunals have contributed greatly to the development of IHL. The decisions of international tribunals are formally a subsidiary source of international law, affirming existing laws and norms. The lawmaking role of international tribunals in practice—through the interpretation of existing norms and the identification of customary international law—is almost a truism in contemporary international law scholarship. It has been specifically recognized in the context of IHL. While the ICJ is a key non-State player in international lawmaking and has contributed to the development of IHL, other international tribunals have greatly influenced this field as well. The international criminal tribunals have had an important effect on the development of the law of asymmetric warfare through decisions on non-international armed conflicts. Of these, the most notable body is the International Criminal Tribunal for the Former Yugoslavia (ICTY). An example of the ICTY’s influence comes from the seminal Tadić case. The Chamber determined that the majority of IHL norms that apply in international armed conflicts also apply in non-international armed conflicts as

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64 See infra Part III.B.


68 See, e.g., Darcy, supra note 65, at 54–67.

69 As discussed infra, the vast majority of international actors define transnational armed conflicts as non-international armed conflicts.
customary IHL. This decision, which was made several years before the completion of the ICRC customary study, opened the door to the dramatic expansion of customary IHL. Another significant influence of the Tadić case is its elaborated definition of the threshold of non-international armed conflict, namely the requirement of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” This definition has become the focal point for any discussion about the existence of a non-international armed conflict. Finally, Tadić was influential in its use of the “overall control” test for the determination of the State control necessary for a conflict to be classified as an international armed conflict.

Other tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) have also contributed to the development of IHL. Additionally, of special importance is the case law of the European Court of Human Rights (ECHR), which has expanded the traditional understanding of the role of human rights law in the context of asymmetric conflicts. In sum, international tribunals play a key role in what Theodor Meron, President of the Former ICTY, described as the “humanization of humanitarian law.”

3. Human Rights Treaty Bodies, Special Rapporteurs, and Commissions of Inquiry

In recent years, different human rights actors have played significant roles in the debate over the regulation of armed conflicts. Human rights treaty bodies, most notably the Human Rights Committee, has taken an active role with regard to important issues such as the relationship between IHRL and IHL concerning detention in armed conflicts. The different commissions of inquiry that the Human Rights Council appointed were controversial and triggered or widened the debate on several practices of contemporary conflicts, such as the issuance of early warnings, the use of artillery in urban warfare, and the investigations of

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71 Id. ¶ 70.


73 Danner, supra note 65.


alleged war crimes. Special Rapporteurs that were appointed by the Human Rights Council produced important studies on key issues that received much attention in the international law community, perhaps most notably on the issue of targeted killings and the use of drones.

4. Human Rights NGOs

Human rights NGOs play an active role in the contemporary debate over the regulation of warfare. They attempt to push the law towards a more humanitarian vision. They do so with a combination of reports on specific legal issues, such as the use of drones or autonomous weapon systems, as well as reports regarding alleged violations of IHL in specific conflicts. Their effect on the public discourse is significant and it is reasonable to assume that they help to push the law in a more limiting direction.

5. International Law Scholars

Article 38(1)(d) of the ICJ Statute recognizes “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” In the literature that discusses IHL lawyering, it is not always clear if the term “humanitarian lawyers” clearly distinguishes between international scholars and more organized efforts such as ICRC publications. The accepted interpretation of Article 38(1)(d) includes the work of international law scholars.

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77 See, e.g., U.N. Human Rights Council, Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution 30/3, A/HRC/14/24/Add.6 (May 28, 2010). Human rights NGOs play an active role in the contemporary debate over the regulation of warfare. They attempt to push the law towards a more humanitarian vision. They do so with a combination of reports on specific legal issues, such as the use of drones or autonomous weapon systems, as well as reports regarding alleged violations of IHL in specific conflicts. Their effect on the public discourse is significant and it is reasonable to assume that they help to push the law in a more limiting direction.

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83 Statute of the International Court of Justice, supra note 66, at art. 38(1)(d).

84 For example, David Luban, who wrote the most comprehensive article on the tension between the different actors in the regulation of warfare includes ICRC outputs in his analysis of humanitarian lawyers. See David Luban, supra note 6, at 324 (citing the ICRC Customary Study). Sivakumaran is
of groups of international law experts as "publicists." This, however, comes with the cost of not properly recognizing the influence of individual scholars.

An illuminating example of this role in the context of contemporary asymmetric conflicts is the discussion of the classification of transnational armed conflicts, one of the major debates concerning their regulation. Potential positions range from two extremes. On the one side of the spectrum it is suggested that these are not armed conflicts and they should be regulated fully by IHRL. On the other side of the spectrum it is suggested that there is a legal black hole since these are armed conflicts that are not regulated by IHL. In the middle are those who suggest that these conflicts are either international or non-international armed conflicts. This debate was led mainly by IHL scholars and resulted in a near consensus regarding the classification of such conflicts as non-international armed conflicts. Thus, it was suggested that the classification of the United States’ “global war on terror” as a conflict governed by Common Article 3 of the Geneva Conventions in the Hamdan case was significantly influenced by the work of humanitarian lawyers. Moreover, it seems that this trend had some impact even on Israel. The Israeli Supreme Court’s Targeted Killings case is among the only cases on the classification of transnational armed conflicts as international armed conflicts. Nonetheless, the Israeli report on the 2014 Gaza conflict did not commit to any specific classification. Instead, it referred both to the Targeted Killings case and international law scholarship on the issue. It placed both on a seemingly equal level, although the Targeted Killings case is a binding precedent.

The Hamdan case and the potential deviation from the Targeted Killings case in the 2014 Gaza conflict report represent the influence of IHL scholarship. In

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87 See Yahli Shereshevsky, Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts, 49 VAND. J. TRANS. L. 455 (2016) (describing the politics behind the decision of humanitarian actors to classify such conflicts as non-international armed conflicts).


89 See Modirzadeh, supra note 5, at 258 (“The Court received numerous amici briefs from IHL and IHRL experts, and the Court’s decision can be read as being highly influenced by these submissions.”)

90 Targeted Killings case, supra note 62, ¶ 18.

addition, they also might reflect governmental interest in less regulation.\textsuperscript{91} As long as the United States continues to deny the extraterritorial application of IHRL,\textsuperscript{92} classification of such conflicts as non-international armed conflicts will lead to less regulation. As for Israel, taking into account that the biggest contemporary threat from its perspective is potential criminal proceedings before the ICC, classification of the conflict as a non-international armed conflict might be a preferred option due to the lesser number of potential war crimes in such conflicts, as per the ICC Statute.\textsuperscript{93}

The impact of IHL scholarship has grown in recent years through the development of international law blogs. These blogs are a lively arena for discussion and debate of contemporary practices and legal positions in a way that enables the authors to quickly react to recent events in short, focused posts without the burden of a long review and publication process. In addition to the increasing number of blog citations in more traditional international law publications (including this Article), the decision of the UK Court of Appeal in the much debated \textit{Serdar Mohammed} case indicates the potential of quick reactions to international law developments through blog posts. The first decision in the \textit{Serdar Mohammed} case, regarding the lack of authority to detain in non-international armed conflict,\textsuperscript{94} attracted many reactions from international law scholars in leading international law blogs. The decision of the Court of Appeal was cited and addressed at length in a significant number of these blog posts.\textsuperscript{95} The court referred to these blog posts over the objections of the UK government, and the court decision was acknowledged and celebrated in the blogosphere.\textsuperscript{96}

Although international tribunals—specifically the ICJ—are still reluctant to directly cite scholarly articles (and blog posts),\textsuperscript{97} the influence of the international scholarship on domestic courts might serve as an effective way to influence international law, as the \textit{Serdar Mohammed} and the \textit{Hamdan} cases indicate.

\textsuperscript{91} See Shereshevsky, supra note 86, at 494–95.
\textsuperscript{93} Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 3. The Rome Statute currently includes thirty-four crimes in international armed conflicts and nineteen crimes in non-international armed conflicts.
\textsuperscript{94} Mohammed v. Ministry of Defense, [2014] EWHC 1369 (QB) (citing blog posts from Just Security and EJIL: Talk!).
\textsuperscript{95} See Rahmatullah v. Ministry of Def. & Foreign & Commonwealth Office [2015] EWCA 843 (Civ).
\textsuperscript{97} Wood, supra note 85, ¶ 9.
II.
THE ROAD TO STATES’ UNILATERAL IHL MAKING

This Section addresses the rise of States’ direct and active involvement in IHL making by examining two specific States: the United States and Israel. The choice to focus on these specific States in the context of IHL making is due to the unparalleled attention that their policies receive from non-State actors. It is hard to find a discussion of the main controversies in contemporary conflicts that does not explicitly address either the United States or Israel or both. This is the case, for example, in discussions of drone strikes (or targeting more generally), detention, the relationship between IHRL and IHL, and the classification and scope of armed conflicts. As I suggest in Part III, in order to actively engage in unilateral lawmaking, States need to have sufficient incentives that outweigh the potential benefits of silence. The United States and Israel serve as a good example for such conditions in the context of IHL. Other States that share these positions but are less significantly invested in the issue, or receive less attention from the international community, can free ride on these lawmaking initiatives without exposing themselves to the costs.

A. Reluctance of States to Actively Participate in IHL Making

The following Section briefly describes the lack of direct engagement by the United States and Israeli governments in IHL making initiatives during much of the first decade of the twenty-first century. It then addresses the unique role of domestic courts in IHL making.

1. The United States

While there were no significant IHL-making initiatives during much of the Bush administration, it is important to note that the US legal position regarding the “global war on terror” under the Bush administration was widely discussed and analyzed in the international law community almost immediately following the American response to the terror attacks of September 11, 2001. In their paper, Schmitt and Watts, present what they describe as the “void of State participation” in the making of IHL. They focus on State opinio juris. Schmitt & Watts, supra note 3, at 191. While I generally share this position with regard to much of the first decade of the twenty-first century, their analysis needs both more support and some qualifications. First, the analysis in their paper addresses the notion of States’ opinio juris, while I believe that a more complete analysis should refer to international lawmaking more broadly. Second, the analysis in the paper focuses almost exclusively on US engagement with IHL. Analysis of the engagements of other States with IHL is needed to strengthen the argument. Third, some qualification of the argument should be made to address the engagements of different State organs with IHL. This could include the jurisprudence of domestic courts, leaked memos, and reports to international institutions. A more accurate description should refer to the decline in international lawmaking by the executive branch of States. Finally, at the time their paper was published, a new trend of State reengagement with IHL was already taking place, at least with respect to the United States and Israel.

Deeks recently argued that the Bush administration held a substantially and rhetorically maximalist approach to the law of asymmetric conflicts and that “it announced, clearly and plainly, its legal views on a wide variety of *jus ad bellum* and *jus in bello* topics.”

Indeed, from various US documents and practices in the first few years after 9/11, it is possible to have a strong understanding of the Bush administration’s position on a series of controversial legal issues. In addition, the administration’s positions on specific issues were adjudicated by US courts and discussed by international bodies, where the administration expressed its legal positions in official briefs and reports. The administration’s positions can be summarized as a belief that States’ ability to use controversial practices in such asymmetric conflicts should be interpreted broadly.

Still, significant parts of these documents only became public as a result of leaks or were released several years after they were drafted. Most of the official statements were a result of what Rebecca Ingber calls “external interpretive catalysts.” This includes court cases and treaty bodies’ reports. The United States did not publish official detailed statements of its legal positions. As such, it is difficult to argue that the Bush administration clearly and plainly announced its international legal positions. Thus, the more accurate characterization of the phenomenon that is described in this Article is not the lack of legal positions by States, but the reluctance of their executive branch to offer an official, elaborate, and comprehensive legal analysis of these positions; to actively participate in the debate over IHL.

One exception to this reluctance for direct involvement was the efforts of States to undermine the importance of non-State actors’ contributions to IHL making and to emphasize the traditional role of States in the international lawmaking process. For example, the Bush administration published a twenty-page response to the ICRC study on customary international law, mostly criticizing the study’s methodology. The response noted, *inter alia*, that the study relies on the position of non-State actors to determine the scope of *War*, 28 *YALE J. INT’L L.* 325 (2003); Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 *AM. J. INT’L L.* 905 (2002).

100 Deeks, supra note 4, at 647.


102 See Schmitt & Watts, supra note 3, at 213.


104 There were brief statements regarding the initial positions of the United States without much explanation. See, e.g., White House Fact Sheet: Status of Detainees at Guantanamo, U.S. Department of State Archive (Feb. 7, 2002), https://2001-2009.state.gov/p/sca/rls/fs/7910.htm.

customary law even though customary law is State-made.\textsuperscript{106} The inefficiency of such efforts by the Bush administration, which might be perceived as a step towards active involvement, is addressed in Part II.C.

2. Israel

The first decades of Israeli engagement with international law are outside the scope of this Article. Israel has been a party to several armed conflicts since 2000, which have received attention from the international law community. These conflicts include the Second Intifada which began in October 2000, the Second Lebanon War of 2006, and the Gaza armed conflicts of 2009 (Cast Lead), 2012 (Pillar of Defence) and 2014 (Protective Edge). The Israeli Government did not voluntarily or explicitly engage with the international law debate that concerned the regulation of these conflicts during the first decade of the twenty-first century. However, Israel did present its legal position—as did the US administration—within domestic proceedings that addressed some of its more controversial legal policies.\textsuperscript{107} Further, Israel also filed reports to IHRL treaty bodies that addressed IHL topics.\textsuperscript{108} In addition to the lack of any official elaborated legal position on the conflicts, Israel consistently refused to take part in international proceedings that addressed its conduct. For example, Israel refused to address the substantive legal question in the ICJ’s proceedings in the Wall Advisory Opinion.\textsuperscript{109} Israel did not present oral arguments before the ICJ and addressed only the question of jurisdiction of the court in its written statement.\textsuperscript{110} In addition, Israel did not cooperate with the Human Rights Council’s commissions of inquiry to the Second Lebanon War,\textsuperscript{111} the 2009 Gaza conflict (the Goldstone Report),\textsuperscript{112} the 2010 takeover of the flotilla to Gaza (the Hudson Philips Report),\textsuperscript{113} or the 2014 Gaza conflict.\textsuperscript{114}

\textsuperscript{106} Id. at 445.

\textsuperscript{107} See, e.g., HCJ 3799/02 Adalah – Legal Center for Arab Minority Rights in Israel and Others v. General Officer Commanding Central Command, Israeli Defense Force and Others [2005] IsrSC 60(3) (ordering the IDF to cease its practice of using civilians to give ‘early warnings’ during arrest operations); Targeted Killings case, supra note 62.


\textsuperscript{109} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004).

\textsuperscript{110} Written Statement of the Government of Israel on Jurisdiction and Propriety 50 (Jan. 29, 2004).


\textsuperscript{112} Abresch, supra note 74.


\textsuperscript{114} Abresch, supra note 74.
3. The Role of Domestic Courts

Formally, domestic courts are State actors. In the process of identifying customary international law, their judgments are widely viewed as State practice and *opinio juris*. Indeed, as State organs, domestic courts are sometimes described as a legitimizing actor with respect to IHL. Nonetheless, it is not clear that when analyzing IHL making, the jurisprudence of domestic courts should be analyzed as State practice and *opinio juris*. Domestic courts are both national and international actors. Domestic courts do not generate norms of their own initiative, but they adjudicate cases that are often brought against the executive. In the context of the rise of States’ direct engagement with IHL making, domestic courts’ IHL case law is better seen as part of the story of executive reluctance to engage in IHL making and the rise of non-State actors. Many of the seminal IHL cases heard by domestic courts were a response to controversial practices of the executive branch that were not accompanied by substantial and open legal justification. These judgements fill a gap in the legal analysis of contemporary warfare and fulfill the traditional executive role to some extent.

Non-State actors that are involved in international lawmaking often substantially support these cases. In the *Hamdan* case, for example, human rights and humanitarian lawyers filed numerous *amici* briefs. There are strong indications that these documents influenced the judgment. Moreover, human rights and humanitarian actors often initiate proceedings. For example, the petitioner in the *Targeted Killings* case were human rights NGOs. This is true for many other Israeli cases. Thus, it is not surprising that the judgments of national courts are not discussed as part of the lack of State *opinio juris* by Schmitt and Watts.

Regardless of classification, domestic courts clearly constitute a significant arena for non-traditional international lawmaking in the context of asymmetric warfare. The contribution of domestic courts to international law has

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118 See, e.g., Modirzadeh, supra note 5, at 258 (“The Court received numerous *amici* briefs from IHL and IHRL experts, and the Court’s decision can be read as being highly influenced by these submissions.”); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT’L REV. RED CROSS 373, 380-81 (2007) (demonstrating that a citation error in the judgment repeat a similar error in an *amicus* brief that was submitted to the court).

119 The petitioners in the *Targeted Killings* case were The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment.

120 Schmitt and Watts emphasized State positions when litigating as a way to shape customary international law, but only at the end of a footnote do they recognize the role of domestic courts in this regard, through a quote from Oppenheim. See Schmitt & Watts, supra note 3, at 209.
received more recognition in recent years, and specifically, their role in the interpretation and application of IHL has been widely acknowledged. As mentioned, the Israeli Supreme Court was a key player in this respect, deciding on a series of important cases on the conduct of hostilities issues, although it has been more reluctant to engage in such review. US Courts have also rendered several important decisions in this regard. Other domestic courts, including courts in Switzerland, Australia, Canada, India, and the Netherlands, have addressed asymmetric warfare. Some of these decisions, such as the Targeted Killings case, the Hamdan Case, and Serdar Mohammed case, played key roles in the debate over regulation of contemporary asymmetric conflicts.

B. The New Lawmaking Effort

States have become more willing to directly engage in the debate over the laws of asymmetric warfare in recent years. In contrast to the initial articulation of their legal positions—which were usually in non-voluntary or semi-voluntary contexts such as domestic court proceedings or engagements with international bodies—the new engagement of States with international lawmaking has been primarily through voluntary acts. The two dominant cases for this trend are the United States and Israel.

1. The United States

In contrast to the United States’ reluctance to directly engage in the debate over the regulation of asymmetric conflict in the beginning of the "global war on terror," in recent years, it has engaged in this debate in three types of ways: (a) Speeches of various US officials, (b) The Department of Defense Law of War Manual, and (c) government reports.


122 See, e.g., Weill, supra note 116; IHL in Judicial Bodies, supra note 65.

123 See, e.g., Adalah, supra note 107.


126 See, e.g., Rahmatullah v. Ministry of Def., supra note 95.

127 See IHL in Judicial Bodies, supra note 65.

128 Targeted Killings case, supra note 62.

129 Hamdan v. Rumsfeld, supra note 57.


131 Each of these decisions was the subject of intensive debate in the international law community.
a. Speeches

The first type of engagement with the regulation of asymmetric conflict is various speeches given by US officials. In a series of speeches, US officials addressed a significant number of controversial legal questions. The speeches began with John B. Bellinger III, the legal advisor for the US Department of State, at the London School of Economics in October 2006.132 This speech addressed the most debated issue of the Bush administration in relation to contemporary conflicts—detention. An academic exchange with critics of the administration’s position followed the speech. This bolsters the assertion that the administration was beginning to willingly present and publicly promote its legal positions.133 Still, Bellinger’s speech was a clear exception to the general tendency of the Bush administration to refrain from public legal justifications of their IHL position, making it hard to date the shift in practice to 2006.

In 2010, at the Annual Meeting of the American Society of International Law (ASIL), Harold H. Koh, then the Legal Adviser to the Department of State, gave an important speech in which he addressed the main legal positions of the Obama administration on transnational conflicts.134 The speech included both legal and policy positions and discussed issues such as detention of armed group members, targeted killings, and the use of drones. Various officials in the Obama administration, including President Obama himself, then gave a series of speeches and statements that expanded the legal position of the United States.135 These speeches included the public acknowledgment of specific legal commitments, including recognition of Article 75 of the First Additional Protocol to the Geneva Conventions as customary law in international armed conflicts,136 and the extraterritorial application of the prohibition on torture.137

134 Harold Hongju Koh, Legal Adviser, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010). Two speeches of President Obama preceded the Koh speech. Nonetheless, these speeches do not directly address international law issues and therefore are not part of the analysis in this article.
135 For a list of the main speeches and other key documents, see THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, Appendix (2016) [hereinafter FRAMEWORKS REPORT].
137 Mary E. McLeod, Acting Legal Adviser, U.S. Dep’t of State, Address to the Committee on Torture: U.S. Affirms Torture Is Prohibited at All Times in All Places (Nov. 12-13, 2014).
The importance of these speeches has been described in very different ways. While Schmitt and Watts suggest that the speeches are part of the unwillingness of the US administration to express its opinio juris on the most important contemporary legal controversies, \(^{138}\) Kenneth Anderson and Benjamin Wittes suggest that the speeches represent the opinio juris of the United States and that they address "a surprisingly wide array of contested legal issues."\(^{139}\) Schmitt and Watts thus downplay the importance of the speeches. For example, Schmitt and Watts suggest that the United States did not explicitly express its opinio juris regarding the ability to target members of a non-State armed group who do not hold a continuous combat function;\(^{140}\) however, US officials have stated in a series of speeches that under IHL, States are permitted to target individuals based on their formal membership in an armed group.\(^{141}\) Taking it one step forward, I want to suggest that these speeches, given over a period of several years and by different members of the administration, should be seen together with the two other types of engagements with international law. They are part of a new effort of the US administration to take an active part in the contemporary IHL discussion.

\(b\). The Department of Defense Law of War Manual

In 2015, the Department of Defense (DoD) published its much-awaited Law of War Manual.\(^{142}\) It is a 1,200-page document that was published after a long drafting process. Significant changes were made following 9/11 and the "global war on terror,"\(^{143}\) which caused delays to its release.\(^{144}\) The Manual was the result of a complex process which involved civil and military lawyers from the DoD, consultation with foreign experts and resources (mainly other States’ military manuals and military lawyers), and the participation of experts from the State Department and the Department of Justice.\(^{145}\) The DoD Manual addresses a wide range of issues, including asymmetric warfare and the relationship between IHL.

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138 Schmitt & Watts, supra note 3, at 215 ("…both administrations have resorted to periodic speeches by senior officials who provide only vague glimpses of the U.S. position").
140 Schmitt & Watts, supra note 3, at 202.
143 See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, DoD LAW OF WAR MANUAL REVIEW WORKSHOP – WORKSHOP REPORT MARCH 2016 (2017) [hereinafter ABA LAW OF WAR MANUAL WORKSHOP REPORT] ("The manual sought to focus on novel LOW matters that had arisen in the aftermath of 9.11 and to offer clear U.S. positions on these issues.").
144 Edwin Williamson & Hays Parks, Where is the Law of War Manual?, WEEKLY STANDARD, July 22, 2013, http://www.weeklystandard.com/where-law-war-manual/article/739267 (stating that at the time the article was written, there was already a 30-month delay in the publication of the DoD Manual).
145 DoD Manual, supra note 142, at V-VI.
and IHRL, the geographical scope of a conflict, the existence of a least harmful means rule for legitimate targets, and the targeting of non-State armed groups members. It also offers some controversial statements of the law regarding issues such as human shields, the targeting of journalists, target selection, and proportionality. The criticism of these issues has led the DoD to review and change the Manual twice. However, not all authors are convinced that the changes have solved the concerns.

The DoD Manual has been widely criticized for its limited goals, its size, and its substance. Specifically, it is widely acknowledged that the DoD Manual is not an official statement of the US legal position on IHL norms. Thus, it cannot be regarded as an expression of US opinio juris on the relevant issues. As the DoD Manual itself acknowledges in the preface, “...the views in this manual do not necessarily reflect the views of [the Department of State and the Department of Justice] or the US Government as a whole.” It was suggested that this comment indicates an actual disagreement between the different Departments over the DoD Manual’s substance in addition to the lack of opinio juris of the manual.

Regardless of actual differences between the Departments, it seems that the DoD Manual followed the US criticism of the ICRC Customary IHL Study in its resistance to see domestic military manuals as reflections of opinio juris.  

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146 Id. at §§ 1.3.2, 1.6.3.1 (adopting a strict lex specialis approach to this issue), § 1.6.3.3 (stating that the International Covenant on Civil and Political Rights does not apply extraterritorially). For criticism of the DoD Manual approach in this regard, see Aurel Sari, Hybrid Law, Complex Battlespaces: What’s the Use of a Law of War Manual?, in THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY & CRITIQUE (Michael A. Newton ed., forthcoming).

147 Id. at § 5.5.5 (stating that attacks removed from the active theater of war are lawful).

148 Id. at § 5.5.6 (suggesting that there is no obligation to use the least harmful means against legitimate targets).

149 Id. at §§ 5.7.2, 5.8.1, 5.8.3, 5.9.2.1 (adopting a status-based approach to the targeting of armed groups members).


152 DoD Manual, supra note 142, at VI.

153 ABA LAW OF WAR MANUAL WORKSHOP REPORT, supra note 143, at 4.

Indeed, when considering the acknowledgement in the preface of the Manual and the statements of its drafters, it is difficult to consider the manual as an expression of the official US opinio juris on IHL norms. Nonetheless, as Part I suggests, traditional lawmaking, including official pronouncements of opinio juris, is no longer necessarily the only—or even the primary—way of international lawmaking, specifically in the context of IHL. The role of military manuals as expressions of the State positions on IHL norms has been widely acknowledged. For example, it was suggested that the delay in the publication of the UK Manual on the Law of Armed Conflict was the result of a "concern over the appropriate timing for publication of such a Manual, which would inevitably be seen as an authoritative statement of the United Kingdom’s position on international law." This insight applies to the DoD Manual as well. The DoD Manual is likely to be commonly used because insights into soft law have shown that a document can be influential even if it is not binding. Moreover, such documents are mostly effective where there are gaps in existing law. In our case, in the absence of significant contradicting official US articulations of its legal position, the DoD Manual may become the primary reference point for the US IHL position. Moreover, the delay in the release date of the Manual was explicitly mentioned in the Schmitt and Watts paper as an indication of the United States’ reluctance to express its opinio juris on core IHL issues, even while recognizing that manuals are not necessarily an official expression of opinio juris.

This understanding did not escape those who emphasized the Manual’s non-binding nature. Thus, in the opening paragraph of Chapter 6 in the Report of the ABA Standing Committee on Law and National Security Workshop on the DoD Manual, it States that "the Working Group observed that, given that the US military is the most technologically advanced in the world, this chapter on weapons will very likely be looked to by other States and international organizations as a definitive US statement on both the lawfulness of various weapons systems and the manner in which such systems might be employed." This view seems to also be shared, at least to some extent, by the drafters of the Manual. As one of the DoD Manual’s drafters, Matthew McCormack, stated regarding the envisioned use of the manual, “the practitioner would use the

Counsel for the DoD, to this position in relation to the scope of the DoD Manual).


156 Garraway, supra note 155, at 425.


158 Id. at IIIC.

159 Schmitt & Watts, supra note 3, at 219.

160 ABA LAW OF WAR MANUAL WORKSHOP REPORT, supra note 143, at 47.
Manual [to] find the particular rule at issue, and the relevant US and DoD interpretations of that rule.  

A comparison between the DoD Manual and the UK Law of War Manual can illuminate the rise of State engagement in the international lawmaking of contemporary conflicts. In 2004, the UK published its long-awaited Law of War Manual. Ostensibly, this Manual provided evidence of the active engagement of States in IHL lawmaking. Indeed, according to international law scholar David Luban, an eminent British lawyer suggested that the Manual had been published in light of the upcoming ICRC Customary Law Study, in order to "get in our retaliation in advance." Moreover, the Manual itself states (with some qualifications) that it is "a clear articulation of the UK’s approach to the Law of Armed Conflict." Nonetheless, Charles Garraway, who took part in the drafting of the Manual, considered the lack of clear positions on State approaches to contemporary IHL to be reflective of their general reluctance in this arena. He states that the Manual deliberately does not include sections that deal with the most contentious issues of contemporary conflicts, such as the status of non-State armed groups members, and refrains from mentioning the "global war on terror" at all. Garraway suggested that the reluctance to publish manuals is due to the fear that they will be used against the States. In contrast to the UK Manual, the DoD Manual addresses the most controversial questions evoked by contemporary conflicts. This seems to represent the realization that the articulation of a State’s positions better promotes its interests than silence.

c. Governmental Reports

In recent years, the Obama administration published several documents on legal and policy issues in relation to contemporary conflicts. Some of them became publicly available several years after their creation. The most important document was released in the last phase of the Obama administration. On December 2016, the White House released a 66-page report which addresses the United States’ use of force in the context of contemporary asymmetric conflict. The report received much attention in the international law blogosphere. The

161 Rostow & Bowman, supra note 154, at 264.
163 Luban, supra note 6, at n.9.
164 THE UK MANUAL, supra note 162, at 5.
165 Garraway, supra note 155, at 439.
166 Id. at 440.
168 FRAMEWORKS REPORT, supra note 135.
report itself does not provide many new substantive legal positions that are not already included in the above-mentioned speeches. Nonetheless, the mere fact that the White House published an official document summarizing its main legal positions on contemporary transnational armed conflict is significant. It gives much more weight to the substance of the speeches and clearly signals the willingness of the US administration to take part in an open debate over the law of contemporary asymmetric conflicts. Indeed, reactions to the report emphasized its contribution to greater transparency from the US administration with regard to its legal position and its direct contribution to the debate over the scope of customary international law.

The report also significantly strengthens the role of the DoD Manual. It cites the Manual several times in relation to the US position on the conduct of hostilities, including controversial issues such as the definition of legitimate targets in conflicts with non-State armed groups. While several authors have stressed the acknowledgement in the DoD Manual as an indication of a significant interagency disagreement on its content, the frequent reference to the DoD Manual, without any reservations or disclaimers, is notable evidence in the other direction. It should be noted in this regard that in contrast to the approach of the DoD Manual, the report scarcely cites external documents and only cites non-US commentary twice.

2. Israel

Israel’s reengagement with IHL making mainly occurred through a series of reports. The first sign of a change can be traced to the brief document that was published by the Israel Ministry of Foreign Affairs after the second Lebanon War in 2006. The document analyzes Israel’s conduct in the war generally without...
providing an in-depth legal analysis. The most notable issue in the document is the justification that it provides for the use of cluster munitions in the conflict.\textsuperscript{175}

A second, more significant, engagement is the Israeli decision to publish a report following the 2009 Gaza conflict.\textsuperscript{176} This conflict had resulted in a high number of Palestinian casualties, including many civilians, and led to much criticism of Israel's conduct from the international community. While refusing to cooperate with the Human Rights Council's commission of inquiry that eventually issued the Goldstone Report, Israel decided to actively react to the upcoming report by issuing its own report on its conduct during the conflict. Much of the 164-page report discusses specific controversial incidents and presents the Israeli narrative of the conflict's development. Nonetheless, the report provides about a 20-page summary of the Israeli position on the application of IHL in contemporary conflicts. The report refers to issues such as the inclusion of force protection in the assessment of military advantage when applying the principle of proportionality,\textsuperscript{177} and the obligation to take precautions before an attack.\textsuperscript{178} Additionally, the report critically addresses specific publications of non-State actors. It suggests that reports by NGOs such as Amnesty International and Human Rights Watch "too often jump from reporting tragic incidents involving the death or injury of civilians during armed combat, to the assertion of sweeping conclusions within a matter of hours, days or weeks, that the reported casualties \textit{ipso facto} demonstrate violations of international law, or even—war crimes."\textsuperscript{179} The report also criticizes the methodology of the ICRC Customary Law Study and states that "[l]ike many other States, Israel does not agree that all of the rules stated in the ICRC CIL Study reflect customary international law."\textsuperscript{180} Nonetheless, the report's commentary on the classification of armed conflict and the scope of customary IHL norms remains vague.\textsuperscript{181} Overall, the report is an initial engagement in the debate over IHL norms, and it combines criticism of the output of non-State actors with a limited legal justification of Israel's conduct.

Unlike the DoD Manual which acknowledges that it may not represent the position of the US government, the Gaza 2009 Conflict Report is an official document of the Israeli government and unreservedly stipulates its legal position.

The two Turkel Commission Reports present a third notable engagement with IHL norms. On May 31, 2010, the Israeli Defense Forces (IDF) intercepted the Comoros-flagged \textit{Mavi Marmara}, a maritime vessel on its way to the Gaza

\begin{flushleft}
\textsuperscript{173} \textit{Id.} at IIIE. \textit{See also} ALAN CRAIG, \textit{INTERNATIONAL LEGITIMACY AND THE POLITICS OF SECURITY: THE STRATEGIC DEPLOYMENT OF LAWYERS IN THE ISRAELI MILITARY} 177 (2013) (suggesting that the legal response had a key role in the defense of Israel's conduct).


\textsuperscript{176} \textit{Id.} ¶¶ 105, 122.

\textsuperscript{177} \textit{Id.} ¶¶ 132-38.

\textsuperscript{178} \textit{Id.} ¶ 34.

\textsuperscript{179} \textit{Id.} at n.70.

\textsuperscript{180} \textit{Id.} ¶¶ 29-31.
\end{flushleft}
Strip, intending to break the maritime blockade imposed by Israel several months earlier. The Israeli soldiers faced resistance upon boarding the vessel, resulting in nine deaths among the passengers of the Mavi Marmara and several wounded Israeli soldiers. The incident received much international attention and led to several international commissions of inquiry, including a request by the Comoros Islands that the ICC open an investigation of the events. As a response to the international coverage, and as a lesson from the Goldstone Report, Israel established its own commission of inquiry. In addition to Israeli members, the Turkel Commission of Inquiry was comprised of two foreign observers—Lord David Trimble and Brigadier General Kenneth Watkin—and two foreign special consultants—Wolff Heintschel von Heinegg and Michael Schmitt. The Turkel Commission provided a lengthy legal analysis that addressed several key IHL issues, including the classification of the conflict between Israel and Hamas, the legality of naval blockades in non-international armed conflicts, the occupation of Gaza, the relationship between IHL and IHRL, and the targeting of civilians who directly participate in hostilities. In addition, the Commission addressed the ICRC Interpretive Guidance by stating that it should be used cautiously due to its controversial nature.

Approximately two years after the first Turkel Report, the Commission of Inquiry published its second report. The second report focused on the Israeli investigation of violations of IHL and its adherence to the international obligations. The report provides a detailed analysis of obligations that international law places on the investigations of alleged IHL violations, comparative analysis of the investigation systems of several other States, and detailed analysis of Israeli policy.

This second Turkel report is of even greater importance for this Article than the first report. While the first report focused on the legality of the specific Mavi

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184 Id. §§ 37-38.

185 Id. §§ 45-47.

186 Id. §§ 98-100, 184-189.

187 Id. §§ 193-199.

188 Id. § 194.

189 THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (THE TURKEL COMMISSION), SECOND REPORT – ISRAEL’S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW (Feb. 2013) [hereinafter TURKEL REPORT PART II].
Marmara incident, the second report examined much broader Israeli policy with regard to investigations of alleged IHL violations. It is a very hot topic in contemporary IHL and international criminal law (ICL), which occupied Israel in other instances, most notably in the Goldstone Report. Beyond the importance of creating a key document on an issue of interest to States occupied with investigations of their military conduct in contemporary conflicts (such as the United States and the United Kingdom), the focus on investigations is of particular importance in the context of the role of States in IHL making for two reasons. First, as ICL’s prominence grows, investigations become a battle over the role of States and non-State actors in a specific conflict. The ICC operates under the principle of complementarity, which allows States to prevent a case from being adjudicated by the ICC if the State demonstrates that it is willing and able to investigate (and if required, prosecute) the case properly. By establishing the standard for investigations of alleged IHL violations (and following those standards), the State may avoid adjudicating IHL cases in an international tribunal while also maintaining control of its own legal issues. Second, David Hughes recently suggested that the rise of ICL shifted in the battle over legitimacy from debates on IHL violations to debates over accountability for war crimes and investigations, defining this trend as a move towards informal complementarity.

Through a focus on investigations and perhaps the prosecution of individuals, States can maintain their legitimacy while reducing the need to justify policies of broader hostility. Israeli officials often use the Turkel Report to hail Israeli accountability mechanisms and to demonstrate Israel’s willingness and ability to investigate alleged war crimes. The second Turkel Report demonstrates Israel’s recognition of the strategic importance of investigations of alleged IHL violations as Israel acted rather fast in producing one of the first outputs on this issue. Whether this decision was strategically correct—in light of the criticism of Israeli practice and its slow implementation of the Report’s recommendations—remains


192 Rome Statute, supra note 93, at art. 17.


to be seen. Nonetheless, the report is a clear indication of Israel’s willingness to actively participate in IHL making.

Another notable decision in the context of the Mavi Marmara incident is Israel’s willingness to cooperate with the Secretary General’s report on the flotilla. In contrast, Israel refused to cooperate with the Human Rights Council’s report on the incident. This cooperation may also indicate Israel’s willingness to actively engage in the IHL debate over asymmetric lawfare.

Israel’s fourth recent engagement with IHL is the Israeli Report on the 2014 Gaza conflict. This conflict led to a significant death toll and intense destruction. Abundant legal criticism followed the results of this event, including a letter by a large number of international law experts, a report by a commission of inquiry of the Human Rights Council, and a preliminary examination of the situation by the ICC Prosecutor. Just as it had following the conflict in 2009, Israel again issued its own official government report on the events in 2014 and refused to cooperate with the Human Rights Council commission of inquiry. However, the 2014 report included three important changes when compared to the previous report. First, the report offered a more detailed legal analysis of relevant and controversial issues, including the deployment of artillery in urban warfare and the targeting of armed group members, while explicitly rejecting the CCF requirement of the ICRC Guidance on Direct Participation in Hostilities. Second, Israel offered international lawyers and experts unprecedented in-person access to its own military lawyers including an in-depth discussion of its views on IHL. This resulted in two articles by Michael Schmitt and John Merriam in which they describe the Israeli legal position on a wide variety of contemporary IHL norms including the customary status of different articles of the Additional Protocols. Lastly, since the release

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195 Id. (arguing that the Israeli investigation system is flawed, that the Turkel Report recommendations were only partially implemented, and that the recommendations that were implemented drew criticism as well).
196 Palmer Report, supra note 182, at 3.
197 Hudson Phillips Report, supra note 182, ¶ 16.
198 The actual number of casualties is disputed but according to all sources the numbers for the 2014 Gaza conflict are much higher than previous conflicts. The HRC report states that the number of Palestinian casualties (2,251 total, including 1,462 civilians) was unprecedented. See Gaza 2014 HRC Report, supra note 77, ¶ 20. According to the Israeli Government’s interim findings, 2,125 Palestinians were killed, including 936 militants, 761 civilians, and 428 “males between the ages of 16-50.” See 2014 Gaza Conflict Report, supra note 90, at Annex – Palestinian Fatality Figures in the 2014 Gaza Conflict, ¶¶ 25-27.
199 Joint Declaration by International Law Experts on Israel's Gaza Offensive, GLOBAL JUSTICE IN THE 21ST CENTURY (July 28, 2014).
200 Gaza 2014 HRC Report, supra note 77.
202 2014 Gaza Conflict Report, supra note 90.
203 Id. ¶¶ 347-60.
204 Id. ¶¶ 264-66.
205 Major John J. Merriam & Michael N. Schmitt, Israeli Targeting: A Legal Appraisal, 68 NAVAL
of the report, Israel has shown a willingness to cooperate with the ICC preliminary examination of its conduct in the 2014 Gaza conflict.206 These developments indicate another step in the increased willingness of Israel to take an active part in IHL lawmaking.

C. Explaining the Rise of States’ Active Engagement in IHL Making

1. Explaining the Lack of Active Engagement

It is not surprising that States that do not actively take part in contemporary armed conflicts do not actively participate in the lawmaking process. States have a tendency to refrain from reacting to non-State actors’ outputs and from explicitly expressing their own legal positions.207 In these cases, a State may not have sufficient legal resources to invest in a specific issue nor sufficient interest to express an official position and may prefer to maintain wide discretion.208 However, the United States and Israel are two examples of States that are both significantly invested in the subject and seem to have the legal resources to actively engage in the debate. The rationale for a lack of engagement within this context is not obvious. Schmitt and Watts offer possible explanations for the lack of active involvement in the legal debate. They suggest that the reluctance to express an opinion can be the result of limited knowledge of the implications of an emerging area of warfare, a political impasse resulting from domestic political considerations, or a calculated decision to suggest that no IHL norms apply to the specific situation.210

I want to offer an alternative explanation that I believe had a significant influence on the decision of States to provide little legal justification for their conduct of hostilities policy. States acted under the traditional positivist model of international lawmaking, thereby discounting the role and power of non-State actors. They assumed that their own actions would be the most influential factor in shaping contemporary IHL. State actors did not expect non-State actors’ outputs to have such a significant influence. Schmitt and Watts’ suggestion that silence was intended to indicate a lack of IHL prohibition (or relevance) is included in this line of reasoning. Early attempts to address non-State initiatives by emphasizing the role of States in international lawmaking, such as the criticism of the ICRC customary study, might be an expression of the same notion. The

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207 See Sivakumaran, supra note 14, at 181.


210 Schmitt & Watts, supra note 3, at 211.
reluctance of the Bush administration to present a detailed legal justification can be explained by the administration’s belief that US practice is significant enough to influence the vague law of such conflicts, especially as one of the "States whose interests are specially affected." Moreover, the same belief may be strengthened by the notion of "hegemonic international law" that emerged in the international law scholarship of that time by Detlev F. Vagts. Under this notion, there need not be any detailed analysis of the relevant legal situation for the hegemon to affect international law. More importantly, no customary rule can emerge when a hegemon abstains from acting. It is not surprising that the United States chose not to provide any detailed justifications for its actions, given its beliefs in its own ability to shape international law and skepticism of the role of non-State actors.

Another explanation may arise out of a negative perception of international law in the contemporary international law community. The Bush administration held a general suspicion towards international law which it viewed as "an obstacle to the exercise of American power." This skepticism towards international law has been portrayed convincingly by Jens Ohlin. As for Israel, its administration has expressed concerns not regarding international law in general but regarding the politicization of international legal institutions, as indicated in its continuing refusal to cooperate with various international law bodies. This sentiment relates to the growing use of the notion of lawfare. The term lawfare was reintroduced by Charles Dunlap Jr., as "a method of warfare where law is used as a means of realizing military objective." This definition is rather neutral, as is the example Dunlap uses in another paper on the use of a contract to obtain exclusive rights to satellite imagery of strategic importance. Nonetheless, the notion that is relevant in our context is the common use of the term to express the "imposition or manipulation of international legal standards to confine traditional military means and operations and to limit both State responses to terrorism and the use of force," that was widely discussed in the Israeli and American contexts.

214 Vagts, supra note 212, at 847.
220 See, e.g., id. (describing the term “lawfare” in the American and Israeli contexts); David Scheffer, Whose Lawfare is It, Anyway?, 43 CASE W. RES. J. INT’L L. 215 (2010) (critically discussing how the notion of lawfare in the United States and Israel affects the two nations’ willingness to engage in the legal debate of their policies). From the other side, several authors have emphasized the political nature
I believe that the ‘skepticism towards international law’ explanation is important and can explain part of the difference between the Bush and Obama administrations’ attitudes. Nonetheless, the Israeli case demonstrates that this explanation does not capture the whole story. Since 2009, the Israeli government is by no means more receptive to international law. And, as the next Section demonstrates, Israel, just like the United States, changed its approach and began to directly engage with the lawmaking of contemporary IHL.

2. Explaining the Recent Direct Engagement of States with IHL

I suggest that greater State engagement with IHL largely resulted from the internalization by States of the impact of non-State actors’ initiatives on international law. The following Section explains the impact of such outputs and then addresses the reaction of States to such impact.

a. Explaining the Influence of Non-State Lawmaking Initiatives

How do non-State actors' outputs gain influence despite the lack of formal authority? The following Section suggests that where traditional actors are relatively silent, the mere existence of non-State actors' outputs is sufficient to influence the law. This Section offers several rational and behavioral explanations for such influence.

In his article about the battle over the law of asymmetric warfare, Eyal Benvenisti captures an important insight about the way in which non-State actors influence international law. When referring to different lawmaking efforts by non-State actors, Benvenisti states that "these norms practically move the law beyond State consent and below the radar screens of governments in the hope that domestic and international courts will resort to them as reflecting evolving law." This insight captures two necessary components of the ability to influence the direction of IHL. First, the lawmaking initiatives should be made "below the radar screens" of governments. Second, they should fill a gap in legal regulation that other actors in the international legal community also need to address—to provide a thick enough legal analysis for these other actors to use.

Sandesh Sivakumaran's recent article on international lawmaking by State-empowered entities discusses various factors that influence the impact of such lawmaking initiatives. While Sivakumaran focuses on State-empowered entities, his analysis could be applied broadly to any non-State actor lawmaking initiative. Sivakumaran's main focus is on the way in which the community of international lawyers receives the lawmaking initiative. His argument is to a large extent a generalization of the argument that was made by Schmitt and Watts, stating that


\[\text{Benvenisti, supra note 52, at 346. Eyal Benvenisti builds on the work of Kenneth Abbott on the effect of privately-generated soft law. See Abbott, supra note 46.}\]
in practice States tend not to respond to non-State actors’ lawmaking initiatives and the vast majority of the responses come from other non-State actors. As a result, non-State actors are gaining more influence in the making and shaping of international law while the role of States declines.\footnote{See generally Schmitt & Watts, supra note 3.}

Another step in the analysis is needed, however, to explain the endorsement of specific non-State lawmaking initiatives. Other factors that Sivakumaran discusses—such as the reputation of the non-State actor, its link to States, or the quality of its reasoning—significantly affect the impact of the output.\footnote{Sivakumaran, supra note 14, at 365–70.} Another explanation is that actors who react positively to an initiative share the same substantive positions as the non-State actor who created the document.\footnote{See Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INT’L Org. 887, 898–99 (1998) (describing the life cycle of international norms including the role of non-State actors in the creation of such norms and the role of States in their dissemination).} This explanation captures part of the story. Nonetheless, ideology can only partially explain acceptance. If everything is already dependent on the political preferences of the different actors, there is no point in battling over norms, since all actors will hold on to their initial preferences. Indeed, political pressure from various actors who endorse the non-State actor’s position can incentivize some States to accept this position as binding.\footnote{Id.} However, there are still limitations to the effect of such pressure, and there is limited explanation of how the norms are accepted by such actors.

I suggest that at least part of the reason that these initiatives are influential is the mere fact that they exist.\footnote{See also Tomer Broude & Yahli Shereshevsky, Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses, in INTERNATIONAL LAW AS BEHAVIOR (forthcoming 2018) (discussing similar explanations for the influence of soft law).} This explanation builds on two assumptions. First, many actors in the international law community have a genuine interest in applying the relevant legal norms to a specific situation. Second, many of these actors either do not have strong expertise in the particular subject matter or alternatively do not hold a strong preference on the matter. In such cases, actors rely on the most accessible, convenient, or detailed source on the relevant subject, especially when the actors need to provide an explanation for their position. This is often the case, for example, in international law cases adjudicated in domestic courts. In many cases, domestic courts lack specific IHL expertise. This is most notable when IHL cases are rare in a specific court or jurisdiction. For example, Naz Modirzadeh described the lack of IHL expertise in US courts and argued that this expands the influence of experts in the field through the filing of \textit{amici} briefs.\footnote{See Modirzadeh, supra note 5, at 257–58 (discussing the lack of IHL expertise in US courts and their reliance on \textit{amici} briefs).}

Steven Ratner’s article on the effect of international law on the prevention of ethnic conflict provides a second example of the practical influence of non-
binding norms.\textsuperscript{228} Ratner suggests that soft norms had a strong influence as an argumentative tool when used by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE), especially when the actors to whom the communications were directed had little knowledge of the relevant international law norms.\textsuperscript{229} One exception to the tendency to rely on soft norms was a small group of foreign ministry specialists who insisted on the relevance of the hard versus soft law distinction.\textsuperscript{230} Ostensibly, the debate over contemporary IHL pertains to foreign ministry officials much more than to actors with no international law expertise. Nonetheless, there is reason to believe that in many cases, the debate over contemporary IHL is closer to the example of the influence of soft law on those actors with no expertise. Even the knowledge of international law experts is limited, especially in an era when it is increasingly common to have a specific, narrow expertise.

Think, for example, of a law clerk at the ICJ who faces a question regarding the customary status of a specific article in First Additional Protocol. Is it reasonable to assume that she is familiar with the relevant State practice and opinio juris needed to determine the status of the article? Can we assume that even an ICJ judge, or a military JAG is familiar with all the relevant materials? Often, within the most important cases in the debate over the regulation of contemporary warfare, there is more than a mere information gap. Instead, a real ambiguity surrounds the legal norm. Take for example the question of targeting non-State armed groups. Until the creation of the Interpretive Guidance (and to a much lesser extent the Israeli \textit{Targeted Killings} case), the debate over this highly important issue was open-ended and vague.\textsuperscript{231} Moreover, in contrast to many soft law instruments that clearly refer to themselves as non-binding, and thus enable international law experts to discern between binding and non-binding norms, most of the non-State initiatives discussed in this context intend to represent existing, binding norms.\textsuperscript{232} This is true even if the legal propositions articulated in these initiatives are not authoritative. For example, the ICRC customary study aims to represent binding customary law and the ICRC new commentaries on the Geneva Conventions aims to offer an interpretation of binding treaty norms. Under these circumstances, it is likely that actors that need to hold a position on these questions will rely, at least to some extent, on such documents.

It is possible to think of different rational and psychological explanations for the widespread use of the lawmaking outputs of non-State actors by other actors. Think again of the example of the ICJ law clerk or government official who faces a question of the customary status of a specific IHL norm. With the ICRC

\begin{itemize}
\item \textsuperscript{229} Id. at 661.
\item \textsuperscript{230} Id. at 664–65.
\item \textsuperscript{231} Schmitt & Watts, \textit{supra} note 3, at 199–200.
\item \textsuperscript{232} See Broude & Shereshevsky, \textit{supra} note 226 (discussing the difference between various types of soft law instruments).
\end{itemize}
Customary Law Study as the only significant account of customary IHL, she has to choose between two options: conducting independent research or using the ICRC study as a starting (and sometimes the only) point of reference. Indeed, there is much value in conducting independent research. Yet this has significant costs. Assuming that the relevant actor is not highly invested in a specific position, and given the workloads of the specific actor, relying on the ICRC study might be the most efficient path. Non-State actors’ outputs can be focal points of coordination for the relevant actors.233

In addition, the ICRC study might gain influence through mechanisms that are recognized in behavioral law and economics and social psychology literature. The ICRC study can be difficult to ignore, since it often serves as an initial reference point (or meaningful anchor) that affects the position of the relevant actor.234 If the ICRC study is perceived as the status quo, then the status quo bias might explain the tendency to rely on it as existing law.235 Finally, if we accept the notion of a shared interpretive community, then insight from the literature on social influence, which addresses the effect of groups on individual decisions, can be invoked to assess the potential effect of existing documents on members of the relevant interpretive community. The reliance on these outputs might be the result of a tendency to conform to others’ positions for informational or reputational reasons, especially when these outputs come from highly regarded experts or organizations.236

Regardless of the actual psychological or rational processes, the common feature of these explanations is the visibility and centrality of the stated norm as an explanation for its influence. The mere availability of the output might best explain why, despite extensive criticism of the methodology of the ICRC study (including by scholars that are not usually associated with the LOAC lawyers camp), it remained an extremely influential document.237 Without a viable alternative, there is little incentive for international law actors to refrain from using the study as the main reference point in the context of customary IHL.

234 Anchoring is usually discussed in relation to the effect of exposure to random numbers on estimations, but the literature has recognized the potential anchoring effect of meaningful non-numerical standards or legal materials. See, e.g., Ozan O. Varol, Constitutional Stickiness, 49 U.C DAVIS L. REV. 899, 947–48 (2016) (suggesting that existing constitutional norms might have an anchoring effect that contributes to the stickiness of constitutional norms); Yuval Feldman, Amos Schurr & Doron Teichman, Anchoring Legal Standards, 13 J. EMPIRICAL LEGAL STUD. 298, 320 (2016) (suggesting that future research should address the anchoring effect of default contract terms); Marcel Kahan & Michael Klausner, Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases, 74 WASH. U. L. Q. 347, 363 (1996) (suggesting that standard contractual terms might have an anchoring effect).
235 See Broude & Shereshevsky, supra note 226, at 23–24.
236 See id.
b. The New Engagement as a Reaction to the Influence of Non-State Actors

When States internalized the potential significance of written legal reasoning in the battle over the law of asymmetric conflicts, they reacted to non-State actors’ initiatives by producing their own legal counter-analyses. Even from the perspective of the notion of lawfare, or a negative sentiment towards international law, a State can decide that it is better to play the game rather than abandon it, and that it is better to adopt a positive strategy of forming counter-arguments on the applicable law rather than avoiding the subject altogether.238 Building on Ingber’s analysis, non-State actors’ lawmaking initiatives might be seen as external interpretive catalysts once their potential influence is acknowledged by States. While Ingber discusses executive speeches as interpretive catalysts, we can look further at the causes that incentivize the decision to give a speech as an external interpretive catalyst.239 As Schmitt and Watts have noted in the context of IHL and Sivakumaran has noted in the broader international law context, the result of the decision of States to refrain from significant involvement in lawmaking has increased, rather than decreased, the influence of non-State actors in shaping international law. This result was acknowledged by States and contributed to their decisions to reengage in international lawmaking.

Moreover, understanding the reasons for the influence of non-State actors’ outputs, as explained in Part II.C, influences the form of the new State lawmaking initiatives. States realized that silence or mere criticism of the lawmaking initiatives are not enough to influence the law. For example, rejecting or criticizing non-State actors’ outputs such as the ICRC customary study (by focusing on their methodology) is not sufficient to counter their influence. When States fail to put forward their own assessments of customary IHL, the ICRC initiative will remain the only significant account and will likely be used by the relevant actors due to the tendency to use such reference points, as described above. Thus, instead of mere criticism, States have decided to follow the path of non-State actors’ nontraditional lawmaking methods to regain their influence. The form of these efforts is described in the Part III.B.

D. Short Summary and Alternative Explanations

Taken together, the speeches, reports, and the publication of the DoD Manual indicate a new approach by the United States and Israel towards IHL making. In the first few years of US and Israeli involvement in contemporary asymmetric conflicts, both nations showed little willingness to actively promote their legal positions, but in recent years they have taken a different path. This does not necessarily mean that the new approach is here to stay. For example, the Trump administration, which I address in the conclusion of the paper, is much less

238 See Kitttrie, supra note 82, at 298.
239 Ingber, supra note 103, at 397.
engaged with international law than the Obama administration.\textsuperscript{240} However, as this Section demonstrates, the Obama administration's approach was not unique, and Israel's current right-wing government has adopted a similar approach. Thus, the decision to engage in IHL making is not dependent on a favorable attitude towards international law and institutions.

Outputs from Israel and the United States have many differences, including the political environment in which they were created, the issues that they cover, their length, and their authors. Thus, while the speeches provide a brief insight into various US policies and do not always clearly differentiate between law and policy, the First Turkel Report provides a more robust analysis of specific legal questions that are related to the flotilla incident. While the DoD Manual is a DoD creation, the Israeli reports are joint projects. In addition, in each case it is possible to offer other explanations for the decision to actively participate in IHL making. With regard to the United States, it is possible to suggest that the internal pressure for transparency and accountability contributed to the creation of the new lawmaking initiatives. More specifically, the release date of the Framework Report was discussed in relation to the beginning of the Trump presidency.\textsuperscript{241} As to Israel, the change can be explained as a result of the difference between the more intensive conflicts in Gaza from the Second Intifada,\textsuperscript{242} or as part of a power struggle between the government and the Supreme Court in Israel.\textsuperscript{243}

I do not intend to argue that the present explanation for the change is the only explanation. I do believe that other accounts of the change shed light on important aspects of the process. Nonetheless, this Article offers an important part of the story. First, regardless of the reasons for the recent use of unilateral lawmaking initiatives, this Article highlights the mere fact that there was such a change. While the reluctance of States to actively engage in international lawmaking was already acknowledged and discussed in the literature, States' recent active engagement in international lawmaking has not received sufficient recognition and analysis. Second, there are strong indications that these outputs were created as a response to non-State actors' involvement in international lawmaking. As mentioned, the Gaza conflict reports were published in light of the upcoming Human Rights Council commissions of inquiry, and the second Turkel Report was created in light of the increased international focus on investigations. In


\textsuperscript{241} See Wittes, \textit{supra} note 169 (discussing these questions and arguing that the release of the Framework Report should not be regarded as an attempt to pressure the Trump administration); Pearlstein, \textit{supra} note 169 (discussing the potential effect of the report on the Trump administration while refraining from looking into the intentions of the drafters).

\textsuperscript{242} The intensity of the Second Lebanon War in 2006 weakens the explanatory force of this argument.

\textsuperscript{243} See Shereshevsky, \textit{supra} note 124, at 255–67.
addition, several authors have already recognized Israel’s deliberate decision to respond to non-State actors’ legal criticism by producing its own legal outputs. With respect to the United States, the DoD Manual was addressed as a lawmaking initiative and as a potential response to non-State actors’ outputs, most notably the ICRC. The next Section offers an analysis of the new engagement and what it can tell us about international lawmaking.

III.
THE NATURE OF THE NEW ENGAGEMENT—STATES ACTING AS NON-STATE ACTORS: LESSONS FOR INTERNATIONAL LAWMAKING FROM THE RISE OF STATE INVOLVEMENT IN THE MAKING OF IHL

As mentioned, in traditional IHL making, States focused on treaty law. This constituted a coordinated effort of a group of States to create binding obligations. The contemporary engagement involves mainly non-traditional lawmaking efforts that result in non-binding documents. In few cases, these outputs take the form of a soft law joint project, such as the Denmark-initiated Copenhagen Process Principles on the Handling of Detainees in International Military Operations, and, in the cases discussed in this Article, in unilateral outputs of specific States. The following Section addresses three aspects of the new lawmaking effort and the way that this lawmaking effort follows the way which non-State actors, mainly the ICRC, have attempted to influence contemporary IHL. This Section looks at the utility of unilateral outputs of specific States; the horizontal, communicative nature of the engagement; and the importance of cooperation between States and LOAC lawyers.

A. Unilateral Outputs, Soft Law Theory, and Reducing the Costs of International Lawmaking

The first lesson from the recent IHL initiatives is the potential importance of unilateral initiatives as a lawmaking tool. The research on unilateral lawmaking addressed the role of the unilateral conduct of States, or domestic legislation, as tools that can influence compliance with international law or shape customary

244 KITTRIE, supra note 82, at 270.
international law as part of the international lawmaking process. Existing research did not pay sufficient attention, however, to the role of unilateral accounts of States' positions on existing international law as a lawmaking tool that can serve as an alternative to traditional lawmaking tools as well as to soft law initiatives.

An important insight from the soft law literature addresses the lower costs of soft law creation as one of the possible explanations for why States choose to create soft law over binding treaties. In their seminal article on soft law, Kenneth Abbot and Duncan Snidal claim that lower negotiating costs, or contracting costs, are a major advantage of soft law.249 Even if binding norms are more effective than soft law, taking into account the lower costs of soft law creation, it might be more efficient to opt for soft law. Abbott and Snidal hypothesize that States will opt for soft law in cases where hard law contracting costs are higher, such as cases that involve intensely political costs.250

These insights could be taken one step further to address the benefits of unilateral lawmaking initiatives. Just like soft law versus hard law, unilateral outputs are less costly to produce than joint outputs. In the same way, even if joint projects are likely to be more effective, the costs of achieving such joint projects might be greater than the gain in effectiveness. Following from Abbot and Snidal, I hypothesize that actors will tend to use more unilateral outputs when the costs of joint projects are higher, for example, in cases involving highly controversial legal issues.

The regulation of contemporary armed conflict is an example of such a highly controversial legal issue and indeed different actors opted for unilateral initiatives. All three ICRC projects described in Part I.C are to a greater or a lesser extent unilateral ICRC projects. The Interpretive Guidance is the clearest example of this trend and illustrates the potential impact of such initiatives on international law. When the group of experts asked that their names be removed from the guidance, the ICRC had to decide how to proceed. The decision to publish the Interpretive Guidance as an institutional publication without the names of any expert who participated in the process is telling.251 It suggests that even if it is more beneficial to produce an output that involves different participants, as was the initial intention, the institution can achieve its goals even with a unilateral publication.252 The well-recognized influence of the Interpretive Guidance further supports the assumption that such outputs should be considered as useful


250 Abbott & Snidal, supra note 45, at 436.

251 See BOOTHBY, supra note 29, at 78 (presenting the decision as an ICRC initiative that was delivered to participants during the final meeting in 2008).

252 See id. at 59 (suggesting that due to the reputation of the ICRC and the lack of knowledge of some government lawyers, the Interpretive Guidance is expected to be influential).
lawmaking initiatives, when facing high costs of reaching an agreement even through the use of soft law.253

States also opt for unilateral initiatives when contracting costs are high. The first option might be a joint soft law instrument. Reflecting on the debates over the contemporary law of detention, John Bellinger and Vijay Padmanabhan suggest that when the creation of a new international instrument is not feasible, like-minded States should act together to reach an agreement on common principles.254 The Copenhagen Process is an example of such an effort.255 Nonetheless, as the US and Israeli initiatives demonstrate, States can produce their own independent documents to promote their interpretations of the law in cases where other options are too costly.

The potential influence of unilateral outputs when the contracting costs are high is not unique to IHL and is relevant to international lawmaking in general. For example, Lawrence Helfer and Timothy Meyer recently described the tendency of the ILC to refrain from promoting its mandate with multilateral treaties as an end result, instead creating other outputs such as principles, conclusions, and draft articles.256 They explain this tendency as a result of gridlock in the UN General Assembly. This makes the production of multilateral treaties much harder, while alternative outputs can still influence international law.257 In other words, the ILC opts for unilateral outputs when contracting costs are high.258

This is not to say that engagement with other actors is not important for the effectiveness of the output. Cooperation with other actors is highly desirable in the creation stage and in the post publication stage of the output, as discussed infra. Nonetheless, the first lesson that contemporary IHL making teaches is about the potential importance of independent State and non-State actors’ lawmaking initiatives.

B. The Form of the New Engagement—Horizontal v. Hierarchical International Lawmaking

The new engagement in the IHL making process is of a different nature than traditional State international lawmaking. It features an active engagement in the

255 See THE COPENHAGEN PROCESS, *supra* note 246.
256 Helfer & Meyer, *supra* note 41, at 305.
257 Id. at 312–13.
258 Helfer and Meyer analyze ILC behavior using a principal-agent theory. Nonetheless, while the principal-agent relations between the UN General Assembly and the ILC might, at least partially, explain the authoritativeness of the ILC outputs, such analysis is not necessary for their conclusion. See Sivakumaran, *supra* note 11, at 367. Even when the actor that seeks to engage in international lawmaking does not act within a framework of principal-agent relations, such as when it is an independent NGO or a State, it will similarly consider the contracting costs and the potential influence of the alternative outputs when deciding between lawmaking alternatives.
conversation or debate over the interpretation of IHL norms in asymmetric conflicts. States recognize that they are only one player, although a prominent one, among many involved in the battle of persuasion. States decide to play the game as it is actually played rather than trying to emphasize its formal rules. In order gain influence, States must take an active part in the conversation and promote the visibility and accessibility of their lawmaking initiatives in order to incentivize other actors to engage with these initiatives, even in a critical way. The main goal of the participants is to make their output the focal point of reference in the conversation. There is not only one way to achieve this goal, and the different outputs use different methods to promote their influence. The important insight regarding the different ways that States communicate their positions to the international community is their resemblance to non-State actors' strategies. States do not rely only on the formal authoritativeness of the texts or their higher formal place in the State/non-State actor hierarchy, but play the game while sometimes using their status to increase the influence of the texts in a horizontal interpretive battle. The following Section describes some of the communication strategies that States use in their new engagement with the lawmaking process. This is not an exclusive list of potential strategies and not all strategies were used in all of the outputs. Nonetheless, these strategies demonstrate the unique features of the new engagement with IHL making.

1. Engaging with the International Law Community: the Role of Conferences and Workshops

The first communication strategy that States use is the promotion of State positions during international law conferences and workshops. This strategy was used in several of the Obama administration’s international law speeches. The seminal example of this method is the location of the Harold Koh speech of 2010. The Koh speech was the most cited speech and is perhaps the biggest symbol of the Obama administration’s engagement with international law. It was the keynote speech at the ASIL Annual Conference, an event that is considered by many to be the most important gathering of the international law community. Koh was a prominent international law scholar before joining the Obama administration, and his speech at ASIL can be seen as an attempt by the United States to become part of the international law conversation in a less confrontational way and be received as an actor that participates in the legal debate rather than challenging existing norms. The beginning of the speech, in which Koh reminds the audience of his past presentations at the annual conferences, is an indication of his attempt to frame the speech as part of a continuum and emphasize that government lawyers and academics are part of the same community. Koh’s speech was not the only government speech to take place

259 Koh, supra note 134.
260 According to a Google Scholar search, the speech was cited more than 130 times. See https://scholar.google.co.il/scholar?cites=16656578638190814366&as_sdt=2005&sciodt=0,5&hl=iw.
at ASIL’s annual meetings. Stephen W. Preston, the General Counsel of the DoD was the keynote speaker at the 2015 conference, and Brian Egan, the Legal Adviser to the Department of State, was the keynote speaker at the 2016 conference.

The DoD Manual serves as a good example for the importance of conferences in promoting States’ lawmaking initiatives. The drafters of the manual—most notably Charles A. Allen, Matthew McCormack, and Karl Chang—have shown a remarkable willingness to engage in discussions about the manual with domestic and international legal experts in symposiums, workshops, and conferences. In most cases these events were either exclusively dedicated to the DoD Manual or had a special panel or a keynote speech devoted to it.

Following the 2014 Gaza conflict, Israel started a new initiative conducting international conferences on the law of armed conflict. The first conference took place in 2015 with more than seventy participants, including "military lawyers, experts in the field of military law, and legal advisors to international organizations." A second, even bigger conference was held in 2017, with more than one hundred participants, including "past and present Military Advocates General, military judges, government and national security legal advisers, senior members of the ICRC, and leading academics from Israel and other countries." It seems that the goal of the conferences was to emphasize the legal challenges that Israel faces in contemporary warfare and its interpretation of the relevant norms. As the Military Advocate General at the time of the first conference, Maj. Gen. Dan Efroni, stated, "the objective of the conference [was] to shed light on the operational difficulties and legal challenges

262 Egan, supra note 141.
posed by modern armed conflicts.” Key subjects in the conferences included areas of disagreement between the Israeli legal position and the ICRC, most notably the targeting of armed groups’ members. In addition, the conferences included field trips and meetings with field commanders. The 2015 conference included a field trip to demonstrate the challenges in the 2014 Gaza conflict and the second conference included a field trip to Israel’s northern boundaries to demonstrate the challenges in the conflict with Hezbollah in Lebanon and the situation near the Syrian border. Lastly, the proceedings of the second conference, including several presentations by Israeli LOAC lawyers, were published in a special issue of the Vanderbilt Journal of Transnational Law. This enables Israel’s positions to reach wider readership under a well-respected international law journal, as Maj. Gen. Afek recognized in his contribution to the special issue.

Conducting conferences on the law of war is not a completely new phenomenon. The Stockton Center for the Study of International Law at the US Naval War College has been conducting annual workshops for years. In addition, LOAC lawyers are regular participants in IHL conferences. Nonetheless, the Israeli conferences are much larger than common IHL conferences. Israel’s willingness to invest such resources in conducting large scale international conferences reflects its efforts to become a more significant actor in IHL making through its own initiatives.

2. Footnotes and Elaborated Legal Analysis

If the only goal of this new form of legal engagement was to pronounce State opinio juris, this could have been done through short, clear, statements of the relevant legal rules. Nonetheless, many of the State outputs contain elaborate legal justifications as well as many footnotes. The Turkel Reports, Israeli Gaza Conflict Reports, and Frameworks Report all contain footnotes and legal justifications, although they differ in the amount of the footnotes and the depth of

268 IDF, supra note 265.
269 Afek, supra note 267, at 693.
270 Id. at 695.
271 The Military Advocate General’s Corps, supra note 264.
272 Afek, supra note 267, at 694.
273 See 51 VAND. J. TRANSNAT’L L. (2018). The table of contents of the special issue and links to the papers can be found at: https://www.vanderbilt.edu/jotl/2018/06/volume-51-no-3-table-of-contents-on-website/.
274 Afek, supra note 267, at 695.
275 Stockton Center for International Law, U.S. Naval War College, https://usnwc.edu/Research-and-Wargaming/Research-Centers/Stockton-Center-for-International-Law (“The Stockton Center annually hosts legal research workshops on emergent issues drawing many of the world’s leading international law experts.”).
the legal analysis. The DoD is the most extreme example of such use of footnotes with almost 7,000 footnotes in its initial 2015 version. The choice to use a quasi-academic style is another indication of the horizontal nature of the new engagement. The footnotes place the outputs within an existing conversation in contrast to a sole authoritative voice; they represent the participation in a battle of persuasion rather than mere expressions of opinio juris.

3. Online Publication and Accessibility

As mentioned above, in order to be effective, the outputs need to be as available as possible for the different relevant actors. The United States and Israel have taken steps to ensure that the outputs will be easily accessible. Once again, the DoD Manual is an illustrative example. The manual has free and open online access. The decision to publish the manual online was, at least partially, aimed at enhancing its global reach. As Matthew McCormack, the Associate General Counsel in the Office of General Counsel for the DoD, put it, "an online Manual would be immediately accessible. You post it and it's not just accessible within DoD, but anybody in the world can hit [the website] and look at [the Manual]."

In addition to the DoD Manual, US government speeches are available online and there are links to the various speeches and documents in the appendix of the Frameworks Report. All of the Israeli documents appear in English and are available online. I recently suggested that the decision of the Israeli Supreme Court to stop the translation into English of its national security cases in recent years indicates a decline in Israel’s role as an international actor. The creation of the Israeli Gaza Reports only in English is a clear indication of a move in the other direction, suggesting that the primary goal of the drafters is to engage with the international community on the legality of Israel’s policies.

4. Openness to Comments and Changes

Perhaps most surprising and most important was the decision of the DoD Manual drafters to include in the DoD Manual an invitation for "[c]omments and suggestions from users of the DoD Law of War Manual" with a special email address included. Indeed, many comments were received in various mediums including a special ABA review workshop with the participation of DoD

277 Rostow & Bowman, supra note 154, at 264.
278 FRAMEWORKS REPORT, supra note 135, at 44.
279 Shereshevsky, supra note 124, at 264–65.
Thus far, this has resulted in two revisions of the original DoD Manual. It is possible that the open nature of the document weakens its authority. However, the solicitation for comments comes with the advantage of increasing the legitimacy of the manual as a text, resulting from a thoughtful process of continual review. The willingness of the drafters to change minor parts of the manual—such as the section on journalists—enhances the legitimacy of the project as a whole. An example of this process can be seen in a blog post by Kenneth Watkin that compares the DoD Manual and the ICRC's New Commentary on the First Geneva Convention. At the end of his second post on the subject, Watkin suggests that the ICRC should learn from the drafters of the DoD Manual and should be willing to change the commentaries if necessary.

This last feature, the openness to criticism, is part of a wider phenomenon—the involvement of different actors in the creation of these outputs. This involvement is analyzed in the next Section in the context of the importance of interpretive communities.

All of these features, while unique for State publications, resemble in many ways the lawmaking efforts of non-State actors. Specifically, they resemble the new ICRC project of commentary to the Geneva Conventions, the first part of which was published a few months after the publication of the DoD Manual. Both documents contain heavy footnoting, involve significant review by external experts, and are published free with open access online. Their authors engaged in many public and private events discussing the documents.
which were already subject to much debate in the international law blogosphere. These similarities represent the desire of the authors of both documents to have a significant influence over the interpretation and application of the relevant IHL norms. In some respects, the IHL community already addresses the contradicting positions between the documents as part of the current debate over the regulation of asymmetric warfare. A more significant and intensive clash between the documents is expected when the next parts of the ICRC project are released, especially the commentary on the Additional Protocols.

C. The Power of Cooperation: The Interpretive Community of States and LOAC Lawyers

1. LOAC Lawyers

The usual discussion of non-State actors’ influence on IHL refers to their role in the “humanization of humanitarian law,” or emphasis on the humanitarian element of the balance between humanity and military necessity in the regulation of warfare. Indeed, most of the non-State actors discussed in Part I.C are usually associated with the humanitarian camp. There is one important exception to this trend, which is closely related to the discussion above regarding the influence of international law scholars: LOAC lawyers.


In the absence of direct State involvement in the IHL making process, discussed supra in Part II.A, the role of States in preserving military needs in the regulation of warfare fell almost exclusively to LOAC lawyers. I use the term LOAC lawyers to refer to the community of lawyers that share the military vision of the regulation of warfare. This follows David Luban's discussion of "military lawyers." According to Luban this vision "assigns military necessity and the imperatives of war-making primary, axiomatic status. In this vision, the legal regulation of warfare consists of adjustments around the margins of war to mitigate its horrors." 292 This concept of the LOAC lawyer, may be contrasted with the notion of "humanitarian lawyers." Humanitarian lawyers endorse the IHL vision that "begins with humanitarianism, and assigns human dignity and human rights primary status." 293 It is necessary to qualify that not all LOAC lawyers are active military lawyers. Although many in the community of LOAC lawyers are active military lawyers, many others have either served as military lawyers in the past or hold a teaching position in military academies. I refer here even to LOAC lawyers who still actively serve in the military as non-State actors, since I address only statements and academic writings made in their personal capacity. 294

LOAC lawyers have engaged in academic writing on debatable subjects and explicitly stated their concerns about the increased involvement of humanitarian non-State actors in IHL making. 295 While taking part in non-traditional lawmaking efforts, including the seminal Interpretive Guidance, LOAC lawyers harshly criticized some of these efforts. They directed much of their criticism toward the ICRC initiatives. For example, several LOAC lawyers criticized the ICRC customary IHL study for its general methodology as well as the status of specific rules. 296

The inability to reach an agreement in the context of the Interpretive Guidance serves as a symbol of the inability to bridge the gap between the two competing communities of international lawyers and was, perhaps, the source of the new engagement of States in IHL making. Facing criticism from LOAC lawyers, the ICRC decided to publish the Interpretive Guidance as its own publication without any individual reference to the experts that took part in the

292 Luban, supra note 6, at 316.
293 Id.
295 The paradigmatic example of such explicit concerns is Yoram Dinstein’s concerns over the increased involvement of "human rights-nicks" in IHL debates. See Yoram Dinstein, Concluding Remarks: LOAC and Attempts to Abuse or Subvert It, 87 INT'L L. STUD. 483, 488 (2011).
process. In a much-cited symposium hosted by the NYU Journal of International Law and Politics, four prominent LOAC lawyers described their main criticisms of the study and the author of the study, Nils Meltzer, responded to these critiques. The symposium highlighted some of the key controversies in the regulation of contemporary asymmetric conflicts.

As a minority in the field, facing a dominant group of humanitarian lawyers, it is not surprising that LOAC lawyers were the first to recognize the limited involvement of States in the IHL debate. In response, LOAC lawyers endeavored to change the situation. They first called for States to become more involved in the lawmaking process. In 2011, in a paper titled *Time for the United States to Directly Participate*, J. Jeremy March, a US Air Force JAG, and Scott L. Glabe, called on the United States to formally respond to the Interpretive Guidance, preferably in order to counter the influence of the ICRC study. In 2013, a blog post in *Just Security* by Sean Watts (which later served as a basis for the 2015 article by Michael Schmitt and Sean Watts) discussed the significant influence of humanitarian actors on IHL and called for States to reengage in international lawmaking. As this Article demonstrates, the shift in States’ willingness to engage in IHL making was already taking place in 2013, but the Schmitt and Watts paper illustrates how LOAC lawyers perceived the power balance in the IHL community at the time.

Furthermore, projects such as the Tallinn Manual on the Law Applicable to Cyber Warfare can be seen as a way to balance the prominence of humanitarian actors in the making of IHL. If States do not engage in the lawmaking process, then non-traditional lawmaking projects governed by LOAC lawyers might enhance their influence in a way that they could not do under projects led by humanitarian actors such as the ICRC.

297 See *INTERPRETIVE GUIDANCE*, supra note 53, at 9-10; Hays Parks, *supra* note 56, at 783-85 (suggesting that the decision to refrain from mentioning individual names was the result of a request by at least one-third of the participants to remove their names from the publication).


300 Schmitt & Watts, supra note 3.


302 TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL ]; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt & Liis Vihul eds., 2017) [hereinafter TALLINN MANUAL 2.0].
In addition to the call for States to explicitly reengage in IHL *opinio juris* and the initiation of non-traditional lawmakers' projects such as the Tallinn Manual, LOAC lawyers tried to establish States’ positions through their writings. Some of these accounts analyze open source documents regarding State positions. Thus, George Cadwalader, Jr. analyzes the US position on the customary status of different norms in the First Additional Protocol.\(^3\) Other projects do not rely on open sources but on independent research. In a detailed article following a visit to Israel, in which the authors interviewed Israeli military lawyers and other officials in the government, Michael Schmitt and John Merriam explain the Israeli position regarding different conduct of hostilities issues, including the Israeli position on the customary status of several articles of the First Additional Protocol.\(^4\) Another example is the response to the notion of CCF as a requirement for the targeting of non-State armed groups' members in the ICRC Interpretive Guidance. Schmitt and Merriam argue that it is clear from State practice and *opinio juris* that States have adopted a formal, status-based approach to the targeting of non-State armed groups members, while failing to reference explicit State positions in this regard.\(^5\)

For several years, the written IHL debate was a debate between different non-State actors. The recent active engagement of States with IHL provides an opportunity to examine the relationship between LOAC lawyers’ lawmakers’ efforts and States' lawmakers' initiatives.

2. **States, LOAC Lawyers, and IHL**

While State outputs are often unilateral projects, a significant part of new engagement involves cooperation with other actors. Such cooperation is highly important for the legitimacy and effectiveness of such outputs. As Sivakumaran suggested with regard to the outputs of State-empowered entities, the reactions of other actors in the international law community significantly influence the lawmakers' ability to be effective.\(^6\) Attempts to enhance the legitimacy and effectiveness of outputs through reactions in the post-publication period were previously discussed regarding the DoD Manual review process. This Section focuses on the involvement of various actors in the pre-publication process.

External actors are involved in the pre-publication process of State outputs in various ways. For example, the DoD Manual went through a multi-tiered review process that included participation of officers from the UK and Australian militaries, review by governmental lawyers from the United Kingdom, Canada,


\(^{4}\) Schmitt & Merriam, *supra* note 63, at 97-104.

\(^{5}\) Id. at 113.

\(^{6}\) Sivakumaran, *supra* note 11, at 371-90.
Australia, and New Zealand, and review by "distinguished scholars." The First and Second Turkel reports involved foreign observers and special consultants. Both reports start with letters from foreign observers praising the independence of the commission and the content of the reports. For example, Lord Trimble, who previously served as the First Minister of Northern Ireland, described them as "clearly balanced and fair reports;" Brigadier General Watkin, who was the Judge Advocate General of the Canadian Forces, described the work of the commission as "an important reflection of the commitment to the Rule of Law;" and Professor Timothy McCormack noted that the "study has identified the applicable international legal requirements for effective investigations into alleged violations of the Law of Armed Conflict." In addition, the Second Report included a comparative study in which six foreign experts prepared reports on the investigation mechanisms of the United States, Canada, Australia, the United Kingdom, Germany, and the Netherlands.

While the 2014 Gaza Conflict Report did not directly involve external actors, it did involve them indirectly. As described in Part II.B.2, Israel granted two LOAC lawyers, Michael Schmitt and John Merriam, unprecedented access to Israeli military lawyers. Schmidt and Merriam conducted in-depth discussions about Israel's legal positions concerning conduct of hostilities. These discussions resulted in academic papers, which were published a short time before the Israeli report and which favorably discussed the Israeli legal positions. While the authors emphasized their independence, their support of the Israeli positions helps strengthen the authority of the Israeli report. This stance was probably considered by the Israeli officials before the authors were granted such far-reaching access to Israeli military lawyers.

In addition to the involvement of foreign experts, States tend to emphasize the outputs of other States. The comparative study in the Second Turkel report is a clear example of this tendency. The comparative study enabled Lord Trimble to note that "taken as a whole, Israeli law and practice will stand comparison with the best in the world." The DoD Manual states that it benefited from consulting foreign State resources, including manuals of the United Kingdom, Canada, Germany, and Australia.

Such reliance on other actors strengthens the power and authority of State outputs as part of a shared understanding of international law rather than an

507 DOD MANUAL, supra note 142, at V.
508 See id. section III.B.2. In 2011, Professor Timothy McCormack replaced Brigadier General Kenneth Watkin as an observer, and Professors Claus Kreß and Gabriella Blum replaced Michael Schmitt as special consultants of the second report.
509 TURKEL REPORT PART II, supra note 189, at 21.
510 Id. at 26.
511 Id. at 28.
512 Id. at 475.
513 Id. at 22.
514 DOD MANUAL, supra note 142, at V.
isolated position of one self-interested State. The new engagement of States should not only be seen as part of a battle over the ownership of international law between State and non-State actors.\textsuperscript{315} This is definitely part of the story, but not the whole story. Rather, the new engagement should also be discussed in the context of the specific battle over IHL: the battle between military necessity and humanitarian considerations and, more generally, between competing interpretive communities in international lawmaking that include State and non-State actors.\textsuperscript{316} When Schmitt and Watts discussed the decline of State opinion juris, they emphasized the role of non-State actors in pushing the humanitarian side of the equation and the important role of States in introducing the military necessity side of the debate.\textsuperscript{317} Nonetheless, an important non-State actor is absent from their analysis: LOAC lawyers who push against non-State actors’ humanitarian initiatives.

The identity of the drafters of the non-State actors’ outputs might explain the tendency of States to engage or refrain from engaging in international lawmaking. The emerging debates over the international law of cyberspace serves as an illuminating example. In recent years, cyberspace has received a lot of attention from the international law community. Debates over the law of cyberspace resemble the debates over asymmetric conflicts. This is an area where the law is vague, and it is unlikely that States will create a new treaty to regulate cyberspace in the near future.\textsuperscript{318} Similar to IHL making in general, States are reluctant to announce their positions on the law of cyber operations.\textsuperscript{319} Schmitt and Watts’ article was part of a symposium on the law of cyber warfare and its last part is dedicated to a specific call for States to express their positions on IHL in the context of cyber warfare.\textsuperscript{320} Recently, Kubo Mačák has described the lack of State cyber lawmaking and called on States to change this tendency.\textsuperscript{321} Finally, similar to the IHL making initiatives of non-State actors in the context of asymmetric warfare, the Tallinn Manual was created by an international group of experts in the context of cyberspace and is a key reference point in any significant discussion of the issue.

In light of the importance of cyberspace and the recent active engagement of States in IHL making, we would have expected to see such engagement in

\begin{footnotesize}
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\item \textsuperscript{315} See Sivakumaran, supra note 11, at 378.
\item \textsuperscript{316} See Robert Cryer, The International Committee of the Red Cross’ Interpretive Guidance on the Notion of Direct Participation in Hostilities: See a Little Light, in HUMANIZING THE LAWS OF WAR: THE RED CROSS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 113, 133 (Robin Geis et al. eds., 2017) (discussing the Interpretive Guidance and its critics in the context of the battle over the ownership of IHL between military experts and other international lawyers).
\item \textsuperscript{317} Schmitt & Watts, supra note 3, at 191.
\item \textsuperscript{318} Id. at 222; Boothby, supra note 29, at 84.
\item \textsuperscript{320} Schmitt & Watts, supra note 3, at 222-224.
\item \textsuperscript{321} Kubo Mačák, From Cyber Norms to Cyber Rules: Re-engaging States as Law-makers, 30 LEIDEN J. INT’L L. 877, 881 (2017).
\end{itemize}
\end{footnotesize}
cyberspace law as well. However, the expected level of engagement has not materialized. For example, the two States that are the focus of this paper have not produced extensive cyber law outputs. Israel did not produce any meaningful analysis on the subject, and most commentators regard the contribution of the Koh speech titled *International Law in Cyberspace* and the DoD Manual cyber chapter as modest additions to the development of cyber law. In his 2016 speech on international law and stability in cyberspace, Brian Egan recognized that States "rarely articulate their views on this subject publicly" and that in the case of the United States, "more work remains to be done." The speech itself did not add much to the substantive US analysis of IHL in cyberspace, although it made some progress on other issues such as attribution of cyber operations.

The literature has offered several explanations for the reluctance of States to express their positions in the context of cyber laws. For example, scholars point to the secrecy that surrounds cyber law and the suggestion that since it is a rather new area States will wait to determine their positions. These explanations are useful and provide part of the answer. Nonetheless, scholars provided similar explanations in the general context of the reluctance of States to actively engage in IHL making, and as this Article demonstrated, States nonetheless decided to directly engage in IHL making.

The creation of the Tallinn Manual, and more specifically the identity of its authors, might explain the continuous reluctance of States to engage in cyber lawmaking in the context of IHL. The literature, including the Tallinn Manual itself, suggests that the existence of the Manual should incentivize States to participate in the lawmaking process. In an article that builds on her notion of interpretive catalysts, Rebecca Ingber suggested that the Tallinn Manual is an interpretive catalyst that should lead to State responses. Kubo Mačák believes that the Tallinn Manual serves a similar function to other soft law instruments as "an intermediate stage on the way towards the generation of cyber 'hard law'" and suggested, as did Schmitt and Watts, that States should express their positions in order to reclaim their lawmaking role in light of the increased influence of non-

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323 See, e.g., Anderson & Witte, supra note 139, at 72-75; Schmitt & Watts, supra note 3, at 223; Sean Watts, *Cyber Law Development and the United States Law of War Manual*, in *International Cyber Norms: Legal, Policy & Industry Perspectives* 49 (Anna-Maria Osula & Henry Rõigas eds., 2016); Mačák, * supra* note 321, at 882 ("Although it does contain a chapter on cyber operations, the Manual skirts virtually all of the unsettled issues, including standards of attribution, rules of targeting or the requirement to review cyber weapons.").
326 See e.g., Mačák, * supra* note 321, at 881.
327 See e.g., Schmitt & Watts, * supra* note 3, at 211.
State actors in this area. However, these authors do not take into account the identity of the leaders of the Tallinn Manual project and their potential effect on the substance of the Manual, and as a result on the interest of States to hold independent positions.

The Tallinn Manual, the only significant project on cyber warfare, was led by Michael Schmitt under the auspices of the NATO Cooperative Cyber Defence Centre of Excellence, with NATO, the US Cyber Command, and the ICRC serving as observers. The important role of LOAC lawyers in the project enabled them to have substantial influence on this project, while still incorporating a significant number of humanitarian lawyers and thus strengthening the legitimacy of the project.

Two examples of the way in which the Tallinn Manual treats highly controversial issues demonstrate how it can promote the interests of States. First, as discussed supra, the targeting of armed group members, and especially the notion of CCF, is a key controversy that led the US and Israel to respond to the Interpretive Guidance. The Tallinn Manual addresses this issue in its discussion of Rule 96—Persons as lawful objects of attack. Rule 96(b) allows the targeting of "members of organized armed groups." In the discussion of the definition of membership, the authors of the Manual suggested that the positions of the international group of experts on this were mixed—referring first to the position that allows targeting that is based on mere membership in the organization, and then to those who hold to the Interpretive Guide requirement of CCF. Thus, the Manual lends support to US and Israeli positions that targeting based on the mere membership in an organized armed group is a legitimate position. Referring first to this position strengthens it even more. Second, the extraterritorial application of human rights is one of the most important issues in recent years. While the Tallinn Manual ostensibly lends support to the position that human rights apply extraterritorially (in contrast to the minority position of the United States on this question), it leaves room for conservative positions on the extraterritorial application of human rights in the context of cyber operations. The Manual States that the majority of experts believe IHRL does not apply extraterritorially without physical control over territory or persons. In the context of cyber law, this means that human rights will not apply to the most controversial issues. For example, the Manual explicitly refers to the inapplicability of human rights, according to the majority of experts, in cases of extraterritorial signal intelligence programs which stand at the heart of contemporary debate over cyber and human rights. Moreover, the Manual relies on the notion of lex specialis when it addresses relations between IHL and IHRL and thus enables restrictive positions

330 Id.; Schmitt & Watts, supra note 3, at 230.
331 TALLINN MANUAL, supra note 302, at 16.
332 TALLINN MANUAL 2.0, supra note 302, at 426.
333 Id. at 184-85.
334 Id.
335 Id. at 185.
on the application of IHRL in situations of armed conflicts.\textsuperscript{336} Indeed, most commentators suggest that the Tallinn Manual majority position on signal intelligence is in line with the positions and actions of certain States in the limited areas that States have expressed their explicit positions.\textsuperscript{337}

The Tallinn Manual demonstrates that when the outputs of a non-State actor are in line with State interests, the incentive of those States to independently engage in international lawmaker decreases. From the perspective of such States, the existence of an authoritative non-State actor output might even be more beneficial than their own outputs, since it has the appearance of a more neutral instrument, especially when actors with various backgrounds and institutional affiliations take part in the process.\textsuperscript{338} This might explain the United States’ unwillingness to explicitly rely on the Tallinn Manual in the DoD Manual, as well as the cautionary tone that Egan used when referring to the Manual in his speech.\textsuperscript{339} Such an attitude towards the Manual achieves two goals. Because the Manual does not align with the US position, the Manual can be perceived as more neutral. In addition, by avoiding an explicit recognition of the value of non-State actor’s outputs, the US does not harm its continuous battle with the lawmaking initiatives of the "humanitarian lawyers."

Dan Efrony and Yuval Shany recently analyzed eleven case studies of State practice regarding cyber operations. They argue that "there appears to be limited support in State practice for certain key rules of the Tallinn Manual, and that it is difficult to ascertain whether States accept the Tallinn Rules."\textsuperscript{340} It is important to note in this regard that the case studies also demonstrate that States are reluctant to explicitly refer to international law in general and not only to the Tallinn Manual. In addition, the States in these case studies did not explicitly challenge or attack the rules in the Manual. Thus, it seems that this might strengthen the notion that there is a qualitative difference between the other non-State IHL making initiatives and the Tallinn Manual. While the reliance on the Tallinn Manual might be limited, it does not incentivize States to actively take adverse positions to those that appear in the Manual. This Article suggests that the lack of such incentive is based on the substance of the majority of the Manual’s norms, especially when it comes to IHL, and that this substance is the result of the identity of the authors of the Manual.

The discussion above explains the lack of unilateral State IHL initiatives in the context of cyber operations. It does not suggest that alternative multilateral lawmaking paths are not attractive to States. As discussed earlier, if the contracting costs are lower than the expected gains, States will tend to use multilateral lawmaking tools. Indeed, the UN Group of Governmental Experts is an attempt to pursue such a path. Nonetheless, it does not seem likely that this

\textsuperscript{336} Id.
\textsuperscript{337} Id. at 181; Frédéric Gilles Sourgens, \textit{The Privacy Principle}, 42 YALE J. INT’L L. 345, 366 (2017).
\textsuperscript{338} See BOOTHBY, supra note 29, at 89.
\textsuperscript{339} Egan, supra note 324.
\textsuperscript{340} Efrony & Shany, supra note 319, at 585.
path will be successful in the near future. In addition, the discussion focuses mainly on IHL making (and some aspects of the application of human rights law), an area in which LOAC lawyers and States share a similar vision. When it comes to other areas, it is possible that the discussion in the Tallinn Manual might incentivize State reactions. One example is the question of sovereignty and cyber operations.

The analysis here suggests that the new engagement of States in IHL making should be seen in light of the wider conflict between competing approaches to IHL, between the two interpretive communities of LOAC lawyers and humanitarian lawyers. States and LOAC lawyers rely on each other's outputs to strengthen and legitimize their positions. LOAC lawyers' outputs should be seen as an alternative for the lawmaking initiative of States, as complementing the efforts of States to reengage with IHL.

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The previous insights on the new forms of State engagement with IHL making shed light on the conditions for the willingness of States to engage in significant unilateral lawmaking initiatives. These conditions are: (1) there are (or are expected to be) non-State actors' lawmaking initiatives on the relevant issue; (2) the State has significant interests in the issue; (3) the substance of these non-State actors' initiatives contrasts with the State's positions on the issue; (4) there are no competing influential legal accounts by non-State actors that exist or are expected to be created; (5) the costs of traditional lawmaking methods or soft law initiatives are high and as a result the creation of unilateral outputs is more efficient. If these conditions are met, it is reasonable to expect that individual States will invest in unilateral lawmaking initiatives.

CONCLUSION

Facing the significant influence of independent lawmaking initiatives, especially the ICRC projects, States decided to change their position and reengage in international IHL making. This new engagement is built on the internalization of the ways in which non-State actors influence international law. It resembles their efforts and benefits from continuous cooperation with the community of LOAC lawyers.

This Article focuses on one example of the move in international lawmaking from joint efforts to unilateral initiatives, or cooperation between individual States and like-minded non-State actors. The change started with non-State actors'
projects and was followed by State initiatives. The decision to produce such outputs was driven by the high contracting costs of developing IHL through traditional lawmaking processes and might represent a wider tendency in other areas in which traditional international lawmaking processes, or joint soft law initiatives, face similar problems.

One such possible case that involves cooperation between States and former State officials is the contemporary question of the right to self-defense against an imminent armed attack by non-State actors under *jus ad bellum*. In this context, the article of Sir Daniel Bethlehem, formerly the principal Legal Adviser of the UK Foreign and Commonwealth Office, in the American Journal of International Law served as a focal point of reference in the debate. The author acknowledged that the principles in the paper "are not the settled view of any State" but stressed that they were "informed by detailed discussions" with legal advisers of several States. While the article was criticized by scholars and former legal advisors, several States seemed to endorse its principles to a large extent in speeches and lectures by officials.

This Article is being published in the Trump era. It is possible to wonder about its relevance in such times when the US President seems to be involved in an "unprecedented assault on the institutions and regimes of the postwar legal order." Indeed, it seems that much of the discussion today focuses on international law in challenging times often characterized by a rise of populism and resentment towards international law and institutions. While it is highly important to discuss the current changes to international law, I strongly believe

544 Id. at 773.
that it is equally important not to focus exclusively on such trends and to look backwards and forward toward other possibilities.

The paper discusses lawmaking tools that States can use and the conditions that might incentivize States to use such lawmaking tools. It does not suggest that these tools will be always be utilized under such conditions. The Trump administration provides a scenario in which these lawmaking tools are less likely to be employed. Nonetheless, unilateral lawmaking is not only part of the toolbox of States that are strong proponents of international law and institutions, as the use of unilateral lawmaking by Israel demonstrates. Finally, there is strong resistance to the current assault on international law and on institutions in the US and elsewhere. The current trend may not last for much longer, at least not in its strongest form. It is important to note in this regard that even in the case of the Bush administration there was a significant change in its approach towards international law between its first and second terms.\footnote{\textit{See} Koh, \textit{ supra} note 347.}

We have yet to see whether these new efforts to influence IHL will be successful. These considerations are further complicated as the Trump administration seems to take a step back in this regard.\footnote{For example, significant parts of the Trump administration’s update of the Frameworks Report were classified. \textit{See} Allison Murphy & Scott R. Anderson, \textit{We Read the New War Powers Report So You Don’t Have To}, \textit{LAWFARE}, March 14, 2018, https://www.lawfareblog.com/we-read-new-war-powers-report-so-you-dont-have.} Taking into account the great influence of some of the non-State actors’ initiatives and the importance of being the first elaborate account of the law, some of the State initiatives might not succeed in significantly changing the path of IHL. The ability of these projects to influence IHL might determine whether this tendency will expand, or whether we will see a reemergence of more traditional lawmaking initiatives.
International Law and Corporate Participation in Times of Armed Conflict

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This Article explores the overlapping conceptions of “international legal personhood” in international criminal law and international investment law in light of the December 2016 International Centre for Settlement of Investment Disputes Award of Urbaser v. Argentina. It is an effort to parse out and test potential standards for investor-to-State liability for corporate participation in mass atrocities and human rights violations, particularly in instances of armed conflict. In exploring the question of when a corporation can be held financially liable for human rights violations under international investment law, this Article suggests that, while the legal status of direct corporate subjectivity remains opaque, Urbaser invites application of international criminal law liability doctrines as “boundary crossing” tools that arbitrators can use to further define the contours of corporate subjectivity to international law.

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The underlying assumption of this Article is that, as a matter of global public policy (if such a thing can be said to exist), an international legal system that encourages legal persons to limit and even decrease the degree to which they may unintentionally participate in state-sanctioned violence by holding them financially liable to states for human rights violations and crimes against humanity (CAHs) is preferable to one in which only the state and natural persons are held accountable, i.e., the present status quo. This Article seeks to explore how such a system may manifest through judicial or arbitral lawmaking. Drawing from the rich practical foundations fostered by the International Court of Justice (ICJ), the International Law Commission (ILC), and relevant IIL scholarship, this Article takes the position that an “all or nothing” approach to granting individual rights and obligations to entities under public international law fails to recognize the intrinsic differences between legal and actual persons and thereby dodges important legal and ethical questions. With that in mind, this Article focuses on the question of how to grant appropriate rights to legal entities under IIL, and how to balance those rights against obligations in situations in which human rights are violated or crimes against humanity are committed.

The current IIL regime faces widespread legitimacy concerns. Issues arising from the “vagueness” and lack of predictability in IIL standards have ushered in the onset of what has been called a “crisis of legitimacy” for IIL. In recent years in particular, and especially since the Argentinian financial crisis, arbitral awards have contributed to growing concerns regarding the balance and fairness of claims. A large part of the legitimacy debate centers upon the single directionality,

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or “asymmetry”, of claims that fall within the jurisdiction of arbitral tribunals. This asymmetry is twofold: it manifests both procedurally and substantively.

From a procedural standpoint, international investment law provides investors a cause of action against States to protect investments in a host State, but does not provide host States a cause of action against investors, and generally refutes attempts by States to bring counterclaims against investors. From a substantive standpoint, international investment law does not impose substantive obligations on investors, but it does grant them rights. Indeed, as the ICSID in *Spyridon Roussalis v. Romania* put it:

The Tribunal…considers that the [bilateral investment treaty (BIT)] limit[s] jurisdiction to claims brought by investors about obligations of the host State. The meaning of the ‘dispute’ is the issue of compliance by the State with the BIT….the BIT imposes no obligations on investors, only on contracting States.

As a reaction to this asymmetry, calls for reform have prompted States to adopt new counterclaim clauses in investment treaties as a means to impose some obligations on States, at least insofar as their commitment to the investment treaty at issue is concerned. However, thus far, these attempts have amounted to mere reflections of the *Roussalis* standard, some of which have been particularly creative. The *Roussalis* standard essentially places the investor at liberty to consent to counterclaims. Even the defunct Trans-Pacific Partnership (TPP), with paragraphs devoted to counterclaims in its investment chapter, implemented a

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6 Emphasis added. Spyridon Roussalis v Romania, ICSID Case No. ARB/06/1, Award (Dec 7, 2011), https://www.italaw.com/cases/927.


8 Hoffman, supra note 4; see also Christian Tietje & Kevin Crow, *The Reform of Investment Rules in CETA, TTIP, and Other Recent EU-FTAs: Convincing?, in MEGA-REGIONAL AGREEMENTS: TTIP, CETA, TISA. NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS* (Stefan Griller et al. eds., 2017).

9 TPP, supra note 7 at ch. 9, art. 9.19(2).
similar asymmetrical standard through some tricky language in a footnote. Notably, the counterclaim language of the 2015 Model India BIT—which looked extremely promising for States—was eliminated in the 2016 version of that treaty.

But in December 2016, in Urbaser v. Argentina, an ICSID tribunal drastically parted from this trend. The Urbaser Tribunal not only acknowledged the right of a host State to bring counterclaims not anticipated by the investor, implying a symmetrical nature to BITs; but it also affirmed the existence of obligations for investors. Urbaser grounded both acknowledgments in general international law, which prompts the present inquiry into how other branches of general international law may further inform IIL’s approach in other contexts where a corporation is alleged to be financially liable to a State for human rights violations.

Under ICL, the leaders of States and military organizations can be held jointly liable as a “joint criminal enterprise” (JCE), a judge-made doctrine that first emerged from the International Criminal Tribunal for the former Yugoslavia (ICTY) in Prosecutor v. Tadić. One formulation of JCE—JCE III—is particularly controversial because it eliminates the individual mens rea element typically required to assign criminal culpability; it seeks instead to determine the JCE’s “common purpose” and, subject to certain conditions, projects that purpose onto each participant in the enterprise. In this sense, a JCE carries “international legal personhood” insofar as an enterprise is treated as an individual for mens rea purposes. By contrast, in the event that a corporate entity is involved in an armed conflict, it has been unclear whether those treaties or rules of custom that enable ICL to apply to private actors (such as the Genocide Convention) and to political entities (through JCE) also apply to corporate entities. The Urbaser decision moves toward an answer.

To this end, Part II of this Article provides a brief background on Urbaser, and Part III provides an overview of the debatable status of corporations as legal persons under international law. Part IV then explores how the Urbaser

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10 Id. at ch. 9, n.32.
14 Id. at ¶¶ 1188–1190.
obligations—what a colleague and I have termed “the Urbaser spectrum”17—contribute to a broader discussion on the limits of corporate legal personhood under public international law. Through a hypothetical application of an ICL-IIL hybrid standard for determining corporate mens rea, Part V suggests that, in times of armed conflict, the Urbaser spectrum provides an avenue through which corporate entities—and not merely individuals acting in their corporate capacity—are obligated not to contribute to Crimes Against Humanity, and Part VI provides three hypotheticals against which to test these obligations. Part VII concludes with a discussion on the implications of the obligations and the hypotheticals for investors and States.

I.

BACKGROUND ON URBASER

Argentina privatized drinking water and sewage services in the 1990s, which prompted a number of foreign companies to invest in providing those services.18 In the early 2000s, during the Argentinian financial crisis, the Duhalde administration froze tariffs in a manner these and other foreign companies considered expropriatory. As a result, many foreign companies resorted to investor-State dispute settlement (ISDS) mechanisms established in Argentina’s various bilateral investment treaties (BITs). Urbaser is the latest in a long line of controversial cases to join this saga.19

The Claimants, Urbaser and Consorcio de Aguas Bilbao Biskaia (CABB), were majority shareholders of Aguas del Gran Buenos Aires S.A. (AGBA), a water and sewer conglomerate. AGBA entered into a contract with the Province of Buenos Aires in December 1999.20 The region to which AGBA provided

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17 See Kevin Crow & Lina Lorenzoni Escobar, International Corporate Obligations and the Urbaser Standard: Breaking New Ground?, 36 B.U. INT’L L.J. 102–03 (2018). In that article, we articulate three standards for potential liability set out in Urbaser that are reproduced in this Article. We argue that, because the standards seem to punish only cartoonishly evil behavior, they are largely nominal. However, in that article, we explore the role of Corporate Social Responsibility, and the commitments of individual corporations to CSR, in the assessment of corporate functions in international arbitral tribunals, and we conclude that because Urbaser recognized a corporation’s internal CSR standards as a measure for determining the aims of its behavior, Urbaser could be considered a small win for human rights activists.

18 See Diego Petrecolla & Martín Lousteau, FDI in Argentina in the 1990s, 2 LATIN AMERICAN BUS. REV. 33–54 (2001).


services had a population of about 1.7 million low-income inhabitants. Argentina argued that one of the main purposes of the contract was to promote expansion of this coverage, and indeed, it relied on the private sector for its technical and financial capacity to achieve this expansion. The Claimants argued that Argentina’s decision to freeze tariffs in 2002 negatively impacted the economic-financial equation that prompted AGBA to accept the contract; they brought fair and equitable treatment (FET), discrimination, and expropriation claims on this basis. Argentina, on the other hand, argued that AGBA’s difficulties with the contract were due to AGBA’s deficient management and, in particular, to its failure to perform obligations to invest in the expansion of services.

Most significantly, Argentina filed a counterclaim alleging that the Claimants’ failure to invest violated the Claimants’ obligations under international law, specifically those based upon the human right to water. Argentina argued that the contract gave rise to bona fide expectations that the Claimants would invest. By failing to do so, the Claimants not only violated good faith and pacta sunt servanda principles, but also affected human rights. While the Claimants argued that human rights bind States, not private parties, Argentina countered that because the obligation during the concession was to guarantee access to water, and because both BIT parties were signatories to certain human rights treaties, the obligation of Claimants was to comply with a fundamental right.

II. ON CORPORATE SUBJECTIVITY TO INTERNATIONAL LAW

The Urbaser Tribunal stated that it was “reluctant” to take a principled position on whether private companies should bear human rights duties. However, while past tribunals considered that corporations are not subjects of international law and therefore not duty holders under international law, Urbaser found that this approach had “lost impact and relevance” in the present IIL
landscape.\textsuperscript{33} The Tribunal found that through the Spain-Argentina BIT’s most favored nation (MFN) clause, investors are entitled to invoke rights resulting from international law: “If the BIT therefore is not based on a corporations’ incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.”\textsuperscript{34} The Tribunal’s reasoning is premised on the fact that under the BIT the investor can bring claims and invoke rights grounded in international law, especially through the MFN clause.\textsuperscript{35} Surely then, the investor could be held to obligations under international law. The Tribunal also inferred the subjectivity of corporations through corporate social responsibility (CSR): a “standard” of crucial importance that is accepted by international law and in consideration of which transnational companies are no longer “immune” from international subjectivity, at least not in the strict sense.\textsuperscript{36}

The existence of rights for transnational corporations is often invoked to ground the establishment of a “full” international subjectivity that includes obligations.\textsuperscript{37} In this sense, \textit{Urbaser} does not refute the many scholars who have made this argument,\textsuperscript{38} but it certainly stops short of “full” subjectivity in the sense that States are subject. Indeed, international subjectivity remains a “theoretical minefield,”\textsuperscript{39} and the Tribunal’s reasoning leaves open a more critical approach to whether rights in international law must necessarily be mirrored as duties.\textsuperscript{40} The complex directionalities of rights and obligations between legal persons, natural persons, state governments, and non-state government organizations further obfuscate the appropriate treatment of corporations under international investment law in general, much more so in times of armed conflict. It is true that under international law, individuals most often receive only protections without obligations, particularly if one excludes human rights treaties apart from the Universal Declaration of Human Rights (UDHR) and the Covenants.\textsuperscript{41} But

\textsuperscript{33} Urbaser, ICSID Case No. ARB/07/26 ¶ 1194.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id. ¶ 1195.
\textsuperscript{37} See generally Alvarez, supra note 32.
\textsuperscript{38} The necessity of the correlation between rights and duties, however, is dogmatically questionable, at least under the traditional theory of international subjectivity. See Karsten Nowrot, “Wer Rechte hat, hat auch Pflichten!”? Zum Zusammenhang zwischen völkerrechtlichen Rechten und Pflichten transnationaler Unternehmen, in BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (Christian Tietje ed., 2012), http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Hef7.pdf. Nowrot provides an extensive overview of the theory of subjectivity under international law and a critical approach to the conclusion that rights must be mirrored by duties.
\textsuperscript{40} See Nowrot, supra note 38.
\textsuperscript{41} There are less-frequently litigated human rights treaties that do, in fact, place explicit obligations on individuals, such as the Inter-American Commission on Human Rights, American Declaration on the Rights and Duties of Man, May 2, 1948, 43 AM. J. INT’L. L. SUPP. 133; and the Organization of African Unity, African Charter on Human and Peoples’ Rights, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.
individuals increasingly incur obligations to the international community through treaties too, most obviously the obligations codified in the Rome Statute of the International Criminal Court (ICC).\textsuperscript{42} Thus, it is not inconceivable that legal persons could also incur obligations from treaties between States, such as those in IIL.

An analysis of international corporate subjectivity must begin with international subjectivity generally and then proceed to an application of subjectivity to the specific case of corporations. To this end, in the seminal Reparations to Injuries case,\textsuperscript{43} the ICJ was careful to stress that subjects of international law are not necessarily identical in their nature or in the extent of their rights.\textsuperscript{44} Although the ICJ concluded that the United Nations (UN) was indeed an international person, the court stressed that this conclusion was “not the same thing as saying that [the UN] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State.”\textsuperscript{45} The ICJ stated that the rights and duties of an organization depend on its purposes and functions.\textsuperscript{46} At the same time, the ICJ’s decision is devoid of actual criteria to delimit subjectivity.\textsuperscript{47}

The ICJ’s open-ended “purpose and function” criteria for determining whether international law imposes obligations on international organizations essentially establishes a case-by-case approach. Perhaps obligations can only be imposed for the special case of the UN, which is in many ways unlike any other non-corporate legal person. Indeed, for the purposes of establishing international duties for corporations or for investors in investor-State arbitration, it is debatable whether international subjectivity for corporations is even an adequate category, due to its incongruous analogy with the State.\textsuperscript{48} States are territory-based regulators which in theory act in the public interest, whereas businesses are private, profit-seeking, and do not have territorial control or legal jurisdiction.\textsuperscript{49}

\textsuperscript{43} Reparation of Injuries suffered in the service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11, 1949). The UN was described by the ICJ as an organization “which occupies a position in certain respects in detachment from its Members.”
\textsuperscript{44} Id. at 178.
\textsuperscript{45} Id. at 179.
\textsuperscript{46} Id. at 180.
\textsuperscript{47} See Alvarez, supra note 32, at 12, 26.
\textsuperscript{48} Id. at 31. Alvarez, however, takes efforts to point out that “skepticism about the “personhood” of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly now they have both. Id.
international law obligations of non-State actors (a “top down” approach) loses sight of the ways that corporations are distinct from States or natural persons.\textsuperscript{50}

Using the category of international subjectivity, the \textit{Urbaser} Tribunal seems to sidestep these difficulties. However, the dogmatic weight of this language is not reflected in the analysis ultimately undertaken in \textit{Urbaser}.\textsuperscript{51} The Tribunal’s considerations on subjectivity of corporations are premised by the rejection of principled positions and by the consideration that the subjectivity of investors cannot be rejected by necessity, but the Tribunal did not offer criteria to delimit corporate international subjectivity. Nevertheless, the Tribunal seems to consider that the purposes and functions of the corporation determine the frame of its potential subjectivity; this is especially apparent in the Tribunal’s careful articulation of the differences between the State and the corporation as “service providers.”\textsuperscript{52}

Regardless of the theoretical shortcomings, \textit{Urbaser} affirms subjectivity for corporations,\textsuperscript{53} but leaves open the characteristics of this subjectivity. Is a corporation subject to international law the same way a State is subject to international treaty obligations, even though the corporate entity is not a signatory? Or should the subjectivity of a corporation appear more like the subjectivity of an individual to international adjudication, for example, as under the ECHR or the Rome Statute?

The International Law Commission’s (ILC) recent Study on Fragmentation provides some guidance on interpretative approaches to importing “subjectivity” and other legal concepts between international and domestic law regimes.\textsuperscript{54} The ILC Study encourages boundary crossings by deploying certain interpretative rules where possible to achieve harmonized international law across distinct sub-regimes. It urges treaty interpreters to use customary rules as unifying gap-fillers where the traditional rules of treaty interpretation so permit.\textsuperscript{55} More specifically, as Alvarez puts it, the ILC Study “recommends that (i) where a treaty is silent on a matter, the customary rule should presumptively apply (fall-back); (ii) where the treaty is not silent, but the terms used are unclear and yet have a recognized meaning in customary international law, one is encouraged to interpret the treaty rule consistently with the customary rule (harmonized fall-back); and (iii) only where the treaty is clear and leads to a different result to the customary rule should one apply the treaty rule to the exclusion of that rule (contract-out).”\textsuperscript{56} Most, if

\textsuperscript{50} See, e.g., Álvarez, supra note 32, at 26.

\textsuperscript{51} This reveals the gap between theory and practice that is made especially evident in the domain of subjectivity in international law. See Nowrot, supra note 38, at 25.


\textsuperscript{53} For a more thorough analysis of \textit{Urbaser} and CSR, see Crow & Escobar, supra note 17, at 10–23.

\textsuperscript{54} See generally Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682, 11 (13 April 2006) (report of the study group of the International Law Commission) [hereinafter ILC Study].

\textsuperscript{55} Id.

\textsuperscript{56} José E. Álvarez, Boundary Crossings, 17 J. WORLD INV. & TRADE 171, 179–80 (2016). As
not all, BITs are silent on the subject of corporate subjectivity with respect to general international law.  

III. THE URBASER SPECTRUM: THREE STANDARDS FOR CORPORATE OBLIGATIONS

So what does Urbaser actually change about the obligations of a foreign investor to a host State under classical BIT interpretation when it comes to human rights? Most importantly for our purposes, Urbaser found that legal instruments traditionally governing state obligations, like BITs and the Geneva Conventions, “may also address multinational companies.” In parsing out how this relationship may appear, Urbaser describes a spectrum of three standards for potential investor liability based in public international law. At one end of the spectrum, Urbaser accords both investors and States an obligation not to engage in activity aimed at destroying human rights, and at the other end, an obligation not to act in ways that are prohibited by peremptory norms. In the following analysis of the three standards on the spectrum, two distinct sources emerge from which a Tribunal may find justiciable performance obligations for corporations: through treaty, or through general principles of international law.

A. Urbaser’s First Standard: An Obligation Not to Aim at Destroying Human Rights

The first standard reflects the JCE mens rea requirement under ICL—intent to destroy—which amounts to an almost cartoonish standard for investor liability under III. After analysis of Covenants, the Tribunal concludes that investors and States have an obligation not to engage in activity aimed at destroying human
According to the tribunal, this standard “complements” positive rights (dignity, housing, etc.) without actually according them.\(^6\)

This initial standard appears nominal; the type of action required to meet the standard is unclear and the mental state required for the action is debatably unprovable.\(^6\) Indeed, for a successful counterclaim by this standard, Argentina would need to demonstrate that Claimants actively aimed to destroy Argentina’s ability to provide clean water and sanitation. There is no international legal standard by which to demonstrate the “aim” of a corporate entity, but in theory, the Tribunal could have borrowed from ICL’s JCE doctrines.\(^6\) The goal of general JCE, initially spawned by the Nuremberg Tribunals, was to bypass the justifications of sovereign immunity or superior responsibility when it came to assigning responsibility to individuals for the commission of mass atrocities.\(^6\) In parsing out a corporate mens rea standard for an IIL case, therefore, JCE’s utility does not lie in transposing the mens rea element from a corporation to an individual. Rather, JCE, particularly JCE III, is useful because it employs a standard by which to determine the mental state of a legal person—an “enterprise” in JCE but a “corporation” for our purposes here—without attaching any requirement for individual mens rea.\(^6\) The corporate standard, first articulated by

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\(^6\) Id. ¶ 1214.

\(^6\) Id.

\(^6\) Domestically, most jurisdictions hold that corporations are incapable of committing crimes because they are incapable of authorizing them; it is only the individuals within them that can foster the mens rea necessary to incur criminal culpability. See, e.g., Alice De Jonge, Transnational Corporations and International Law: Accountability in the Global Business Environment 127 (Edward Elgar Pub., 2012). However, on the international stage, lawyers would be remiss to ignore JCE’s similarity to the corporate legal person. It is worth noting also that JCE III in particular places great weight on what would appear to be the mens rea of the enterprise; through the structure of the enterprise, it lowers the mens rea standard necessary to prove individual culpability.

\(^6\) Here, JCE is described as ‘doctrines’ rather than ‘doctrine’ because the evolution of JCE has produced three similar but separate doctrines, each with slightly different mens rea requirements. Jose Alvarez’s has cautioned generally about transposing such concepts of public law to the international investment arena, even as a way to generally inform arbitral interpretation, because the circumstances and stakeholders in the various branches of international law tend to differ so vastly. See Álvarez, supra note 56 at 171–228. See also ILC Guidelines, rule 20; Vienna Convention on the Law of Treaties art. 31–32, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (hereinafter VCLT).


\(^6\) I recognize that the equation of an “enterprise” in JCE to a “corporation” under general international law is problematic, at least because of the different avenues through which corporations and JCEs are formed. Nevertheless, JCE is the only such tool in international law available to determine mens rea, and as such, could be considered by an ICSID Tribunal’s interpretation of “aimed”. This is because the ICSID Convention requires that the terms of treaties litigated under its rules be interpreted according to the VCLT art. 31. The VCLT Article 31(3)(c) stipulates that, in interpreting treaty language “any relevant rules of international law applicable in the relations between the parties” be taken into account. And as an element of public international law to which virtually all the world’s states are party, the ICJ Statute can inform the sources arbitrator use; specifically, Art. 38(1) of that statute stipulates that “international custom” and “general principles of law” can be considered, among
the ICTY, is that the legal person have a “common plan or purpose,” which can be demonstrated through the results of the legal person’s actions.\footnote{See ibid., at art. 6-7.}

In Urbaser and in ICSID cases generally, the results of a legal person’s actions are highly unlikely to reach the level of criminality required for entity liability under ICL. The only crimes under the Rome Statute that require a demonstration of the “intent” or “aim” of an enterprise to incur liability are that of Genocide,\footnote{Ibid., at art. 6.} and the crime against humanity of “[o]ther inhumane acts . . . intentionally causing great suffering.”\footnote{Id. at art. 7.} Unless a denial of water and sewage rights could be construed as an “intent to destroy, in whole or in part” the Argentinian people, or as an inhumane act intended to cause “great suffering,” Urbaser’s standard would not be met. Even considering the lower standard of proof for civil as opposed to criminal cases (preponderance of the evidence rather than beyond a reasonable doubt),\footnote{Id. at art. 66.} the fact that most “crimes against humanity” require a mental state only of “knowledge” for a JCE—rather than a demonstration of “intent” or “aim”—highlights the almost cartoonish absurdity of Urbaser’s counterclaim standard.

**B. Urbaser’s Second Standard: An Obligation to Perform**

The middle standard on the Urbaser spectrum veers away from the “aimed at” extreme in asking whether other parts of international law, and specifically water and sanitation, impose positive obligations on investors.\footnote{Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award, at ¶ 1210 (Dec., 7 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf} After surveying multiple sources, the Tribunal found that both investors and States have an obligation to comply with some performances required by public international law.\footnote{Id. ¶¶ 1193–1220.} However, the required performances significantly differ. While the State has a positive performance obligation to provide access to water and sanitation services,\footnote{Id. ¶¶ 1211–1212.} there is no basis in international law that would accord the same positive performance obligation to the investor, at least with respect to the human right to water.\footnote{Id. ¶¶ 1211–1220.} Rather, the investor could only be obligated to provide water and sewage on the basis of private contractual law. However, the investor could be obligated to fulfill those contractual obligations in a way that did not violate general international law, which would be the only justiciable question before an

\footnote{The Rome Statute requires that the “aim” of each individual to further the criminal purpose of the enterprise, but the standard remains results-based for demonstrating “common plan.” See Rome Statute, supra note 42, at art. 28. The intent behind individual participation in the enterprise—the most controversial element of JCE III—is not at issue here.}
arbitral tribunal. The Tribunal does not exclude the possibility that a justiciable international obligation could exist, but such an obligation must arise either from another treaty or from a general principle of international law. It found neither in this case.

The reasoning in Urbaser appears to reject private law theories about IIL by drawing a sharp distinction between an investor’s contractual obligations and general international law. At the same time, it could seemingly elevate private investors to the level of states in international economic law by drawing just such a distinction. Curiously, it also appears to create horizontal obligations, even if limited, between investors as foreign individuals and citizens of a host State—a perplexing and paradoxical position from the perspective of traditional human rights law. On the one hand, unless it can be gleaned from the prohibition on aggression enshrined in the Geneva Conventions, there is no negative obligation on States not to actively engage in activity “aimed at” obstructing the activity of other states in protecting the human rights of citizens. On the other hand, individuals have neither positive nor negative obligations under the ICCPR and the ICESCR; these Covenants impose positive obligations only upon States. However, according to Urbaser, the Covenants now impose negative obligations on investors as well. This convoluted web of liabilities between individuals and States, international law and individuals, and international law and private law constitutes the second Urbaser standard: the middle ground.

76 “Although the conduct of corporations under these treaties is regulated by an international instrument, the international legal obligation under the treaty rests with the state, which needs to adopt national measures to regulate the activity of the corporations on the domestic legal level. Corporate responsibility under these treaties is thus purely domestic rather than international”. Eric De Brabandere, Non-State Actors and Human Rights, Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM, 268, 275 (D’Aspremont ed., 2011).

77 Urbaser ¶ 1207.

78 See id. ¶¶ 1182–1220.

79 The Tribunal’s finding implies that the investor is bound by treaties that typically govern only state action toward individuals, which suggests that investors carry greater obligations than individuals. However, the finding does not place investors under the same standard as states under international law, as is clear in the first ‘negative’ standard. Thus, investors appear to be placed in an undefined zone with greater responsibilities than individuals but lesser responsibilities than states. See Urbaser ¶¶ 1207–1210.

80 CSR nuances this to the extent that horizontal relationships are created beyond the binary dichotomies of binding or non-binding law. As we will see at point 2) below, after the United Nations Guiding Principles, it is universally accepted that companies hold responsibilities—a category that is distinct but not necessarily below the category of obligations—vis-à-vis the society in which they operate. These responsibilities are thus horizontal.


C. Urbaser’s Third Standard: An Obligation to Abstain

In the third standard comprising the Urbaser spectrum, the Tribunal states that investors have an obligation to abstain from activity prohibited under general international law, which includes international criminal law, international human rights law, and the law of armed conflict. This standard notably renders intent irrelevant in such cases. It would appear that “activity prohibited under general international law” refers to activity that would violate jus cogens rights, but the Tribunal is quick to state that the constitution of such violations “is not a matter for concern in the instant case” because no such activity had occurred. Nevertheless, footnote 446 to the Award may provide some insight into situations in which the jus cogens standard might amount to “a matter for concern.” That footnote essentially states that because no prohibited activity under “general international law” is at stake, Argentina’s reliance in its counterclaim on the 1980 United States Court of Appeals for the Second Circuit case of Filártiga v. Peña-Irala was unconvincing. The Tribunal does not detail how exactly Argentina relied upon that case and none of the submissions of the parties have been made available to the public. However, one might presume that, because Filártiga involved a civil claim heard and upheld in the U.S. for wrongful death by a torture committed in Paraguay, the Urbaser Tribunal found the Filártiga norm on torture insufficiently applied when it came to a discontinuance of water and sewage services. Footnote 446 implies that it is the lack of a violation of jus cogens alone that renders Filártiga unconvincing. Thus, it implies that the converse is presumably true: if there is a violation of jus cogens, the Filártiga reasoning would be “convincing”. In Filártiga, the Second Circuit found that a violation of “the law of nations”—based upon the UN Charter, the UDHR, other international instruments and customary international law—could stand in US courts under the Alien Tort Statute, even though the parties did not explicitly agree to grant the US such jurisdiction. The court proceeded to find that torture was “clearly” a violation of the law of nations.

While Filártiga involved a dispute between individuals, Urbaser opens a similar window through which States may be able to hold foreign individuals liable for financial damage caused by the investor’s violations of jus cogens. Indeed, Tribunals have found jus cogens a justiciable standard to impose liability in the past. Under the jus cogens prong of the Urbaser spectrum, no showing of

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84 Id. ¶ 1210.
85 Id.
86 Id. ¶ 322, n.446.
87 Id.
88 See generally Urbaser.
89 Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir 1980).
90 Id.
91 Urbaser ¶ 1210.
92 See, e.g., Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice, 143 (Oxford U.P. 2011). Sabahi discusses Turkish arbitration cases in
intent is necessary for such liability—paragraph 1210 notably omits the “aimed” language set out in paragraph 1207. Fascinatingly, under this standard, an investor could be held liable for providing a State with, for example, chemicals produced without the intent of violating the Geneva Conventions, but that debatably violates the Conventions nonetheless.

Thus, although none of the standards set out on the Urbaser spectrum appear to change much about the actual arbitral practice of IIL, at least two of them open new avenues for corporate subjectivity for future arbitral tribunals. On one end of the spectrum, States must demonstrate that investors actively aimed at destroying human rights in order to succeed on a counterclaim. At the other end, in the rare event that an investor tortures, uses chemical weapons, or violates some other jus cogens norm under international law, the investor still carries discretion over whether to bring a claim in the first place. This arrangement is tantamount to the nominal “counterclaim” clauses in the 2015 draft model India BIT and the Investment Chapter of the TPP, and to the “investor consent” standard set out in Spyridon Roussalis v. Romania. Moreover, in light of the ILC’s 2006 study, the customary rules of ICL could inform corporate subjectivity in IIL: “(i) where a treaty is silent on a matter, the customary rule should presumptively apply (fallback); (ii) where the treaty is not silent, but the terms used are unclear and yet have a recognized meaning in customary international law, one is encouraged to interpret the treaty rule consistently with the customary rule (harmonized fallback).”

which states successfully alleged damage to their international reputation as a result of a “jurisdictionally baseless claim asserted in bad faith.” See also PSEG Global, Inc. v. Turk., ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf.

93 Urbaser ¶ 1210.
94 E.g., Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T 571 [hereinafter Geneva Protocol].
97 Trans-Pacific Partnership Agreement, supra note 7, ch. 9.
99 Álvarez, Boundary Crossings, supra note 56. As elaborated in rule 20 of the ILC’s Guidelines: “Application of custom and general principles of law. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31(3)(c) especially where: (a) The treaty rule is unclear or open-textured; (b) the terms used in the treaty have a recognized meaning in customary international law or under general principles of law; (c) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19)(a) above, to look for rules developed in another part of international law to resolve the point.” Id. at 15.
IV.
CORPORATE SUBJECTIVITY AND INDIVIDUAL LIABILITY IN ICL: POSSIBLE “BOUNDARY CROSSINGS?”

In addition to providing a method to determine corporate mens rea via JCE, ICL may also provide some insight into determining a standard for certain corporate behavior should incur financial liability to a State.\(^{100}\) There is a rich and vibrant debate amongst international criminal lawyers regarding whether and how international corporations and the individuals who run them could be held criminally liable for their contributions to crimes against humanity (CAHs),\(^{101}\) but recapping a full review of that literature is beyond the scope of this article. However, at the risk of oversimplification, and in the context of criminality, there appears to be an emerging consensus among international criminal lawyers that if a corporation possesses “control over a crime”—an adaptation from German criminal law—\(^{102}\) then corporate criminal liability is possible.\(^{103}\) ICL would then pursue the individuals behind the “control.” Alternatively, I want to suggest that for a corporation to incur financial liability for a human rights violation, a determination that the corporation itself is liable is sufficient. In the financial context, a requirement for complete control seems overly stringent. If the corporate criminality literature is to inform an IIL tribunal’s analysis, it must be mitigated to the degree that the standard emerges from ICL’s mission to determine which actors are “most responsible” for CAHs, and to shield those actors which were merely following orders or unwittingly producing materials that would later be used in the commission of a CAH. In the criminal context, specific knowledge requirements shield Lockheed & Martin (the United States’ largest weapons

\(^{100}\) As far back as 1985, former ICJ Judge Bruno Simma noted that the prospect that any international legal regime, no matter how detailed its own treaty rules, has no need to resort to non-treaty sources of international obligation is unlikely since no international legal regime had managed to avoid them. So far as I am aware, this observation still holds true. See generally Bruno Simma, Self-Contained Regimes, 16 NETH Y.B. INT’L L. 111 (1985).


\(^{102}\) Indirect perpetration through an organization was originally conceived by German legal theorist Claus Roxin with the particular experience of Nazi state-directed crime in mind. See Thomas Weigend, Perpetration through an Organisation: The Unexpected Career of a German Legal Concept, 9 J. INT’L CRIM. JUST. 91, 94-97 (2011).

manufacturer). Boeing (which produces drones), General Electric (which won the largest US government contracts for military technology), Northrop Grumman (which produces various drone-related technologies), and many other companies. And this might be ethically palatable to most in a criminal context, but the fact that the products produced by private companies often exacerbates damage to civilians in times of armed conflict renders the status quo unviable in a civil-financial liability context.

What can IIL take from ICL in evaluating the subjectivity of corporations to international law, and how might ICL converge with the Urbaser spectrum to determine which corporate action should incur financial, rather than criminal, liability? There appears to be an expanse of grey area regarding the international legal status of corporate liability that rests between the extremes of Degesch (which designed the pesticide later used in Holocaust gas chambers long before Hitler took power and continued to produce it under government direction) and the doctrine of “control over the crime.” On one end, there is an inefficacy of inaction, and on the other, an inefficacy of stringency: “control over the crime” has yet to be successfully applied to any corporate act or actor on the international stage. Thus I want to explore a possible “third way,” where lowered mens rea standards in JCE and aiding and abetting liability might apply to corporate actors in an ISDS context.

Article 25 of the Rome Statute paragraphs 3(c) and 3(d) set out the ICC’s requirements for individuals to incur aiding and abetting liability. In order to incur such liability, paragraph 3(c) indicates that a legal person facilitates the commission of a CAH with the purpose that the CAH be committed. However, paragraph 3d indicates a second, deceptively lower standard. Article 25(3) states:

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105 Id.
106 Id.
107 Id.
109 See Joanna Kyriakakis, Developments in International Criminal Law and the Case of Business Involvement in International Crimes, 94 INT’L REV. RED CROSS 981 (2012).
[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- Be made in the knowledge of the intention of the group to commit the crime.

Article 25(3)(d)(i) and (ii) set out a choice between standards. The first sets out a mens rea similar to Urbaser’s first standard—an obligation not to engage in activity with the aim of destroying human rights. The second, however, opens the window to a lower mens rea standard of knowledge of intention, which for practical purposes under public international law, requires knowledge of the likelihood that an international law violation will occur as a result of the “contribution.” The ICTY Trial Chamber also articulated a similar standard in Tadić, though more recent Appeals decisions from that Tribunal may require a more stringent interpretation of the aiding and abetting provisions of the ICTY statute. The Trial Chamber in Tadić found that “there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.” Various other ICL Tribunals, including Appeals Chambers at the ICTY and the Special Court for Sierra Leone (SCSL), agree that the appropriate interpretation of the “knowledge”

110 Rome Statute, supra note 42, art. 25 (emphasis added).

111 For a description of the test for aiding and abetting under customary international law, see the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (ICJ Expert Panel), Corporate Complicity and Legal Accountability, Vol. 2, International Commission of Jurists, Geneva, 2008, pp. 17–24. However, also note the decisions of the International Criminal Tribunal for the Former Yugoslavia that import a ‘specific direction’ requirement as a material element of aiding and abetting. This new requirement demands that to constitute an accomplice under international criminal law, a person must not only provide assistance that has a substantial effect on the commission of an international crime, but such assistance must additionally be specifically directed toward assisting such crime. See Prosecutor v. Perišić, Case No. IT-04-81-A, Appeal Judgement, (Int’l Crim. Trib. for the former Yugoslavia Jan. 28, 2013); Prosecutor v. Stanišić, Case No. IT-03-69-T, Trial Judgement, (Int’l Crim. Trib. for the former Yugoslavia May 30, 2013). While the introduction of a ‘specific direction’ requirement will have significant implications for satisfying aiding and abetting in the context of commercial relationships and international crimes, this Article’s primary aim is to apply doctrines that emerged from ICL in the context of IIL. Moreover, the Rome Statute, on which this Article’s argument rests, was not at issue in the 2013 ICTY decisions on aiding and abetting.

112 See id.

113 Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgement, § 674 (Int’l Crim. Trib. for the former Yugoslavia May 7, 1997)
requirement is “knowledge of the likelihood that a crime would occur,” or indifference to whether a crime would occur. This standard is all the more necessary when it comes to the liability of corporate persons. For as an ICJ Expert Panel on Corporate Complicity in International Crimes stated in its 2008 Report, to require the elevated standard of “purpose,” and not merely knowledge, would render the notion of aiding and abetting almost wholly inapplicable to corporate persons, since corporate persons are almost always motivated by the purpose of profit. Thus, in order for a corporate person to incur aiding and abetting liability, the Rome Statute standard, informed by general international law, should apply. It is not necessary that the corporation intend that the actual crime occur, or even that it have “control over the crime” as is the consensus for choate liability. A corporation should incur inchoate liability if its primary intent is, for example, to increase profits for its shareholders, so long as it acts with the knowledge that increasing profits in a particular way has a likelihood of aiding or abetting a CAH.

Moreover, under the “attempt” doctrines codified in the ICC statute and other ICL statutes, it is not necessary that the CAH actually occur. Instead, all that is required is that the primary actor intend to commit the CAH and attempt to do so (although the line between attempt and mere preparation is far from settled). Thus, a corporate actor could theoretically incur inchoate liability for assisting preparation for a CAH that is likely to occur, even if the CAH never actually occurs.

In the event that a CAH does actually occur, perhaps the best illustration of a transferable standard for investor liability from ICL is the aiding and abetting

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114 See Prosecutor v. Brima, SCSL-06-16-A, Appeal Judgment, ¶ 242 (Feb. 22, 2008): “[t]he mens rea required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.” (quoting Prosecutor v. Brima, SCSL-06-16-T, Trial Judgment II, ¶ 776 (June 20, 2007); see also Prosecutor v. Sesay et al., Case No. SCSL-04-15-A, Appeal Judgment, Special Court for Sierra Leone, ¶ 546 (Oct. 26, 2009). The SCSL Appeals Chamber subsequently endorsed this Court’s jurisprudence that awareness of a substantial likelihood is a culpable mens rea for aiding and abetting liability in customary international law. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, Case No. STL-11-01/I, ¶ 227 (Feb. 16, 2011). In domestic legal systems this mental state ranges from “being ‘indifferent’ to the result, to being ‘reconciled’ with the result as a possible cost of attaining one’s goal. ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW, 41 (2012).


116 Id.


118 This is an old debate in U.S. jurisprudence, and different states still take different approaches. For an old but classic example of the scholarship on the issue see generally, John S. Strahorn, Jr., Preparation for Crime as a Criminal Attempt, 1 WASH. & LEE L. REV. 1 (1939).
standard applied by the SCSL in *Prosecutor v. Charles Ghankay Taylor*. In that case, the Court rejected the prosecutor’s claims that Taylor’s role in facilitating diamond mining to fund the Revolutionary United Front was sufficient to place him at the helm of a JCE. Instead, the Court found that Taylor had “aid[ed] and abett[ed]” a JCE in a role the Court described in terms remarkably similar to a business financier or investor. The Court found that, for a determination of aiding and abetting, the offender’s acts “must provide substantial assistance to the commission of a crime with knowledge that such acts would assist the commission of the crimes or with awareness as to the likelihood that such acts would render assistance.” In the case of Charles Taylor, the nature of the Revolutionary United Front’s criminal conduct was so well-known that Taylor’s willingness to work with the group left little question as to whether the standard was met, but that does not preclude potential liability for working with less extreme groups, especially if IIL were to draw on SCSL jurisprudence to articulate a standard for corporate financial liability. In virtually all of the world’s democracies, the burden of proof for civil financial claims is lower than that for criminal claims; one might presume that in IIL, a preponderance of the evidence would be sufficient to determine that a corporation’s leadership was aware of a likelihood that atrocities would occur as a result of the corporation’s assistance or would be perpetrated by the organization the corporation assisted.

Thus, setting aside the cartoonish JCE-esque standard set out at one end of the Urbaser spectrum, and departing from the domestic contract law standard set out in the middle of the spectrum, Urbaser’s third standard may open a window for corporate financial liability for contributions to exacerbating armed conflict. The third standard omits the requirement that corporate activity be “aimed at” promoting human rights but requires that corporations “abstain from activity prohibited under general international law.” With this inroad, ICL’s aiding and abetting mode of liability may provide effective “boundary crossing” tools to international investment arbitrators in determining when a corporation should incur liability for prohibited actions under general international law, including violations of human rights and CAHs.

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120 Id. at ¶¶ 143–44.

121 See id. at ¶¶ 160, 164, 168. See also *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement, Special Court for Sierra Leone, ¶¶ 3919–4026 (May 18, 2012).

122 *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement, Special Court for Sierra Leone, ¶ 6904 (May 18, 2012).

To summarize the cornerstones of my argument so far: (1) As a matter of public policy, it is desirable to encourage corporations to avoid situations in which they assist a State in committing human rights violations or CAHs. (2) International arbitral tribunals are permitted to draw interpretive tools and normative principles from other fields of international law in what Alvarez termed “boundary crossings.” They can do this by looking to international treaties and by looking to the jurisprudence of international courts. The ILC has provided recommendations to international judges to identify appropriate times for boundary crossings when the treaty at issue is silent, and to identify the appropriate weight to be given to a source when the treaty at issue is unclear. (3) The ICJ, the ILC, and international law scholars have acknowledged that corporations can be subject to international law, but the boundaries of that subjectivity remain unclear. What seems to be clear is that corporations cannot be treated like a natural persons under international law, nor can they be treated like States. They occupy an ill-defined third category; perhaps they even occupy multiple ill-defined categories. (4) In the specific context of corporate financial liability to a State for a human rights or ICL violations, Urbaser provides the beginning of what could be a standard for determining when a corporation is liable. (5) To this end, the ICL doctrine of aiding and abetting as articulated in the Rome Statute and as developed by the other ICL tribunals, especially the SCSL, may provide a useful “boundary crossing” tool to further develop a standard.

Let us proceed with three hypotheticals to tease out how a hybrid IIL-ICL corporate liability standard might apply in the context of international armed conflict. All of the following hypotheticals are based on actual corporate actions in conflict zones, but I have added several non-factual elements for the sake of argument and inquiry.

A. Hypothetical One: Monsanto and Vietnam

To begin with an obvious (and controversial) hypothetical, suppose that today’s law applies to the Vietnam War in the 1970s, that both the United States and Vietnam have ratified the Rome Statute and the Vienna Convention on the Law of Treaties. Finally, suppose also that Monsanto exists just as it did in the 1970s (it was recently purchased by Pfizer), with business operations in Vietnam that exceed “mailbox company” status (this is necessary for IIL law to hypothetically apply). Just like in the 1970s, the United States government sets
manufacturing specifications for an herbicide known as Agent Orange, a combination of two common herbicides already produced by Monsanto, and commissions Monsanto and several other companies to produce the herbicide. The US government then sprays Agent Orange in a strategic effort to cut off the food supply of its “enemy combatants” from North Vietnam. Monsanto did not design the chemical, nor did it design the spray distribution system, which caused particles of the chemical to land far distances from the intended targets. However, Monsanto also did not test the combination in its own laboratories or design a distribution system that would minimize the potential damage caused to humans through exposure. Indeed, neither domestic nor international law imposed an obligation upon Monsanto to do either of those things. Given these facts, and given the standards set out in the previous sections, under what circumstances could Monsanto be held liable for damages?

The U.S. most likely distributed Agent Orange in a “widespread and systematic” manner as a result of orders during an “attack.” The distribution at least partially targeted a civilian population—even though the primary targets were North Vietnamese combatants, these combatants were not the only ones who consumed the targeted crops, and presumably, they were not the individuals who worked in the targeted fields. Monsanto chose only to manufacture the chemical; it did not choose the targets or how to distribute it. Furthermore, it could not have thought that the US government would “likely” commit a crime against humanity. There is a possibility that the mere production of the chemical was an activity “aimed at” destroying human rights, but this would require some evidence of Monsanto’s knowledge that the chemical was extremely harmful, and there is none. However, under the third standard on the Urbaser spectrum, there is only an obligation to abstain from violating jus cogens norms, such as the use of chemical weapons, regardless of whether Monsanto intended to do so.

This liability likely would not stick under the Urbaser standard alone: Monsanto is not in breach of its obligation to abstain unless that obligation can be said to extend to production alone, not distribution. Such a standard would suggest extreme results: every producer of every bullet used in every gun could be liable for violating jus cogens norms. However, if we employ lessons from ICL jurisprudence and treaty text, we can tighten the sphere of liability: Monsanto would only be liable if it knew that it was likely that the chemical would harm

127 ICL and the Geneva Conventions distinguish between treatment of ‘civilians’ and ‘combatants’ in defining the parameters of international war crimes. Article 7 of the Rome Statute defines ‘crimes against humanity’ as a specified criminal act “committed as part of a widespread and systematic attack on a civilian population, with knowledge of the attack”. Rome Statute, supra note 42, art. 7(1).
human beings, and if it knew that the U.S. government was likely to use Agent Orange in a way that exposed human beings to the chemical.

B. Hypothetical Two: The Reich Group and Nazi Germany

A common narrative explaining the rapid expansion of international law post-WWII is that the international human rights and economic regimes conceived between the 1940s and 1970s were necessary to prevent a reoccurrence of events similar to those that took place during the war.\(^{128}\) Let us therefore examine how effective our current tools would be under similar circumstances. Suppose that the post-WWII international legal systems, barring EU law, existed during WWII, and Germany was subject to all of the international treaty obligations to which it is presently bound. On 28 April 1938, as a response to the German insurance company’s concerns that civil violence against Jewish businesses was resulting in a massive increase in the number of collectable claims, the Reich Supervisory Board told the Reich Group for Insurance that “in the National Socialist State the marketing of riot insurance and the mention of riot, domestic or civil unrest, disturbance of the peace, mob action, plundering, strikes, lockouts, and sabotage in general insurance conditions of the other insurance branches is insupportable.”\(^{129}\) In effect, the German government eliminated domestic coverage against civil disturbances because the State insisted that the New Germany did not have civil disturbances.\(^{130}\) The Reich Group for Insurance thereafter claimed non-liability to their customers and referred them to the courts and the government if they sought payment.\(^{131}\)

The Reich Group did not only insure Jewish businesses in Germany, but also in Nazi occupied territories such as Poland, and for the purposes of this hypothetical, let us assume that Poland is still an autonomous, unoccupied state. Following the Reich Supervisory Board’s decree, the Reich Group and foreign insurers alike stopped selling policies that covered civil disturbances.\(^{132}\) Foreign insurers insisted on nonliability for civil disturbance claims, arguing that, as a matter of common knowledge, police and government personnel routinely stood by idly while Jewish property was destroyed: the State bore liability, not the insurers.\(^{133}\) The government responded to the pressures of foreign companies by issuing paper vouchers for some of these claims, the value of which it could revoke at any time. And it eventually did: Section 81a of the Reich Insurance Decree gave the government power to set aside existing clauses and conditions if


\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Id.
it deemed such action to be “in the public interest.”\textsuperscript{134} Let us suppose, for the hypothetical, that the Polish government continued to require the Reich Group to pay out insurance claims resulting from civil unrest, and let us further suppose that, emboldened by the evasion of liability in Germany, the Reich Group views the Polish government’s actions as expropriatory. The Reich Group initiates a claim based under the hypothetical Germany-Poland BIT, which is identical to the Argentina-Spain BIT, and Poland initiates a counterclaim alleging that the Reich Group is actively obstructing human rights.

Recall that present day international law applies to the past in this hypothetical (except for EU law). Article 17 of the UDHR states that “Everyone has the right to own property alone as well as with others. No one shall be arbitrarily deprived of his property.”\textsuperscript{135} Article 7 of the Rome Statute criminalizes widespread and systematic “persecution” of any “identifiable” civilian group, a definition which encompasses Jewish business owners.\textsuperscript{136} Article 7(2)(g) clarifies that “persecution” means “the intentional and severe deprivation of rights contrary to international law.”\textsuperscript{137} While the notion that property rights are human rights is controversial and shaky at best,\textsuperscript{138} the language of the Rome statute calls only for a severe deprivation of a right, not necessarily a “human right” in the same sense as those explicitly recognized by the Covenants. An arbitrary deprivation of property is certainly contrary to international law;\textsuperscript{139} and indeed, it was the basis of a substantial portion of expropriation claims under the world’s various BITs\textsuperscript{140} (almost all distinguish between justifiable and non-justifiable expropriation, and many cite US Fourth Amendment “takings” jurisprudence as theoretical underpinnings\textsuperscript{141}). And finally, recall that in the Charles Taylor case, Taylor was convicted of aiding and abetting a JCE because of his role in financing organizations that committed CAHs; he was not convicted of participation in the JCE itself.\textsuperscript{142}


\textsuperscript{135} G.A. Res. 217 (III), Universal Declaration of Human Rights, art. 17 (Dec. 10, 1948).

\textsuperscript{136} See Rome Statute, supra note 42, art. 7(1).

\textsuperscript{137} Id. art. 7(2)(g).

\textsuperscript{138} Most prominently, Austria School economist Murray N. Rothbard’s 1959 essay that described human rights as an extension of each individual’s “property right” over their own body, and accordingly, material things produced by the body are an extension of those rights. Murray N. Rothbard, Human Rights Are Property Rights (1959), https://fee.org/articles/human-rights-are-property-rights/.

\textsuperscript{139} This is apparent from numerous treaties and prohibitions in the constitutions of many of the world’s countries.


\textsuperscript{141} The seminal regulatory takings case in the U.S., Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922), has been cited in numerous ICSID and UNCITRAL Awards over the past century, one recent example being the somewhat controversial case of Methanex Corp. v. United States of America, UNCITRAL Rules, Final Award of the Tribunal on Jurisdiction and Merits, Part IV (August 3, 2008).

\textsuperscript{142} See Prosecutor v. Taylor, ¶ 168.
In this hypothetical, Urbaser’s “aimed at” standard might apply if the tribunal recognized a human right to be free from the arbitrary deprivation of property, but it would still be a stretch to claim that seeking to avoid payment was arbitrary deprivation of payment. However, if a tribunal employed boundary crossing tools from the Charles Taylor case, an argument could be more easily made that the Reich Group should be held individually financially liable: the Nazi Party’s persecution of Jewish people, even in the 1930s, was so well-known that the Reich Group could not plead ignorance, and by transferring payment responsibility from the Reich Group (in the form of cash) to the German government (in the form of vouchers), the Reich Group could be said to have aided and abetted the CAH of arbitrary deprivation of property.

This is an extreme hypothetical, but it is relevant to consider for two reasons. First, it charts a financial liability through which victims of CAHs may be compensated in international legal venues apart from ICL Tribunals. This is significant because victim compensation is an area in which ICL Tribunals have made great strides forward (especially recently), but is nevertheless an area in which ICL Tribunals still fall tragically short. And second, the hypothetical highlights IIL’s capacity to deter those CAHs that hurt the financial interests of transnational corporations. If the Reich Group knew that it could not avoid liability for civil disturbance claims, it may have placed greater pressure on the government to discourage such violence. In fact, this was the Reich Group’s initial approach, and it was only after the German government gave them an “out” through the vouchers that they eased up on lobbying against the destruction of Jewish property. Perhaps IIL deprives governments of the ability to provide such “outs” to transnational corporations.

C. Hypothetical Three: Northrop Grumman and Afghanistan

Northrop Grumman is the largest producer of drone-related communications and navigations technologies in the United States. It has offices in several Greater Middle Eastern countries, including Afghanistan. Moreover, it is no secret that the US drone strikes in Afghanistan have produced an unfortunate

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144 Although there are more than 4,000 ‘civil party’ cases on file at the ECCC, political hurdles and changes to the ECCC’s Internal Rules have rendered that tribunal’s enhanced victim participation all but nominal. See Ignaz Stegmiller, Legal Developments of Civil Party Participation at the ECCC, in THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, 535–550 (Simon M. Meisenberg & Ignaz Stegmiller eds., 2016).


146 See generally NETWORKS OF NAZI PERSECUTION, supra note 145.

147 This information is stated on the company’s official website. See http://www.northropgrumman.com/Pages/default.aspx.

148 Id.
number of civilian casualties; 116 if one accepts the US government’s numbers in the 2016 ODNI report, or 474 if one prefers to trust the Bureau of Investigative Journalism. Suppose that, recently, in full knowledge of the civilian casualties produced as a result of drone strikes, Northrop accepts a new contract from the US government to extend the communicable area in Afghanistan in which drones can accurately navigate, and provides company personnel to operate and maintain the necessary equipment. Finally, suppose that, somewhat predictably, more civilian deaths result from drones utilizing Northrop’s technology.

No matter which civilian casualty numbers one believes, it cannot be credibly argued that the drone attacks are systematic attacks directed at a civilian population, as the chapeau to Article 7 of the Rome Statute requires. However, drone attacks are designed with far greater specificity than the traditional law of war assume to be possible. Although a grave breach of the Geneva Conventions requires that an attack as a whole not have a disproportionate effect on the civilian population, because drone attacks are individually designed with an extremely high degree of specificity, a drone attack determination of a “grave breach” of the Conventions or a “target” under Article 7 should be determined on an individual basis, rather than looking at drone warfare as a whole. This targeting also differs from traditional warfare, in that the civilians attacked were actually the targets of the strikes, as former-President Barack Obama admitted. Moreover, it could be argued that a “civilian population” should be defined within the scope of the strike as well—the civilian population present in the area chosen for the strike. If these arguments were accepted (which is unlikely), Afghanistan would still need to establish that Northrop considered it extremely likely that the US government would continue to mistakenly target civilians in drone strikes. Recall that, under the Rome Statute’s aiding and abetting liability, and accepting the “public knowledge of atrocities” standard accepted by the SCsL in Prosecutor v. Charles

\[ \textsuperscript{149} \text{See generally OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (2017).} \]


\[ \textsuperscript{151} \text{It recently did exactly this, but it did so in a no-bid contract, which would complicate the hypothetical with issues of control. See generally U.S. Dep’t of Defense, Contracts, May 24, 2017, https://www.defense.gov/News/Contracts/Contract-View/Article/1192914/.} \]

\[ \textsuperscript{152} \text{Rome Statute, supra note 42, art. 7.} \]

\[ \textsuperscript{153} \text{See, e.g., Dexter Filkins, Operators of Drones are Faulted in Afghanistan Deaths, N.Y. TIMES, May 29, 2010, http://www.nytimes.com/2010/05/30/world/asia/30drone.html (to be clear, the civilians were mistakenly thought to be “combatants,” but the civilians killed were nevertheless the actual targets of the strikes).} \]

\[ \textsuperscript{154} \text{See, e.g., Massimo Renzo, Crimes Against Humanity and International Criminal Law, 31 LAW AND PHILOSOPHY 443, 445, 447–48 (2012) (noting the difficulty of applying ICL to individual HR violations, especially with respect to group dimensions of ICL crimes). See also Rome Statute supra note 42, art. 7 (requiring an expansive interpretation of the phrase “attack on” in defining a crime against humanity as a criminal act “committed as part of a widespread and systematic attack on a civilian population”).} \]
Taylor, further civilian killings would not need to occur so long as Northrop accepted the likelihood that they would occur. But if this were the standard implemented, it would also produce extreme results: Northrop or similarly situated companies might not accept any contract in circumstances in which a military had already caused a significant number of civilian deaths, because if they accepted the contract, they could be held financially liable for future damages on the grounds that they accepted the likelihood that further deaths would occur.

CONCLUSION

Even if arbitrators imported the most permissive corporate-person liability doctrines from ICL, holding corporations financially liable for CAHs under IIL would be almost impossible. Moreover, even if the avenues I have suggested could provide a basis, arbitrators could only do so on the basis of questionable “boundary crossing” tools endorsed by the ILC in instances of treaty silence. Considering IIL’s ongoing “crisis of legitimacy,” a decision on these grounds might do more harm than good for the future of corporate subjectivity. Thus, once it is agreed that it would be desirable to incentivize corporations to double-check the effect of the military products or services they are contracted to provide or perform, international lawyers should then investigate the ways in which IIL, ICL, and international legal subjectivity is designed to shield corporations from liability, followed by identifying and critiquing the factors that motivated that design. In some cases, corporations may ‘go along’ with State-sanctioned violence simply because there is no legal incentive for resistance. In other cases, the products a corporation designs and manufactures add considerable gravity to the degree of the atrocities committed by States and by non-State JCEs. This Article does not suggest that corporations are the cause of these atrocities, but it does highlight the lack of international legal incentives for corporations to limit and eliminate their involvement in mass atrocities, particularly those involvements that may be less susceptible to the public eye.

To this end, however, IIL’s widespread “crisis of legitimacy” is priming the field for (hopefully positive) changes. Although the optimism of international human rights lawyers regarding Urbaser is likely premature,155 Urbaser pushes the boundaries of potential investor-to-State liability in instances of CAHs and armed conflict in at least two ways. First, it invites “boundary crossings” from ICL through language suggestive of corporate mens rea standards, including application of ICL theories of enterprise liability, and as this Article suggests, application of “aiding and abetting” JCEs through financial or other services, such as design or manufacturing. Second, even if future Tribunals never draw from ICL theories of individual subjectivity to international law, Urbaser nevertheless sets out a framework from which we can begin to conceptualize corporate subjectivity in the non-criminal context. We can clearly see that IL treats legal persons

155 See generally Crow & Escobar, supra note 17.
differently from natural ones and that it treats States differently from both. *Urbaser* makes clear that each entity occupies its own legal territory, and it moves toward a sort of self-defining standard for corporate subjectivity: the corporation’s functions determine the scope of its international subjectivity. But this standard begs several questions: which functions expose corporations? Should some functions expose corporations to more liability than others, and if so, how can the liability-weight be measured? And would this exposure produce negative externalities? For example, would corporations avoid contracts for providing public services such as water and sewage due to greater liability exposure? Accordingly, *Urbaser*’s implications for corporate obligations under international law—and the subjectivity of corporations to international law on the basis of their status as “organs of society”—warrant further discussion.
Bordering Migration/Migrating Borders

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From the Great Wall of China to the Berlin Wall, border walls have long served as symbols of visible, fortified manifestations of sovereign control. Increasingly, however, prosperous countries utilize sophisticated legal tools to restrict mobility by detaching the border and its migration control functions from a fixed territorial marker, creating a new framework: the shifting border. This shifting border, unlike a reinforced physical barrier, is not fixed in time and place. It relies on law’s admission gates rather than a specific frontier location. The remarkable development of recent years is that the border itself has become a moving barrier, an unmoored legal construct. These dramatic transformations unsettle ideas about waning sovereignty just as they illustrate the limits of the push toward border-fortification. By charting the logic of a new cartography of borders and membership boundaries, Professor Shachar shows both the tremendous creativity and risk attached to these new legal innovations and the public powers they invigorate and propagate. This Article further demonstrates that debates about migration and globalization can no longer revolve around the dichotomy between open versus closed borders. As an alternative to these established theoretical poles and as part of a broader attempt to overcome policy deadlocks at the domestic and international level, Professor Shachar proposes a new approach to human mobility and access to membership in a world marred by unequal opportunities for protection and migration.
“It is truly astonishing that the concept of territoriality has been so little studied by students of international [law and] politics; its neglect is akin to never looking at the ground that one is walking on.”

“[A] border for immigration purposes [is defined] as any point at which the identity of the traveler can be verified…[viewing] the border not as a geographical line but rather as a continuum of checkpoints along a route of travel from the country of origin to [destination].”

INTRODUCTION

From Donald Trump’s campaign promise to build an “impenetrable, physical, tall, powerful, beautiful southern border wall,” to the brisk construction of barbed-wire fences by European countries as diverse as Austria, Bulgaria, Estonia, France, Hungary, Greece, Latvia, Lithuania, Norway, and Slovenia in response to the refugee crisis, border walls and razor fences signal that even in a supposed post-Westphalian era, physical barriers are still considered powerful measures to regulate migration and movement.

Instead of becoming relics of a bygone era, as many had predicted after the fall of the Berlin Wall, border walls have become visible, fortified manifestations of (real or imagined) sovereign control. As important as these walled borders are,
both symbolically and practically, this Article highlights an equally striking yet under-studied trend: the surge of invisible borders—borders that rely on sophisticated legal techniques that detach migration control functions from a fixed territorial marker.

One might reasonably expect that the regulation of access to the territorial state would automatically correspond with its recognized physical and cartographic frontiers. In contrast with the fixed lines we find in our maps and law books, however, the location of the border is shifting when it comes to migration control: at times the border penetrates into the interior, while in other circumstances it extends beyond the edge of the territory. In other contexts, fixed territorial borders are “erased” or refortified. This reinvention of the border is occurring in the midst of growing political anxiety over immigration and “uncontrolled” entry. The fixed black lines we see in our world atlases do not always coincide with those comprehended in—indeed, created by—the words of law. Increasingly, prosperous countries utilize sophisticated legal tools to selectively restrict—or, conversely, accelerate—mobility by detaching the border and its migration control functions from a fixed territorial marker, creating a new framework that I call the shifting border.

This shifting border, unlike a reinforced physical barrier, is not fixed in time and place. It relies on law’s admission gates rather than a specific frontier location. The remarkable development of recent years is that the border itself has become a moving barrier, an unmoored legal construct. This is part of a shifting-border strategy that strives, as official government policy documents plainly and tellingly explain, to “‘push the border out’ as far away from the actual [territorial] border as possible.”8 The idea, enthusiastically endorsed by governments in relatively rich and stable regions of the world, is to screen people at the source or origin of

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7 My focus throughout the discussion is on the formal, legal aspect of crossing international borders. The terms “unauthorized,” “undocumented,” and “irregular migration” are used interchangeably. The International Organization for Migration (IOM) defines irregular migration as “[j]ovement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries irregularity requires entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is seen for example in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country.” INT’L ORG. MIGRATION, KEY MIGRATION TERMS, https://www.iom.int/key-migration-terms.

their journey (rather than at their destination country) and then again at every possible “checkpoint along the travel continuum—visa screening; airport check-in; points of embarkation; transit points; international airports and seaports.”9 The traditional static border is thus reimagined as the last point of encounter, rather than the first.10

Just as the shifting border extends the long arm of the state to regulate mobility half the world away, it also stretches deep into the interior, creating within liberal democracies what have been referred to as “waiting zones” or “constitution lite zones.”11 In these zones, ordinary constitutional rights are partially suspended or limited, especially for those who do not have proper documentation or the necessary legal status to remain in the country.12 Each of these spatial and temporal contractions and protrusions has dramatic implications for the scope of rights and protections that migrants and other non-citizens enjoy, and contribute to a global mobility divide between the haves and have-nots.13 As migration pressures mount, governments in rich countries frantically search for new ways to expand the reach of their remit, both conceptually and operationally, inwards and outwards, while in the process reinventing one of the classic dimensions of sovereignty in the modern era: territoriality.

Under the Westphalian lens and lexis, the modern state is a territorial state. Territoriality, or the territorial principle—understood here as the proposition that a legitimate government has ultimate authority over a defined territory and its population—is a central feature of the classical understanding of the current

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9 SMU, supra note 2.

10 My reference here is to the current legal situation which holds, in the words of the European Court of Human Rights, that “[s]tates enjoy an ‘undeniable sovereign right to control aliens’ entry into and residence in their territory.” Saadi v. UK, App. No. 13229/03, Eur. Ct. H.R., para. 64 (2008) (internal references omitted).

11 See United States v. Gabriel, 405 F. Supp. 2d 50, 59 (D. Me. 2005) (noting the constitutional implications of “pushing the border in”). In the United States, Customs and Border Patrol agents are invested with the statutory authority to stop and conduct searches on vessels, trains, aircraft, or other vehicles within “a reasonable distance from any external boundary of the United States” for purposes of “preventing the illegal entry of aliens into the U.S.” Immigration and Nationality Act, 8 CFR § 237(a)(3); 8 U.S.C. § 1357(a)(3) (2012). See Chris Rickerd, AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION’S 100-MILE RULE, https://www.aclu.org/sites/default/files/assets/14_9_15_cbp_100-mile_rule_final.pdf. This “reasonable distance” is defined through regulation as “100 air miles,” although a distance of more than 100 miles may also be considered reasonable due to unusual circumstances. See 8 C.F.R. § 287.1(b), https://cdn.loc.gov/service/rightsinfo/0022/f0022236/f0022236.pdf.

12 Legal status here refers to a right to enter or remain in the country. See Hiroshi Motomura, Haitian Asylum Seekers: Interdiction and Immigrants’ Rights, 26 CORNELL INT’L L.J. 695, 696 (1993) (discussing the concept of the “functional equivalent of the ... border”). In the European context, these have been referred to as “waiting zones” (zones d’Attente). For a concise overview, see Tugba Basaran, Legal Borders in Europe: The Waiting Zone, in A THREAT AGAINST EUROPE: SECURITY, MIGRATION AND INTEGRATION (Peter Burgess & Serge Gutwirth eds., 2001).

international world order. On this familiar and naturalized account, the territorial principle plays a key role in constituting respect for international borders and justifying their operation to demarcate “places, territories, and categories,” thereby producing a cartographic image of the world as a “jigsaw puzzle of solid colour pieces fitting neatly together.” Borders, according to this perspective, are the black lines we draw in our maps to divide up the world, with dramatic ramifications for the scope of rights and protections offered to individuals, depending on where said individuals stand in relation to these divvying lines. This process distinguishes between member and non-member, insider and outsider, and the interior and the exterior. Only citizens have a guaranteed right to enter and remain within the jurisdiction of the territorial state; all others (with the exception of those seeking refuge and asylum) require permission to gain such access. For the bulk of humanity, then, gaining lawful admission to desired destination countries remains “a privilege granted by the sovereign.” This makes control of the border the liminal and legal linchpin of migration regulation.

In a world where borders are transforming, but not dissolving, I aim to show that the question of legal spatiality—where a person is barred from onward mobility, and by whom—has dramatic consequences for the rights and protections of those on the move, as well as the correlating duties and responsibilities of the countries they seek to reach and the transit locations they pass through. Here lies the deep paradox of the shifting border: when it comes to controlling migration, States are willfully abandoning traditional notions of fixed and bounded territoriality, stretching their jurisdictional arm inward and outward with tremendous flexibility; but when it comes to granting rights and protections, the very same States snap back to a narrow and strict interpretation of spatiality, which limits their responsibility and liability by attaching it to the (illusionary) static notion of border control. This duality is perhaps most profoundly pronounced in the case of asylum seekers who trigger protection obligations only once they reach the destination country’s soil, even as access to these territorial spaces of protection is increasingly unavailable. States shut those on the move out long before they reach the gates of the promised lands of migration and asylum.

By charting the logic of a new cartography—a legal reconstruction—of borders and membership boundaries I seek to show both the tremendous creativity


17 This is the classical formulation articulated by the United States Supreme Court in the case of United States ex. rel. Knauff v. Shaughnessy, 228 U.S. 537, 542 (1950). In rule-of-law societies, which are the subject of inquiry here, such determinations are made by authorized officials based on rules, regulations, and provisions stipulated in domestic and international law.

and risk attached to these new legal innovations and the yet-to-be regulated
governmental powers they invigorate and propagate. I further aim to establish that
debates about migration and globalization can no longer revolve around the
dichotomy between open versus closed borders. Instead, the unique and
perplexing feature of this new landscape is that countries simultaneously engage in
both opening and closing their borders, but do so selectively. Countries indicate,
quite decisively, whom they desire to admit (those with specialized skills, superb
talents, or increasingly, deep pockets), while at the same time erecting higher and
higher legal walls to block out those deemed unwanted or too different.19

This dialectical relationship between restrictive closure and selective
openness is what makes the study of the new legal gates of admission ever more
vital. This relationship is also where the reformulation of basic conceptions of
membership boundaries intertwine with profound questions of justice and
distribution about how, by whom, and according to what principles, well-off
societies should allocate access to safety and protection in an unequal world like
our own. It further reveals, quite vividly, the recalibration of new immigration and
border regimes as “public statements,” as a recent study put it, “about who we are
now, who we want to become, and who is morally worthy to join us.”20

The shifting border is a key pillar in prosperous countries’ wholesale agenda
to strategically and selectively sort and regulate mobility. As a result, it is
increasingly difficult for unwanted and uninvited migrants to set foot in the
greener pastures of the more affluent and stable polities they desperately seek to
enter. Conversely, wealthy migrants wishing to deposit their mobile capital in
these very same countries find fewer and fewer restrictions to fast-tracked
admission.21 Increasingly, the world’s most prosperous and stable democracies
rely on the shifting border concept and practice to (re)ascribe meaning to borders
and gatekeeping far beyond the traditionally fixed sovereignty-territory nexus,
making borders “semi-permeable to some and inescapable for others.”22

To substantiate these claims, my discussion proceeds in three parts. Part I
begins by painting a picture of the complex, multilayered, and ever-transforming
border, one that is drawn and redrawn through the law. To comprehend the
novelty of the shifting border, I contrast competing models: the classic, clearly
demarcated territorial border that serves as the frontline for setting barriers to

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19 Ayelet Shachar, Picking Winners: Olympic Citizenship and the Global Race for Talent, 120 YALE
L.J. 2088 (2011); Ayelet Shachar & Ran Hirschl, On Citizenship, States and Markets, 22 J. POL. PHIL.
231 (2014); Ayelet Shachar, Selecting by Merit: The Brave New World of Stratified Mobility, in
MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Lea
Ypi eds., 2016).
20 David Cook-Martin & David FitzGerald, Culling the Masses: A Rejoinder, 38 J. ETHNIC & RACIAL
STUD. 1319, 1320 (2015); see also Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA.
21 Shachar, supra note 13 at 794.
22 As Frontex, the European border agency, has explicitly put it, these measures are designed to curb
the flow of “the billions of less fortunate people of the world.” See JAMES FERGUSSON, TWELVE
SECONDS TO DECIDE: IN SEARCH OF EXCELLENCE, FRONTEX AND THE PRINCIPLE OF BEST PRACTICE
8 (2014).
admission, which I call the static model and the alternate, globalist vision of a world in which extant borders are, or soon will be, traversed with the greatest of ease, to the extent that they become all but meaningless. This we might label the disappearing border. The latter has led some scholars to claim that the grip of borders, or even the fundamental principle of territoriality itself, is waning in a world “where agency (individual choice) takes precedence over structure (the laws and rules of territorial States).”23 As a corollary, some argue that in the current age of globalization, States are losing control over their authority to determine whom to include and whom to exclude.24 The actual legal practices of and exercise of authority by governments operating under the shifting border framework, alas, refute this narrative of global, unidirectional progression toward a borderless world. Instead, we witness a more dynamic process of change whereby States—acting alone or in concert—are reinventing and reinvigorating their borders and membership boundaries in profound ways.25 By understanding the shifting border as an alternative to the established theoretical poles of static and disappearing boundaries, I aim to show that the proposed framework of analysis more fully captures and accounts for the profound patterns of change that we are witnessing in the world around us.

Part II focuses on the legal innovations adopted by the world’s leading immigrant-receiving countries spearheading the shifting border paradigm: the United States, Canada, and Australia. I also demonstrate how the European Union and its member States have rewritten pages—if not chapters—of the shifting border book. These case studies provide a rich empirical foundation upon which the rest of the discussion relies.

Part III moves from the positive to the normative to the prescriptive. It articulates the contours of a new approach that seeks to realign the almost boundless reach of migration control in the age of shifting borders with some degree of accountability, legal responsibility, and adherence to important constitutional limitations and human rights norms by state actors or their delegates, public and private. I argue that in order to effectively constrain the excesses of the shifting border, jurists and activists must adapt to its perplexing “everywhere-and-nowhere” logic. One promising way to respond to the multiple,
mobile and diffuse features of the shifting border is to apply the presumption that “when legal power is brought to bear, so too are legal protections.” This presumption adheres to basic rule of law principles holding that “the political branches … [cannot] govern without legal constraints.” When a country such as the “United States acts outside its borders, its powers are not ‘absolute and unlimited.’ Basic rights protections are not ‘turned on or off at will.’ Instead of focusing on where the act of border regulation took place, the proposed approach requires adopting a functional or jurisdictional test according to which obligations to protect are activated as soon as effective control by official agents of States, or their delegates, occurs. The idea is to treat the everywhere-and-nowhere logic of the shifting border as a new feature of governance which invites innovation to tame the most excessive and yet-unregulated exercise of de-territorialized migration and border control. I will argue that by applying familiar principles to novel circumstances, the restless agility and multiscalar operations of the shifting border may elicit a set of rights-enhancing protections from the restricting States, which hitherto have relied on this new technology of governance and spatiality to escape accountability and constrain rights. This line of response incorporates the very logic of de-territorialized migration control that lies at the heart of the shifting border, while at the same time subverting it, and relies on three prongs: (i) expanding the extraterritorial reach of human rights; (ii) requiring states to extend their shifting borders in favor of mobility, rather than to limit it; and (iii) rethinking legal spatiality as a resource, rather than a barrier, for migrants in need of protection. While this three-pronged approach is not a panacea, the endeavor is to break the current deadlock and refute the claim that applicable solutions are beyond reach or impossible to imagine.

I. THE SHIFTING BORDER

To comprehend the novelty of the shifting border, we must contrast it withcontending models: the classic, clearly demarcated territorial border that serves

26 Kal Raustiala, *The Geography of Justice*, 76 FORDHAM L. REV. 2503, 2504 (2005). This presumption is rebuttable, as Raustiala rightly points out. Indeed, some of the most lasting debates center around defining the precise geographical reach of this presumption. For an excellent overview of these debates, see Shown E. Fields, *From Guantánamo to Syria: The Extraterritorial Constitution in the Age of ‘Extreme Vetting,’* 39 CARDOZO L. REV. 1123, 1129–41 (2018).


28 *Id.*

29 *Id.*

as the frontline for setting barriers to admission and the contrasting, globalist vision of a world in which extant borders are traversed with the greatest of ease, to the extent that they become all but meaningless. It is convenient to refer to these competing approaches as the static versus disappearing conceptions of the border. I discuss each in turn.

A. Neither Static Nor Disappearing

The classic Westphalian ideal of statehood sees the border as a permanent and static barrier that stands at the frontier of a country’s territory. This formidable border serves a crucial role in delimiting (externally) and binding (internally) a nation’s territory, jurisdiction, and peoplehood, correlating with a notion of fixed “legal spatiality.” For many years, this concept permeated our thinking about mobility, borders, and sovereignty, ensnaring us in what political geographers refer to as the “territorial trap.” This trap, and the assumption undergirding it, reifies and naturalizes the lines demarcating States as though they represent bounded, mutually exclusive territorial units. By envisioning States as having a monopoly over the legitimate exercise of power and authority within their domains, the territoriality principle politicizes space and brings it under juridical control.

With the rise of the discourse of globalization, a competing vision emerged. The thought de jour was that borders are, or soon will be, disappearing. Theorists of post-nationalism, trans-nationalism and open-border admission policies have painted a picture of a new world order in which borders are on the decline, global commerce and human mobility is on the rise, and international human rights instruments gain sway. Catchphrases such as the “end of the nation-state,” “waning sovereignty,” and a “borderless world” have gained traction. In the post-Westphalian literature of the last quarter century, the core prognosis is that borders are becoming things of the past, sovereignty is diminishing, and States as territorially-bounded “containers” of authority are dissipating.

These predictions are now contested. From the surge of nationalist populism to the backlash against supranational courts and challenges to the multilateral architecture of the post-war international order, reports of the demise of States and borders appear to have been, like the rumors of Mark Twain’s death, greatly exaggerated. Whereas adherents to the disappearing border thesis have claimed that States can no longer restrict access by non-citizens seeking to enter, an opposite trend has appeared. By severing the link between the territorial border and the exercise of migration control, the shifting border has given governments and regulatory agencies (operating primarily but not only at the national level) greater latitude to develop new enforcement policies that manipulate the location and spatial reach of the border—seeping into the territory’s interior or extending

31 Raustiala, supra note 26; see also John H. Herz, Rise and Demise of the Territorial State, 9 WORLD POL. 473, 480–481 (1957).
well beyond its outer limits—in the process deterring access by uninvited migrants.

B. The Sites of Regulation: “At the Border”

Given the close connection between sovereign authority, territory, and legal spatiality, the Westphalian model logically assumed that it is precisely at the border that agents of the State are permitted to exercise the utmost control over access, including through the power to make the decision “to turn back from our gates any alien or class of aliens.”33 The core precedents in the corpus of American immigration law repeat the observation that an alien who is stopped at the border enjoys far less protection than a person who is already within the country.34 Such rights remain unavailable to would-be immigrants, so long as they remain outside the geographical borders of the United States.35 The notion that legal circumstances affecting non-members substantively change after they cross “our gates” manifests a vision of a world order characterized by hermetically sealed legal spatiality alongside delineated and permanent borders. However, these assumptions are increasingly strained. While continuing to formally rely on the fixed conception of a border with rigid binary distinctions between the exterior and the interior, regulatory agencies and actors situated at multiple levels and junctures of governance simultaneously expand the actual (largely unchecked) scope and reach of their migration and border control activities far beyond the edges of the territory and deep into the interior.

Relaxing the relationship between law and territoriality has created a whole new purview for exercising sovereign control over migration anywhere in the world in the name of securing the integrity of the home territory and vigilantly protecting its membership boundaries. This new interpretation profoundly challenges the classic Westphalian conceptualization of the border as static and fixed. Instead, the shifting border resourcefully turns the border, which was once territorially affixed to the edge of a country’s geopolitical frontier, into a moving barrier. As such, it can be “implanted” wherever and whenever mobility control operations are required. While retaining the foundational notions of inclusion and exclusion, the shifting border fractalizes them such that they can be reoriented across time and space distally remote from the actual protected homeland, relocating the encounter between the non-citizen and the state’s power of exclusion away from the physical border toward the outermost concentric ring of regulation that is closest to the departure point and time. These dramatic measures also blur and erode the once-firm distinction between the full-fledged rights-holding citizen and the less-welcome alien.

As both scholars and law enforcement agencies are quick to observe, States have the capacity and the authority to “determine those to admit and to whom

33 Shaughnessy, 228 U.S. at 550 (Jackson J., dissenting).
34 This dates back to the early twentieth century. See, e.g., Kaplan v. Tod, 267 U.S. 228 (1925).
citizenship should be granted." 36 Under the static image of the Westphalian international system, each state has its own clearly-demarcated and exclusive territory and citizenry. The legal drawing of borders and membership boundaries—and the consequent authority to control who enters the territory—is seen as a sine qua non of sovereignty. 37 However, the flexible way in which these traditional concepts of sovereignty and jurisdiction are now put into operation are novel, leading to pressing and yet unresolved tensions between these new measures of controlling mobility across (ever-shifting) borders and rule-of-law countries’ declared commitments to constitutional and human rights standards and protections. These tensions reveal the inadequacy of seeking (or creating) legal cover under the static conception of the border while persistently breaching it through the devising of far more dynamic, multifaceted, and de-territorialized techniques of governance that rely on the shifting border. I now turn to chart the surprisingly sophisticated and imaginative “re-bordering” techniques that enable the far-reaching reinvention of the border as simultaneously more open and closed.

II. DOMESTIC AND COMPARATIVE EXAMPLES

Ongoing developments in the regulation of immigration around the world demonstrate a complex shift in the way modern states implement and situate border controls. Consider the following examples, from near and far. 38

A. Seeping Inward

As part of a major reform to border control and immigration regulation, the United States adopted a procedure called “expedited removal.” 39 This legal


37 This sentiment is perhaps best captured by Emmerich de Vattel’s milestone mid-eighteenth century international law treatise, THE LAW OF NATIONS. Fast forwarding to the early twenty-first century, however, we find that many of the most heated debates in legal and political theory today reexamine this, once taken for granted, authority of States to exclusively control their membership boundaries and to unilaterally control the borders of entry and admission, or put more bluntly, their right to exclude. See, e.g., Arash Abizadah, Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders, 36 POL. THEORY 37 (2008). For a contrasting view, see Christopher Heath Wellman, Immigration and Freedom of Association, 119 ETHICS 109 (2008). While these theoretical debates are illuminating and potentially path-breaking, they often lack the kind of minute detail and sensitivity to context offered by legal or sociological analysis.

38 These examples are elucidatory and cumulative rather than exhaustive.

39 The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 302 (revised § 235(b)(1)(A)(i) and (ii) of the Immigration and Nationality Act, 2017) (“If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless
provision permits frontline officers and border patrol agents to expeditiously turn away undocumented migrants at the border and review the legal status of individuals detected up to one hundred miles away from any external boundary of the United States. In effect, expedited removal has moved the border from its fixed location at the country’s territorial edges and into the interior.

This legal maneuver not only relocates the border, but also augments what has been referred to as a “constitution-free” or “constitution-lite” zone within the United States—allowing law enforcement agents to set up checkpoints on highways, at ferry terminals, or on trains, requiring any random person to provide proof of their legal status in the United States. Such governmental surveillance of movement and mobility—traditionally restricted to the actual location of border crossing—is now spilling into the interior. This trend is depicted in Figure 1: United States: The Shifting Border—Seeping into the Interior, located in the Appendix.

The most recent official US census data reveal that no less than two-thirds of the United States population lives in this one hundred-mile constitution-lite zone. That is, more than 200 million people live in the malleable or moveable border zone. The whole State of New York, for example, lies completely within one hundred miles of the land and coastal borders of the United States. So does Florida, another migrant-magnet State. And the governmental agency responsible for managing the shifting border, the Department of Homeland Security, has gone on record declaring that its border-enforcement measures may well expand “nationwide.”

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40 The current temporal and spatial specifications of expedited removal appear in the Federal Register. In 2002, expedited removal was extended to all those who had entered the United States without authorization by water and could not establish to the satisfaction of a border agent that they had been continuously present in the country for at least two years. Cuban nationals were originally exempted from this class. However, that exemption was rescinded on January 17, 2017. In 2004, the reach of expedited removal was expanded to include aliens apprehended within one hundred miles of a US international border within fourteen days of entry. See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

41 The US Supreme Court has held that such internal checkpoints on highways leading to or away from the border are not a violation of the constitutional guarantee against unreasonable searches and seizures, and the border patrol agents “have wide discretion” to selectively refer motorists for additional questioning. See United States v. Martinez-Fuerte, 428 U.S. 543, 564 (1976). Such checkpoints are “located on major U.S highways and secondary roads, usually 25 to 100 miles inland from the border.” See U.S. Gov’t Accountability Office, GAO 09-824, Border Patrol: Checkpoints Contribute to Border Patrol’s Mission, but More Consistent Data Collection and Performance Measurement Could Improve Effectiveness 7 (2009). People who enter the United States without permission and are apprehended within one hundred miles of a US international border within fourteen days of entry are subject to expedited removal. See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

42 Rickerd, supra note 11.

43 Id.

44 Id.

45 Id.

Until recently, the prospect of nationwide implementation seemed to belong squarely in the realm of the futuristic and the implausible. However, in today’s political environment of “getting tough” on immigration, the current administration’s commitment to “using all these statutory authorities to the greatest extent practicable”\(^\text{47}\) potentially translates into a massive spatial and temporal expansion of expedited removal.\(^\text{48}\) Supplemented by multiple executive orders and accompanying memos, expedited removal could potentially reach “any immigrant anywhere in the United States who can’t prove that they’ve been in the country for two or more years.”\(^\text{49}\) A simple notice in the Federal Register is all that is required to make this sweeping augmentation of the border a legal reality. Under the shifting border paradigm, the “interior” could be recast as the “exterior” for the purposes of immigration control with the stroke of a pen.\(^\text{50}\)

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\(^{48}\) On January 25, 2017, President Donald Trump issued Executive Order 13767 (“Border Security and Immigration Enforcement Improvements”) and Executive Order 13768 (“Enhancing Public Safety in the Interior of the United States”) which cumulatively hold the potential to dramatically expand the reach of expedited removal. Subsequently, then-DHS Secretary John Kelly issued two memos on the implementation of the aforementioned executive orders. Read together, the memos committed to using all “statutory authorities to the greatest extent practicable” and promised a new Notice Designating Aliens Subject to Expedited Removal to be published in the Federal Register. Memorandum from John Kelly, supra note 47; Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Protection, et al. on Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (Feb. 20 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf. Based on the language of the executive orders and memos, some observers have concluded the Secretary intends to utilize his discretion to the fullest extent authorized, both spatially (nationwide) and temporally (two years). \(\text{E.g.},\) INA § 235(b)(1)(A)(iii); 8 U.S.C. § 1225(b)(1)(A)(iii) ((I) The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time. (II) An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.]).

\(^{49}\) Parties in Castro and Peralta-Sanchez raised the likelihood of such expansion in their arguments (emphasis added). See Castro v. United States Dep't of Homeland Sec, 835 F.3d 422 (3d Cir. 2016); United States v. Peralta-Sanchez, 847 F.3d 1124 (9th Cir. 2017), opinion withdrawn on grant of reh’g, 868 F.3d 852 (9th Cir 2017), and on reh’g, 705 F App’x 542 (9th Cir. 2017), cert. denied sub nom Sanchez v United States, 138 S Ct 702, 199 L. Ed. 2d 575 (2018) (“Peralto-Sanchez”). For information on an interview with ACLU lawyers for Castro, see Esther Yu Hsi Lee, Immigrant Families Aren’t Getting Their Day in Court, THINKPROGRESS (May 20, 2016, 1:09 PM), https://thinkprogress.org/immigrant-families-arent-getting-their-day-in-court-17061026ec2e/ and for information on Peralta-Sanchez, see Bob Egelko, Court Denies Immigrants Right to Attorney in Expedited Deportations, SFGATE (Feb. 7, 2017, 4:57 PM) http://www.sfgate.com/nation/article/Court-denies-immigrants-Sright-to-attorney-in-10915296.php.

\(^{50}\) To date, no such notice has been issued. If such an expansion were to occur, major litigation
The notion that legal circumstances affecting non-members change dramatically after migrants “passed through our gates” is well-established, as canonical case law from *Shaughnessy* to *Zadvydas* attests.\(^{51}\) However, in addition to conjuring house of mirrors-like stretching and contracting movements, the shifting border distinguishes between *physical entry* into the country (which does not count for immigration purposes) and *lawful admission* through a recognized port-of-entry (which makes one’s presence in the territory permissible, and therefore visible, in the eyes of the regulatory state). Accordingly, entry into the territory—the material act of crossing the geographical border and physically being present within the jurisdiction of the United States—does not equate with legally “being here.”\(^{52}\) This change in meaning is formalized in law: “an alien present in the United States without being admitted,” to recite the somewhat cryptic language of the Immigration and Nationality Act, is treated as though the irregular migrant (who is already present in the territory) had never really crossed the border into the country.\(^{53}\) This legal fiction bears serious consequences for those aliens present in the United States without being admitted. For instance, their unlawful admission effectuates the preclusion of status regularization or the application of waivers during the removal process, thereby causing them to forfeit their prospect of future lawful admission to the United States.\(^{54}\) Moreover, the very act of crossing without inspection and permission (the otherwise unrecognized presence of the non-citizen in the territory) becomes the “main substantive charge used to remove them.”\(^{55}\)

Another such ramification is that those on the “inside” are deemed to be “outside.” This includes the hundreds of thousands of people expeditiously removed each year, who find themselves in a parallel universe of “nonexistent procedural safeguards.”\(^{56}\) As a recent court decision put it, for those facing expedited removal “[t]here is no right to appear in front of a judge and no right to hire legal representation. There is no hearing, no neutral decision-maker, no evidentiary findings, and no right to appeal.”\(^{57}\) When such far-reaching denial of procedural justice occurs in an established democracy such as the United States,

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\(^{51}\) *Shaughnessy* v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *Zadvydas* v. Davis, 533 U.S. 678, 693 (2001); see also *Kaplan* v. Tod, 267 U.S. 228 (1925).

\(^{52}\) The term “being here” is drawn from Linda Bosniak’s critical investigation into the ethical significance of territorial presence of unauthorized migrants. See Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES IN L. 389 (2007); see also Leti Volpp, *Imaginings of Space in Immigration Law*, 9 LAW CULTURE & HUMAN. 456 (2013).

\(^{53}\) 8 U.S.C. § 1182(a)(6)(A)(i) (2012). These individuals will have certain constitutional protections while in the country, including procedural or substantive due process, or both.


\(^{55}\) There is also a ten-year bar to re-admission. See Immigration and Nationality Act § 212(a)(9)(B)(i)-(II).


\(^{57}\) *Id.* at 1142.
it tests not only our notions of territoriality, but legality as well. Recent figures show that a “staggering 83% of the people removed from the United States . . . were [expeditiously] removed without a hearing, without a judge, without legal representation, and without the opportunity to apply for most forms of relief from removals.”58 The traditional constitutional and human rights arsenal of responses has proven toothless in the face of these new realities. To begin to counter this phenomenon, we must familiarize ourselves with the shifting legal ground upon which this immense, and almost unrestricted, governmental power to determine whom to exclude or remove now stands.

In creating the legal distinction between “entry” and “admission,” US immigration law effectively treats individuals present in the country without authorization as though they had been stopped at the border, depriving them of the traditional protections enjoyed by non-citizens who have actually made it into the interior. Such a legal maneuver can only occur by “redrawing the traditional exclusion-deportation line” under a shifting conception of the border.59 The exclusion-deportation line has become de-territorialized; the key factor for the legal analysis is not whether the person has passed through the territory’s physical frontiers. Rather, the question for immigration regulation purposes is whether the person has crossed at any time or place through the law’s gates of admission, which, as the authorizing legislation proclaims, are not territorially fixed but rather designated by the executive branch of government.60

B. Stretching Outward

Just as the shifting border seeps into the interior, it extends the long arm of the state outwards, ever more flexibly, to regulate mobility at a distance. To provide but one example, travelers that wish to embark on a US-bound flight now regularly encounter the US border, or its authorized guardians (US officials located on foreign soil), in places as diverse as Freeport and Nassau in the Bahamas, Dublin and Shannon in Ireland, or Abu Dhabi in the United Arab Emirates.61 Thanks to a legal carve-out known as the pre-clearance system, these

58 Id. at 1143. The 83 percent figure comes from Department of Homeland Security immigration enforcement data for fiscal year 2013 and covers expedited and reinstatement of removal procedures, both of which are grounded in the IIRIRA reform and fast-tracked. Id. at 1142–43.
61 After 9/11, the Department of Homeland Security (DHS) was established. It combined the functions of the former Immigration and Naturalization Service (INS) and the former US Customs Service. Currently, several agencies within DHS perform the duties of border patrol and interior enforcement. The US Customs and Border Protection (CBP) is the largest uniformed federal law enforcement agency in the country. CBP agents have the authority to safeguard America’s borders at officially designated ports of entry in the United States as well as a growing number of pre-clearance locations outside the country. See Preclearance Locations: Preclearance Overview, U.S. CUSTOMS & BORDER PROTECTION (June 22, 2017), https://www.cbp.gov/border-security/ports-entry/operations/preclearance. The US Border Patrol (BP) is part of CBP, which is responsible for patrolling the areas at and around the US international borders, namely, the one hundred-mile zone in
procedures regularly take place in foreign transit hubs that are sometimes located tens, hundreds, or even thousands of miles away from the homeland territory.\textsuperscript{62}

This reinvention of the border and the kind of legal framework it relies upon—allowing the United States to exercise sovereign control over its border, far away from its territory, on the home turf of another nation-State—is “a really big deal,” explained the former Secretary of the Department of Homeland Security in an interview with The New York Times.\textsuperscript{63}\[I\]t would be like us saying you can have a foreign law enforcement operating in a U.S. facility with all the privileges given to law enforcement, but we are going to do it on your territory and on our rules … So you flip it around, and you realize it is a big deal for [another] country to agree to that.”\textsuperscript{64} Currently, more than 600 American customs and border control and agricultural specialists are deployed in airports around the world, processing over 18 million US-bound passengers per year before they embark on their air travel journeys to the United States. An ambitious expansion program for such preclearance and pre-inspection procedures launched in 2015 with the goal of pre-clearing, on foreign soil, at least a third of all US-bound air travelers by 2040. The official publication of America’s border protection agency simply and elegantly summarizes the thinking behind this manifestation of the shifting border, highlighting its outwards expansion.\textsuperscript{65} Such expansion is expected to promote America’s interests by facilitating international trade and travel, while at the same time countering global security threats by allowing the “United States and our international partners to jointly identify and address threats at the earliest possible point.”\textsuperscript{66} Such conflation of priority in time with location and distance is made possible by and is a manifestation of the shifting border paradigm. Strikingly, such pre-inspection decisions bear the full weight of US law as though their determinations were made “at the border,” even though the territory of the United States is very far from sight. The border has instead been replanted as a legal construct on non-US soil.

While no other country operates its immigration control on American soil, the United States has now entered into advanced negotiations to build more preclearance capacity at airports overseas, seeking to further expand its reach into which expedited removal takes places, where BP agents have the jurisdiction to detect, apprehend, investigate, and detain “illegal aliens and smugglers of aliens at or near the land [and coastal] border.” Lastly, US Immigration and Customs Enforcement (ICE) is responsible for locating persons who are within the remaining areas of the United States without authorization and removing them where relevant. The combined budget of these immigration enforcement agencies is larger than all other federal enforcement agencies combined.

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
new regions and continents. The rationale for such expansion is drawn straight from the playbook of the shifting border. As the government’s highest officials readily pronounce, the intent is to “take every opportunity we have to push our operations out beyond our borders so that we are not defending the homeland from the one-yard line.”

Critics, for their part, have decried such developments, arguing that coupled with increasingly intrusive reporting and monitoring requirements for international travel, the heightened risk of privacy violations reflects a “dystopian vision of a ‘transatlantic security space’ involving an exchange of [passenger] records, fingerprints and personal data.” Despite initial skepticism and concerns about compliance with the European Convention on Human Rights, key European countries such as Belgium, the Netherlands, Norway, Spain, Sweden, and the United Kingdom now permit, or are in the process of finalizing, approval for US officials to obtain “quasi-operative competences at European airports” so as to perform security checks on passengers before embarking on transatlantic flights. Iceland and Italy are the latest countries to have joined this list.

Such measures for screening individuals before their arrival at a desired destination may well prove to be the wave of the future; they are arguably a regulator’s dream tool for deterring unwanted admission. As the International Organization for Migration (IOM) noted in a recent report, “[m]any States which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic immigration laws and policies.” This insight has not been lost on the architects of the shifting border. The governing legislation in the United States, the Immigration and Nationality Act, now authorizes US customs and immigration protection officers to examine and inspect the passengers and crew of “any aircraft, vessel, or train proceeding directly, without stopping, from a port or place

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67 In addition to extending migration control aboard for air travel, the United States also has a long history of interdiction at sea, which has engendered the controversial US Supreme Court Sale precedent, according to which summary return of migrants, including asylum seekers, interdicted on the high seas does not engage the non-refoulement obligation to which the United States, like other rich democracies, has committed through both its domestic and international law obligations. Haitian Ctrs. Council, Inc. v. McNary, 807 F. Supp. 928 (E.D.N.Y. 1992), cert. granted sub nom Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918 (1993).

68 Press Release, Dep’t of Homeland Sec. Press Office, DHS Announces Intent to Expand Preclearance to 10 New Airports (May 29, 2015) (quoting Jen Johnson, then Secretary of Homeland Security); see also Ron Dixon, Homeland Security Goes Abroad. Not Everyone is Grateful, N.Y. TIMES, December 26, 2017 (estimating that over 2,000 Homeland Security employees, including immigration and customs enforcement special agents, are now deployed to more than 70 countries around the world).

69 Philip Oltermann, UK May Allow the U.S. Security Checks on Passengers before Transatlantic Travel, GUARDIAN, Sept. 11, 2014.

70 Department of Homeland Security, supra note 68.


in foreign territory to a port-of-entry in the United States” at its point of origin.\textsuperscript{73} Such decisions made by US officers stationed at these non-US locations are \textit{final} determinations of admissibility. A fine example is found in the arid, bureaucratic words of US immigration law, which hold that inspection made “at the port or place in the foreign territory … shall have the same effect under the Act as though made at the destined port-of-entry in the United States.”\textsuperscript{74} This radical “re-location” of the border—placing it in a foreign territory’s jurisdiction—is made possible through a combination of domestic authorization and transnational cooperation (typically bilateral agreements with the countries on whose territory US agents are permitted to conduct the preclearance). Taking the logic of the shifting border a step further, the United States recently signed its first-ever regional compact, known as the Memorandum of Cooperation, facilitating multilateral border security cooperation in Central America.\textsuperscript{75} Officials at the Department of Homeland Security clarified that such collaboration with national governments in transit countries gives the United States room to “stem the flood of irregular migration and develop [a] regional approach to addressing the ongoing humanitarian and security emergency at our Southern Border.”\textsuperscript{76}

The United States’ shifting border is part of a larger transformation to which other leading destination countries have contributed through the legislative and regulatory actions they have undertaken. The Canadian government, for example, proclaims itself a “world leader in developing interdiction strategies against illegal migration.”\textsuperscript{77} Apart from Canada’s massive shared land border with the United States, it is otherwise surrounded by large bodies of water and ice. Given its geopolitical location, Canada relies heavily on overseas interdiction.\textsuperscript{78} Over the years, it has perfected the technique of interdiction abroad, effectively relocating much of its migration regulation activities to overseas gateways, located primarily in Europe and Asia.\textsuperscript{79} There, migration integrity officers, or liaison officers (as they are called now), conduct border control activities as a matter of course even though they are nowhere near the formal edge or frontier of Canadian territory. Instead, as a key component of the shifting border strategy, these government officials are strategically located in “key foreign embarkation, transit and immigration points around the world.”\textsuperscript{80} As official documents put it,\

\begin{itemize}
  \item \textsuperscript{73} 8 C.F.R. § 235.5(b) (2019).
  \item \textsuperscript{74} Id.
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Janet Dench, \textit{Controlling the Borders: C-31 and Interdiction}, 19\textit{ REFUGE} 34, 34–37 (2001).
  \item \textsuperscript{78} House of Commons, Standing Committee on Citizenship and Immigration, “Evidence” in \textit{Standing on Guard for Thee: Ensuring that Canada’s Immigration System is Secure}, No 021 (14 February 2012) (Chair: Mr. David Tilson) at 1-4.
  \item \textsuperscript{79} Id. at 3. (Canada has 63 liaison officers in 49 locations around the globe.).
  \item \textsuperscript{80} CAN. BORDER SERV. AGENCY, FACT SHEET (2009), https://www.cbsa-asfc.gc.ca/media/facts-faits/030-eng.html.
\end{itemize}
this part of Canada’s border strategy strives to “‘push [the] borders out’ . . . as far away from our [territorial] borders as possible.”  

In the words of the Statement of Mutual Understanding on Information Sharing, “moving the focus of control of movement of people away from [the territorial] border to overseas, where potential violators of citizenship and immigration laws are interdicted prior to their arrival” has become a core feature of the country’s “Multiple Borders Strategy,” as Canada has branded its extensive variant of the shifting border strategy.  

For further details, see Figure 2: Canada: The Shifting Border—Stretching Outward, located in the Appendix.

As is traditionally the case in the United States, in Canada the act of “touching base” on the territory has significant legal consequences for the scope of rights and protections granted to asylum seekers, according to domestic and international legal obligations.  

In 1985, one of the earliest and most revered cases of the Supreme Court of Canada in the Charter era dealt with the rights of refugees. In that case, Singh v. Minister of Employment and Immigration, the court held that if undocumented or irregular migrants reach Canadian territory, they are entitled to the protection of the Charter of Rights and Freedoms.  

Those who have managed to physically reach Canada have a consecrated right to a refugee status hearing before facing potential removal from the country. Similar substantive protections and procedural guarantees are not automatically triggered if one is interdicted or intercepted before reaching Canada’s border. As part of a comprehensive study on immigration-triggered detention and removal, Canada’s Senate Standing Committee on Citizenship and Immigration concluded that the “interdiction abroad of people who are inadmissible to Canada is the most efficient manner of reducing the need for costly, lengthy removal processes.”  

Under this scheme, Canada can avoid triggering the constitutional provisions that it had previously established to apply to protect the rights of non-citizens landing on Canadian territory.  

Investing such legal meaning in the distinction between “inside” and “outside” had the unintended consequence of incentivizing policymakers to introduce a slew of measures “to push out the border” in order to avert both the arrival of unauthorized migrants and the engagement of

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81 GOV’T OF CAN., supra note 8.

82 SMU, supra note 2 (reflecting the premise that “border security and border management are based upon cooperation and collaboration”).


84 Singh v. Canada (Minister of Emp’t & Immigr.), [1985] 1 S.C.R. 177, para. 81 (Can.).


86 Singh, supra note 86.
constitutionally-protected rights and procedures. Asylum seekers caught in the wide net of Canada’s interdiction and the shifting border strategy of enforcement are prevented from presenting their full cases to State authorities.

Being turned away before reaching Canadian territory is crucially important for defining the scope of the constitutional and international protections to which these non-citizens are entitled. For if the very same individuals were to land on Canadian soil, by virtue of Singh, they would have been entitled to a full oral hearing to determine the merits of their claims to stay, even if they were carrying improper documents. No similar rights apply to them if they are interdicted prior to reaching Canada. Here again, we see an example of the tension between human rights protections and the border control measures established beyond national territory, purportedly to “combat global irregular migration” (as official government documents state). From a human rights perspective, measures to outwardly “relocate” the border in order to skirt legal obligations are objectionable, as they reveal governmental attempts to evade and confine rights protections to the classic boundaries of the static Westphalian interpretation of territory in a world where mobility is increasingly regulated across time and space without constraint. The dynamism of the shifting border—its flexible and alternating inward and outward mobility—thus actively contributes to the immobility of those who seek to cross it. By barring certain bodies and populations from territorial arrival to well-off countries, the shifting border not only redraws the geography of power but also exacerbates the influence inequality and accidents of birthplace have on access to life-saving protection regimes. At-a-distance control measures play a vital role in the process as they prevent would-be immigrants and asylum seekers from activating the range of legal entitlements that they are owed in the destinations they seek to reach, while shielding affluent law-abiding countries from otherwise binding human rights obligations towards those escaping persecution. Nevertheless, it is not difficult to appreciate why such legal fictions, and the idea of a shifting border more broadly, are so attractive to policymakers who are under increasing pressures to act decisively in the face of growing voter anxiety over immigration, ever more frequently finding themselves in “crisis-control” mode.

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87 See, e.g., Efrat Arbel, Bordering the Constitution, Constituting the Border, 53 OSGOODE HALL L. J. 824, 826-27 (2016).


89 In response to shifting border techniques, the scope and application of international refugee and human rights laws should not be determined, from a moral and legal point of view, by the question of where the encounter with State officials (or their delegates) has occurred. What matters is that such an encounter took place and effective control was exercised, a point to which I return later in the analysis, in the final part of the discussion. See infra notes 200-220.

90 INTER-PARLIAMENTARY UNION & UNHCR, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 6 (2017) (“Providing protection to people fleeing in search of refuge is one of humanity’s most long-standing traditions—a shared value embedded in many religious and cultural traditions, and now part of international law.”).
Canada, along with many other wealthy nations, also relies heavily on private sector third-party actors, in particular airline carriers, as “enforcers” of its immigration regulations and border control provisions. As many seasoned travelers will know, it is usually airline personnel who verify that the required documents and visas are valid prior to permitting embarkation on international flights. They do so, at least in part, because their companies face steep financial penalties from the receiving countries if they transport improperly documented persons into their territories. Canadian law permits the government to seek reimbursement from airline carriers for “costs of detention, return, and, in some cases, medical care” associated with irregular migrants that arrive aboard their flights. Likewise, the Schengen Implementation Agreement obliges all members of the European Union to implement similar carrier sanctions. Allowing airline personnel to perform such passport control activities contributes to the growing role of private sector intermediaries in conducting what is arguably a central plank of sovereign authority: deciding whom to admit and whom to keep at bay.

In the same vein, the United Kingdom, New Zealand, and Australia have also developed comparable mechanisms of migration regulation and control abroad, working in close cooperation with U.S. and Canadian overseas migration integrity and liaison officers. This partnership resembles the collaborative model of the “five-eyes” alliance (FVEY, as it is known), which is a wide ranging intelligence and data-sharing network with extensive surveillance capabilities that focuses, among other activities, on “remote control” border and migration control. Since the early 2000s, Member States of the European Union have followed suit and created an expanded transnational network of immigration liaison officers operating under an overarching EU directive framework. As a result, these interdiction programs have proliferated into a massive information-gathering “network of contacts with host-country officials, officials from other governments


92 Canada as well as other countries have also signed memoranda of understanding with airline carriers that permit immigration officials abroad to refuse permission to individual passengers to board flights in return for indemnity from the administrative fines these airline carriers would have been obliged to pay if found carrying inadmissible passengers. See, e.g., KLM Royal Dutch Airlines v. Canada (Solicitor General), [2004] F.C. 308 (Can.).

93 Andrew Brouwer & Judith Kumin, Interception and Asylum: When Migration Control and Human Rights Collide, 21 REFUGE 6, 10 (2003).

94 In the same vein, the 1990 Schengen Implementation Agreement obliges all members of the European Union to implement carrier sanctions. This mandate was further enhanced in 2001 by a European Council Directive that aims to harmonize these financial sanctions as a powerful regulatory tool, used here by member-States in concert, to diminish the prospects of arrival to their shores of unauthorized migrants.

95 Aristide R. Zolberg, Matters of State: Theorizing Immigration Policy, in THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 70, 71 (Charles Hirschman et al. eds., 1999) (using “remote control” to refer to unilateral visa control and related measures). Here, the term is used to relate to translational, multilateral measures that extend far beyond that term’s original definition.
in the designated region, airline personnel and law-enforcement agents.” Operating along the travel continuum, the network of trusted partners identifies and interdicts improperly-documented travelers at the earliest point at which their identity can be verified and as remotely as possible from the actual border.96

No less significant for our discussion, these overseas government agents operate under the recommended guidelines developed by the International Air Transport Association (IATA).97 The existence of this non-state organization representing the global airline industry reveals not only the shifting location of the border but also the increased collaboration between private and public actors in regulating de-territorialized “edges” of well-off polities seeking to prevent admission of persons they deem unwanted.98

C. Erasing Territory

Australia has relocated its border more explicitly than Canada or the United States by creating a legal distinction between the country’s “migration zone” and the “Australia” that is recognizable on the map.99 The Migration Amendment Act of 2001 created this “excision” policy, which was expanded in 2005 and then again in 2013.100 This legislation authorizes Australia’s immigration officials to remove asylum seekers that have reached its “excised” territory as though they had never reached Australia, despite having physically landed on its shores.101 Put differently, those who reach the excision zone cannot make a valid asylum claim in Australia because they have never entered it in a legally cognizable way. The territory they reached is no longer “Australia” for immigration law purposes. This legal fiction further limits the procedural and substantive rights to which asylum seekers and other irregular migrants are entitled under domestic and international law.102 The excision policy also eliminates the possibility of judicial review; thus it not only redraws the territorial border but also attenuates legality in the

101 Instead, they are immediately directed to third countries declared safe, such as Nauru and Papua New Guinea (until the latter’s court ruled the practice unconstitutional according to PNG law) where Australia has funded detention centers. Even if found to be refugees, such unauthorized arrivals cannot be settled in Australia, and must remain in Nauru or PNG, or be resettled elsewhere. See U.S. Committee for Refugees and Immigrants, World Refugee Survey (2002).
102 Even before the creation of the excision zone, Australia introduced a mandatory detention policy for all arrivals without valid visas. See Migration Act 1958 (Act No. 62/1958) (Austl.).
process. In 2013, the excision zone was expanded through legislation to include the entire Australian mainland. In effect, this means that the border applies everywhere and nowhere at the same time. For further details, see Figure 3: The Shifting Border—Australia’s “Excision” Map, located in the Appendix.

The legal consequences of arrival to Australia’s “erased” territory are both far-reaching and irreversible; those falling under the spell of excision are denied the opportunity to secure refugee status in Australia even after their claims are adjudicated. Excision provides a hocus-locus-pocus way to keep out those who were never wanted or invited. Under this legal fiction, asylum seekers who arrived by boat and without permission are ineligible to claim protection under Australian immigration laws. By erecting a limitless line-of-defense against unauthorized maritime arrivals, excision creates a legal barrier that makes the possibility of passing through the proverbial entry gates illusionary, even for those who have managed to reach the country’s physical territory. This logic is reminiscent of the “seeping” of the U.S. border into the interior and the resulting restriction of rights, but with a unique Australian twist of “erasing,” with the stroke of a pen, certain segments of its own territory off the map for migration regulation purposes.

More limited versions of “excision” also once operated in high-traffic airports in European capitals, which declared certain areas physically located in their national territories as extraterritorial “international zones” or “transit zones” where the standard protections of domestic and international law did not apply. These transit zones functioned as legal “grey zones” in a limbo space, “in which officials ‘[w]ere not obliged to provide asylum seekers or foreign individuals with some or all of the protections available to those officially on State territory.’” This practice was eventually challenged in the European Court of Human Rights, which concluded that “[d]espite its name, the international zone does not have extraterritorial status.” As a result, border-control actions in these transit zones were brought back into the fold of legality.

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103 The terms legality and rule of law are notoriously difficult to define and are used interchangeably in my discussion. Martin Krygier, Transformations of the Rule of Law: Legal, Liberal and Neoliberal in The Politics of Legality in a Neoliberal Age 19–20 (Ben Golder & Daniel McLoughlin eds., 2018) (referring to “a number of ideas, among them constitutionalism, due process, legality, justice, that make claims for the proper character and role of law in well-ordered States and societies... Appeal to the rule of law [or legality] signals the hope that law might contribute to articulating, channeling, disciplining, constraining and informing—rather than merely serving—the exercise of power. If[t] refers collectively to such contributions as tempering power.”).


105 This unprecedented act was prefaced by a governmental clarification that the excised zones were not altogether removed from Australian sovereign territory. See PARLIAMENT OF AUSTL., supra note 91; Anthea Vogl, Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border, 38 U. OF NEW SOUTH WALES L.J. 114, 137 (2015).


108 See id.
The creation of these legal “gray zones” is not entirely new. The United States once used its navy base in Guantanamo Bay as a repository for asylum seekers, particularly Haitians, whose shattered boats were intercepted on the high seas to prevent those onboard from claiming refuge at “our gates.”109 Again, we witness the craftsmanship of using legal definitions and categories to interdict unwanted entrants before they can reach the actual border (unless, as in Australia’s extreme variant of the shifting border, that territory itself is “excised”).

Along with the spatial expansion of the zone of excision, Australia has adopted another means of border-shifting. Since 2013, all “asylum seekers who unlawfully arrive anywhere in Australia” must be transferred to third countries for offshore processing.110 The Australian government calls this policy “regional processing,” which in practice has meant that those who reach the excision zone are transferred to offshore locations.111 The offshore locations are remote islands in the Pacific, such as Nauru, a tiny microstate island-nation that is 4,500 kilometers away from Australia, or Manus Island in Papua New Guinea.112 There, asylum seekers may languish for years while the immigration authorities process and assess the asylum claims.113 Australia is the only country in the world that uses other countries to process asylum claims. Close to eighty percent of those transferred to such offshore processing centers have proven they have credible claims.114 These asylum seekers were on average detained for 450 days, and almost one quarter of the detained/incarcerated population spent more than two

109 These strategies of “containment” of irregular mobility through foreign maritime enforcement have long been employed by the United States, which has entered bilateral agreements with the Bahamas, the Dominican Republic and other countries in the Caribbean; these signatory countries regularly intercept boats and summarily return unauthorized travelers heading toward the United States to their place of embarkation. For an exposition of the governmental practice of detention without trial of Haitian refugees at Guantanamo in the 1990s, and the legal challenges that followed, see generally Harold Hongju Koh, The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation, 18 MD. J. INT’L L. 1 (1994).


years in the facilities.115 Even those recognized as refugees are forbidden for life from settlement in Australia, alas, due to the “original sin” of arriving on its excised territory. The erased territory thus becomes a legal black hole, a gravitational field so intense that no unauthorized migrant can ever escape it. This ironclad policy—the one-way ticket away from Australia—has recently attracted the interest of European policymakers desperately seeking answers to their respective challenges of responding to uninvited migration flows and has fueled discussion of building migrant “reception” centers in North Africa and deeper in the heart of the continent.116

Australia has invented one of the most striking manifestations of the shifting border by legally redefining the area of Australian territory upon which asylum claims can be made, and by removing and “emplacing” any intercepted irregular migrants to offshore processing centers in remote locations in poorer and less stable third countries. Australia’s restrictive policy offers a remarkable attestation to the willingness of countries to deter unauthorized migration flows, even at the cost of blatantly breaching domestic and international rights-protection obligations to which they have committed themselves. To complicate the picture even further, there are some early indications that Australia’s highly problematic interpretation of its refugee protection obligations is proving effective in advancing its stated policy mission: to stop unauthorized boat arrivals.117 As a representative of the UN High Commissioner for Refugees in Indonesia—a major transit hub in the region for asylum seekers and human smugglers heading toward Australia—noted: “[w]ord that the prospects of reaching Australia by boat … are now virtually zero appears to have reached smugglers and would-be asylum seekers in countries of origin.”118 Such focus on deterrence and “reclaiming” border protection is in turn used politically to justify the tough policies Australia adopted in the first place. Despite domestic contestation and international condemnation, the major political parties in Australia have refused to reverse the policy of offshore processing.119 This refusal raises a host of pressing queries

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115 Id.
118 Asylum Seekers left High and Dry in Indonesia, IRIN NEWS (Apr. 9, 2014), http://www.irinnews.org/report/99908/asylum-seekers-left-high-and-dry-indonesia (quoting UNHCR country representative in Indonesia, Manuel Jordano).
119 For an overview of these positions, see Robert Manne, This Pains Me, but It’s Time to Compromise on Australia’s Cruel Asylum Seeker Policy, THE GUARDIAN (Sept. 22, 2018), https://www.theguardian.com/australia-news/2018/sep/23/this-pains-me-but-its-time-to-
about how to avert the denial of constitutional and human rights by the very institutions and processes designed to protect them and whose voices and interests ought to be considered when challenging such policies. Australia is not alone in facing such quandaries. From Europe to North America, incumbent leaders and their contenders are trying to appease the anxieties of voters fearing “loss of control” over borders and membership boundaries. The lethal combination of the perceived loss of control and the apparent deterrence effect of a restrictive policy forces us to rethink the complex relationships between official and unofficial routes of passage, as well as the uneasy interactions among countries of origin, transit, destination, offshoring locations, and the activities of human smugglers—a dynamic constellation that the literature has largely overlooked.

D. Who Guards the (Legal) Guards?

If we conceptualize borders as “crucial sites from which the nation-state is narrated and constituted,”120 Australia’s heavy-handed approach brings into sharp relief several important quandaries. Key among them is: who guards our legal guards? Australia’s High Court has on several occasions reviewed various aspects of Australia’s excision policy and offshore processing framework. In several landmark decisions, the High Court favored the claims of those in excised territories. These decisions include the cases known as Plaintiff M61/2010 and Plaintiff M69/2010, in which the High Court unanimously found that two Sri Lankan asylum seekers detained on Australia’s Christmas Island had been denied procedural fairness.121 The Court’s decision led the government to amend certain aspects of the processing of claims beyond mainland Australia.122 In another case, Plaintiff M70/2011 v. Minister for Immigration and Citizenship [2011] 244 CLR 144 (Austl.), the High Court struck down the government’s so-called “Malaysian solution,” which proposed that Australia swap 800 asylum seekers held in detention after they arrived by boat to the excision zone with 4,000 refugees waiting for resettlement from Malaysia.123 The Court found that Malaysia is neither a signatory to the Refugee

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120 Vogl, supra note 105, at 117.
122 Id.
123 Plaintiff M70/2011 v. Minister of Immigration and Citizenship [2011] 244 CLR 144 (Austl.). Most recently, the High Court raised questions about the legality of maritime interception and turn-back operations, but in a tight 4:3 decision it eventually upheld the government’s policies. CPCF v. Minister of Immigration and Border Protection [2015] HCA 1 (Austl.). Human rights lawyers have argued that despite this High Court decision, which focused on domestic law, Australia is still in breach of its non-refoulement international obligations. In a previous decision, Plaintiff S156/2013 v. Minister for Immigration and Border Protection [2014] HCA 22 (Austl.), the High Court unanimously rejected a challenge to the constitutional validity of sections 198AB and 198 AD of the Migration Act 1958, as amended by the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) (Austl.), which gives the immigration minister the power to designate regional (offshore) processing countries. These amendments were introduced into law in response to a previous ruling of the High Court, Plaintiff M70, a decision in which the Court struck down the government’s “Malaysian solution.”
However, the very same justice system that protects all refugees but those arriving without authorization by boat, ultimately upheld some of the most controversial aspects of the country’s excision and offshoring tactics. As Robert Cover observed in his now-classic Justice Accused, judges may feel compelled to uphold “neutral” legal rules despite perceiving them as unjust, in the process causing violence through the words and acts of law. For asylum seekers who are excised and offshored, the law failed to provide solace or safety and imposed violence instead.

An unexpected twist in this saga occurred when the Supreme Court of Papua New Guinea, unlike the High Court of Australia, ruled that the practice of transferring and detaining asylum seekers on Manus Island was both illegal and in violation of the constitutional right to personal liberty. The Court held that because the “asylum seekers held [on Manus Island] did not arrive…of their own volition, they had not broken any immigration law,” and “keeping them in indefinite detention, where they face frequent acts of violence and suffer from poor health care, therefore, violated their constitutional protections.” The Court ordered immediate steps to end the detention, and the government of Papua New Guinea requested that Australia make alternative arrangements. Asylum seekers remaining at Manus Island are currently in a state of limbo. In the wake of the center’s closure, they have lost access to running water, electricity, medicine, and working toilets, and their food supplies are dwindling. Yet many have refused relocation to other sites in Papua New Guinea out of fear for their safety. Some were forcibly removed by local police forces from the (now decommissioned) Australian facility. The UNHCR has warned of an “unfolding humanitarian crisis” and has called on Australian authorities to act based on their responsibility in the original offshore transfer and eventual internment. New Zealand offered to resettle some of the refugees remaining in Manus Island, but the Australian government has yet to accept this proposal.

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124 See generally ROBERT M. COVER, JUSTICE ACCUSED (1975) (exploring critically the behavior of anti-slavery judges who nevertheless issued pro-slavery decisions according to “neutral” rules); see also Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601 (1986).


129 Office of the Spokesperson for the UN Secretary-General, Highlights of the Noon Briefing by Stéphanie Dujarric, Spokesman for Secretary-General António Guterres (Nov. 3, 2017), https://www.un.org/sg/en/content/highlight/2017-11-03.html.

commenced before the High Court of Australia and in Papua New Guinea to
require that these offshore refugees and asylum seekers be brought back to
Australia, but neither country’s courts have ruled on the matter. A growing choir
of voices from civil society and human rights organizations, both local and global,
has called on the Australian government to take accountability for the escalating
situation, demanding “an end to this cruelty.” Such democratic protests have
made a dent in the past, for example by pressuring the government to bring back
to Australia some of the detained on Nauru and Manus Island who required
medical attention. The jury is still out on the impact of such contestation and
protest on finding a resolution to the current deadlock.

E. Big Data and iBorder Control

In disrupting the Mondrian-like precision of clearly delineated and
jurisdictionally exclusive territorial States that has undergirded the Westphalian
international system of States (at least in principle), the shifting border tacitly and
covertly redefines the relationship between membership, territory, and
sovereignty. As such, it provides a rare opportunity to reflect on the distributive
implications of selectively opening and closing the border.

For the bulk of the twentieth century, the mobility of those relegated by birth
to the wrong side of the tracks of prosperity and opportunity was manifestly
controlled at official checkpoints by “guards [that] have guns,” as Joseph Carens
memorably put it. Alternatively, today’s restrictions against unwanted and
uninvited entrants rely on ultra-sophisticated, high-tech, partly invisible but
always present transportable legal walls, aided by ever-expanding surveillance
systems and remote control border regulation activities. As the Canadian Border
Service Agency explains, the ubiquitous shifting border can, in principle, operate
at “any point at which the identity of the traveler can be verified,” giving full
meaning to the notion of a border that is simultaneously nowhere and
everywhere.

In Europe, for example, the European Union devised the integrated border
management strategy. This strategy relies on a multi-tiered control model that
seeks to track the movement of non-EU citizens, known as third-country
nationals, “from the point of departure in countries of origin, all throughout transit, and up to their arrival in the EU.” Within the Union, inland control

135 CAN. BORDER SERVS. AGENCY, supra note 2.
136 VIOLETA MORENO-LAX, ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW 3 (2017); see also Council of the European Union
measures, including detection, investigation, and return, are applicable to third-
country nationals deemed to lack status (regularly referred to as “illegal
immigrants”), as are futuristic iBorder control strategies that “re-engineer” the
system of border crossing and migration control.137

Pilot projects funded by the European Union will enable “automatic control”
procedures, involving pre-registration, whereby “[t]ravelers perform a short,
automated, non-invasive interview with an avatar, undergo a lie detection and are
linked to any pre-existing authority data.” This data will then be stored in large
databases and connected with “portable, wireless connected iBorderCtrl units that
can be used inside buses, trains or any other point” to verify the identity of the
travelers and “calculat[e] a cumulative risk factor for each [individual].”138 Here,
the once-fixed territorial border is not only shifting, but also evolving into an
operational individualized-control system, where each person “carries” the border
with her as she moves across space and place. The border attaches to her pre-
arrival, at crossing stations, and wherever and whenever she travels within the
protected and surveilled territorial space—today within the area of free movement
in Europe, tomorrow (potentially) the world.139

Here, the underlying objective of ensuring that entrants meet all legal
requirements takes on a new social, political, and technological meaning. Such
individualized control systems transform and blur the regulation of pre- and post-
arrival movement and risk morphing into a “society of control,” where everyone
(non-citizen and citizen alike) is tracked and encoded.140 Furthermore, while these
new surveillance techniques that utilize a combination of algorithmic machine
learning and human vetting are neutral in theory, they may produce divergent and
discriminatory results by reaffirming and intensifying practices of racial and
geographic profiling.141

Such global ID systems have long been the dream of law enforcers, but they
are now ever-closer to becoming a reality. Even the United Nations has teamed
up with leading technology firms to explore plans for creating a digital ID network

on common standards and procedures in Member States for returning illegally-staying third-country
nationals, 2008 O.J. (L 348) 98.
139 I am indebted to Irene Bloemraad for suggesting that I explore the imagery of the shifting border
as “transported” to individual bodies.
140 I draw the term “society of control” from the work of Gilles Deleuze, but it has since been applied
more broadly in the literature. See, e.g., Shamir, supra note 24. The loss of civil liberties is not
restricted to non-citizens. In the United Kingdom, for example, draconian “control orders” that
provided the State with legal authority to indefinitely detain non-citizens without trial if a trial asked
secret or sensitive intelligence information was challenged before the courts as discriminatory. In
response, the UK government did not rescind such powers. Instead, it equally applied them to citizens.
For related examples whereby the deprivation of rights of non-citizens foreshadows a similar
deprivation of the liberties of citizens, see generally Eric A. Ormsby, The Refugee Crisis as Civil
Liberties Crisis, 117 COLUM. L. REV. 1191 (2017).
141 See, e.g., Margaret Hu, Algorithmic Jim Crow, 86 FORDHAM L. REV. 633 (2017); Karen Yeung,
using blockchain technology to provide tamper-resistant legal documents for refugees and other displaced persons who lack official documents. Such a digital ID would create a “stamp”—a unique identifier between the refugee and the data on the servers—that proves they have been authenticated for each service they receive at refugee camps or by official aid organizations. While informed by benevolent intentions, such initiatives may violate bearers’ privacy and restrict their international mobility, especially if their “stamp” indicates passage through a third-country deemed safe. As a result, digital ID may potentially prohibit onward travel or trigger return if the migrant’s intended country of destination has signed readmission agreements with these transit locations.

**F. Tracking and Stratifying Mobility**

Beyond reinventing the “moveable” border while selectively opening and closing its gates of admission, destination countries are developing and implementing new surveillance technologies that cross time and space. These technologies are implicated in bilateral and multilateral agreements with countries of origin and transit that treat the latter as migration “buffer zones” for wealthier nations. This new conception of the shifting border has coincided with the rise of “big data” and propagated the creation of enormous databases that store biometric information and electronic passenger name records. Sharing these records prior to travel has replaced traditional interactions between the individual and State officials at the actual territorial border, because, as the UK Home Office revealingly put it, this border encounter “can be too late—they [unauthorized entrants] have achieved their goal in reaching our shores.” For governments to achieve this ambitious yet Orwellian vision, the location, operation, and logic of the border must be redefined through a complex conceptual and operational framework that allows state officials or their delegates (increasingly operating transnationally and in collaboration with third parties and private sector actors) to screen and intercept travelers en route to their desired destinations, and long before the travelers are within their territories. Pre-travel electronic clearance is now required as a matter of course, even for those in possession of “high-value” passports, including travelers hailing from EU member States. The government of the destination country must approve such electronic travel authority before the traveler embarks on his or her journey, and it is linked electronically to the traveler’s passport. Without such authorization, it is impossible to board a plane

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145 On high value passports and migrants, see Shachar, supra note 13.

146 As Australia’s Department of Immigration and Border Control explains, the next generation of
heading to the United States, Canada, or Australia or to enter these countries. European countries are expected to follow suit by implementing the European Travel Information and Authorization System (ETIAS) in 2021. This additional layer of preclearance and information-gathering creates a powerful yet invisible electronic border that applies everywhere, adjusting to the location and risk profile of the traveler. The electronic authorization process is intentionally detached from and precedes the act of territorial admission, facilitating mobility for approved or trusted travelers while denying access to all others.

While these high-tech borders are designed to keep out unwanted and uninvited entrants, even trusted travelers—those who benefit from the highest level of flexibility and mobility in crossing borders—must now have their identities verified before embarking on international travel at airports and at other regulation points. “Smart” and automated-entry gates have iris scans or other biometric readers that run through multiple national and global databases that cross-reference and authenticate the trusted-traveler’s identity, low-risk status, and un-flagged profile. In an increasing number of airports, the initial decision regarding whether the golden gates of admission will open or shut is determined not by a human agent, but by EasyPASS or other automated systems of immigration clearance and border control. These automated systems authenticate digital data and are coded to identify risk factors based on sophisticated algorithms (themselves hardly ever subject to open, democratic review). In the age of big data and shifting borders, Ali Baba’s “open sesame!” incantation assumes a new magic and mythos.

For those lacking the requisite credentials, the unending technological innovation and preemptive mobility review encoded into the shifting border strategy makes it ever-harder to lawfully set foot in the more affluent polities they desperately seek to enter. This asymmetry raises serious questions of justice in not only the initial allocation of membership affiliations but also the enduring inequality of mobility opportunities. Those who lack privileged biometric border security will require further developing analytics-based capabilities, including “a state-of-the-art risk scoring engine developed by departmental analysts uses complex statistical models to process large amounts of data in real time, to identify higher than acceptable levels of risk” as well as “a real-time risk identification system that scans information collected through the department’s advance passenger processing system.” All inbound travelers are screened and travelers representing potential risk are more closely examined. See AUSTL. HUMAN RIGHTS COMM., ANNUAL REPORT 2012–2013 (2013).


148 For more information on the automation of such decisions, see generally Ruggero Donida Labati et al., Biometric Recognition in Automated Border Control: A Survey, 49 ACM COMPUTER SURVEYS 24:1 (2016).

149 Such regulation is more intertwined and partly dependent upon private-sector providers and developers of sophisticated biometric data collection and verification technologies.


151 See, e.g., Eric Neumayer, Unequal access to foreign spaces: how States use visa restrictions to
indicators and the required documentation have little if any option to lawfully cross international borders. Coupled with restrictive immigration categories and limited travel visas for those entering from poorer and less stable countries, the shifting border may have the unintended effect of pushing unauthorized mobility further underground. This in turn triggers policy concerns about the rise of a lucrative black market for increasingly sophisticated human-trafficking and smuggling networks. These concerns breed political pressures that help explain (although they do not justify) why and how governments seek to sever the knot that has traditionally tied a fixed territorial border to migration control. By attempting to cover the globe with “transportable” regulation and surveillance, they may head off uninvited entrants before they begin their journey.

By identifying the shifting border as an alternative to the established theoretical poles of “static” and “disappearing” boundaries, I hope to have shown that neither of those visions captures the dynamics of the new regulatory regime of mobility and migration control. Affluent countries’ ability to flexibly redraw the border for migration control and admission regulation is a key new tool to reassert control over their allegedly “broken borders.” At the same time, these policies belie the demise-and-fall predictions of those who have declared the “erasing of the world of spaces,” meaning the abolition of States and borders as primary organizational units of the current world system.

For those locked outside the prosperous core of developed countries, border and migration control is anything but a relic of the past. For the vast majority of the global population who have received the shorter stick in the birthright lottery, barriers to international mobility have not disappeared but have instead been retooled and reinvented. When a non-citizen is stopped before she can ever reach our entry gates, the likelihood of her being able to embark on lawful admission and gain eventual access to citizenship is close to nil. By redefining the core liberty interests of those residing in countries of origin, transit, and destination, today’s extensive “re-bordering” efforts contribute to enforcing and sustaining a global mobility divide.
G. Transit Countries as Border Enforcers

If we turn our gaze to Europe, we find a continent scrambling to find coherent responses to the major ethical and political conflicts that the 2015 migration crisis has unleashed. When it comes to devising new measures to regulate mobility, the European Union and its Member States have borrowed more than one page from the shifting-border book. Much like the United States maintaining a hundred-mile interior border zone, the Court of Justice for the European Union (CJEU) has ruled that border and migration enforcement activities can stretch inward beyond the actual, territorial border of members States. Specifically, it authorized border “officials responsible for border surveillance and the monitoring of foreign nationals” to carry out their activities within twenty kilometers of the border, crafting a European variant of the United States’ “constitution-free” zone, here translated to the denser continental geography. In 2017, the CJEU reviewed the matter again, holding that “random” and “baseless identification checks” cannot be used as a way to circumvent free mobility within Europe. However, so long as such checks are proportional and done “to prevent unauthorized entry,” identity checks can take place not just within the twenty-kilometer zone, as previously ruled, but within a broader territorial range: within thirty kilometers of the land border and within a radius of fifty kilometers of the sea border, as well as in train stations nationwide and onboard trains anywhere. Again, we find the same inland “stretching” dynamic already witnessed elsewhere. What is perplexing in this context, however, is that such shifting border measures are now exercised within Europe’s free movement zone.


159 Id.

160 Beyond such invisible, moving borders, several Schengen member States also temporarily re-erected their marked and visible border controls at Europe’s internal borders in the wake of the migration crisis, pursuant to the requirements of Article 25 of the Schengen Border Code. The reintroduction of border controls within the Schengen area is a measure of last resort prerogative of the member States, which is subject to the requirement of proportionality and must be limited in time. See EUR. COMMISSION, MIGRATION & HOME AFF., Member States’ notifications of temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf.
In addition to the above-mentioned measures of tightening inland control and shifting responsibility and accountability (as well as finger pointing) among European countries, the European Union and its member States have adopted an extensive outward-looking bordering strategy, known as “externalization,” which extends beyond the boundaries of the continent and shifts focus to migrants’ countries of origins or transit. This has led the European Union to establish one of the world’s most complex, interagency, multi-tiered visions of the shifting border, comprised of pre-entry controls at countries of origin and transit all the way through to removal of irregular migrants after they have reached EU territory. This removal procedure is facilitated by the shared European Return Directive and a growing list of bilateral and multilateral “readmission agreements” negotiated with poorer and less stable non-EU countries to which irregular migrants can be returned, even if they merely passed through such countries en route to Europe.

Europe’s externalization policy creates a ring of protection outside the EU. It involves a “close partnership” with non-EU States from near and far through programs such as the Neighborhood Policy, Euro-Mediterranean Partnership, the Balkan Stability Pact (which was later formalized into the Regional Cooperation Council), the Africa-EU Partnership, the Valletta Action Plan, the Global Approach to Migration and Mobility, and so on. These policies are designed to enforce migration control in collaboration with countries of origin or “at the earliest possible stage”; they combine readmission agreements with development

162 Moreno-Lax, supra note 138, at 33-40.
incentives and capacity-building of asylum systems in the region concerned.\textsuperscript{165} They also contain incentives for countries to agree to readmit refused asylum seekers from Europe that “transited” through their territories, such as promises for easier visa processing for the citizens of the signatory third-countries.\textsuperscript{166} Such an incentive structure highlights the unequal bargaining power of member states of the European Union and the Union as a whole vis-à-vis transit countries, although it also reveals how the latter may gain concessions in exchange for promises to “stem the flow.”\textsuperscript{167} The controversial agreement between the European Union and Turkey, which involves the transfer of 3.2 billion euros and other inducements in return for Turkey’s assistance with “‘keep[ing] people in the region’ and out of Europe,” is a classic example of outsourcing migration and border control.\textsuperscript{168}

Earlier bilateral and multilateral agreements have been criticized as absolving EU-countries of their otherwise binding human rights obligations. These agreements have insisted upon concessions and collaboration from non-EU States, pressuring them to take responsibility for providing protection to forced migrants, including asylum seekers, as soon as possible after the initial displacement and as close as possible to countries of origin or transit. Such agreements recast countries of origin or transit as “gatekeepers to the developed world” and, in the process, allow wealthier countries to insulate themselves from

\textsuperscript{165} For example, the Valletta Action Plan reads “[t]he EU, its Member States and associated countries will step up efforts to mainstream migration into their development cooperation.” \textit{Valletta Summit, 11-12 November 2015 Action Plan}. The Africa-EU Joint Strategy states that: “[p]artners will foster the linkages between migration and development, maximise the development impact of remittances, facilitate the involvement of diasporas/migrant communities in development processes . . . and help countries of origin, transit and destination in Africa build capacity to better manage migration.” \textit{Press Release, Africa-EU Strategic Partnership}, ¶ 69.


\textsuperscript{168} James Kanter & Andrew Higgins, \textit{E.U. to Offer Turkey 3 Billion Euros to Stem Migrant Flow}, \textit{N.Y. Times}, Nov. 29, 2015 (quoting Chancellor Angela Merkel of Germany). The most far reaching variant of the externalization policy, which has been proposed but not implemented, would involve “outsourcing” the processing of asylum claims of those who attempt to reach the territory of the European Union to non-EU countries, along the lines of Australia’s controversial regional offshore-processing practice. On treating the Australian model as a potential blueprint for Europe, see Interview with Austrian Chancellor Sebastian Kurz, \textit{In Deutschland ist sehr viel Bewegung in die richtige Richtung}, \textit{WELT}. (Mar. 24 2018), https://www.welt.de/politik/ausland/article174864314/Oesterreichs-Kanzler-Sebastian-Kurz-In-Deutschland-ist-sehr-viel-Bewegung-in-die-richtige-Richtung.html.
legal responsibility towards refugees and other persons entitled to international protection.

The shifting border is difficult to contain and confine. Now that nations have escaped the once-fixed territorial boundaries and legal restraints that were inherent to the old, static border regime, we must explore potential remedies and reforms. Before I turn to elaborate on such ideas, and how they might be put into action, I wish to locate the shifting border in the context of recent discussions about the diffusion or “migration” of constitutional and human rights norms and practices. I argue that an understanding of borders as mobile constructs provides an important corrective to prevalent theoretical accounts.

III.
TRANSNATIONAL BORROWING AND THE DIFFUSION OF RESTRICTIVE POLICIES

In academic circles, the idea of policy diffusion has now become almost synonymous with the expansion of human rights. Here, however, we are faced with a pattern of circumventing and narrowing such rights and protections as they apply to a particularly vulnerable category of irregular migrants. The bulk of legal literature on the “borrowing” of constitutional ideas across borders has focused on comparative and international (or where relevant, regional) influences on domestic norms and structures. Studies of such processes have led to the conclusion that the effects of such borrowing practices are “nothing short of transformative.”

In the same vein, a growing number of empirical studies have emphasized the importance of policy diffusion in explaining the spread of democratization, liberalism, and human rights. The emergent consensus is that when policies “travel”—across national borders, organizational domains, or multiple levels of governance regimes (global to local), the results have frequently been a favorable increase in rights protection, both de jure and de facto. The

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argument is that apex courts in the world of new constitutionalism now regularly “borrow” progressive ideas from one another by, for example, citing precedents from comparable countries as a source of persuasive authority.172 Through this transnational dialogue, judges are advancing a new and expanded catalogue of rights protections for citizens and non-citizens alike. But there is another, darker, side to this increased cross-border dialogue. Just as progressive ideas about the scope and extent of rights protections can travel quickly, so can restrictive policies. Call this the constrictive precedent problem: emulating the “worst case” rather than following the “best case” precedent.

Just as human rights and constitutional ideas can travel across borders and organizational terrain, so may restrictive immigration measures, anti-constitutional or abusive constitutional measures travel just as easily and effectively, if not faster, across borders and organizational terrain.173 A powerful example of this pattern of restrictive policy emulation emerged following 9/11 with the global spread of anti-terrorism laws.174 Despite a degree of local variation, these policies reveal several overarching convergence features, including the concentration of power in the hands of executives, increased ease of surveillance of the public, restriction of due process protections, breach of privacy and other potential limitations on protected rights and liberties as part of an ever-fragile search for a new balance between the competing demands of security and freedom.175 A similar trend has emerged in many parts of the world with the surge of “unconstitutional constitutional amendments.”176 The structure and logic of the shifting border have helped germinate this pattern of restrictive (rather than rights-enhancing) policy diffusion. This is demonstrated, for example, by inter-jurisdictional emulation (subject to adjustment in response to specific country conditions) and the leveraging of cooperation by other actors to enforce “non-entrée” to prosperous jurisdictions.177 These patterns are particularly visible, as we saw earlier, in processes that involve transferring responsibility and, in effect,

175 Scheppele, The Migration of Anti-Constitutional Ideas, supra note 110, at 351.
“outsourcing migration and asylum policy by subcontracting controls” to regional partners or migrants’ countries of origin and transit.178

Once a reputable court or government adopts a highly restrictive policy towards unauthorized migrants, other governments facing similar predicaments may decide to follow that earlier restrictive decision or policy (even if legally and morally contentious) as a persuasive precedent or “model” to justify their own subsequent choices limiting the substantive rights or procedural protections accorded to vulnerable migrant populations such as refugees, asylum seekers, and other humanitarian causes. Tellingly, when Australia initiated and then expanded its divisive “stop the boats” operations in the Pacific, advocates of these policies argued that, contrary to the sober objections raised by human rights groups and other non-governmental organizations, such operations were both permissible and unexceptional. In a classic manifestation of the impact of the constrictive precedent, Australian officials readily drew on the U.S. experience, stating publicly in defense of Australian tow-backs that the “U.S. Coast Guard has been turning boats around in the Caribbean for years.”179 “If the United States (or any other affluent, rule-of-law democracy) can do it, so can we,” seems to be the operative rationale that guides such restrictive-policy-migration emulation.

The global influence of the US Supreme Court decision in Sale offers a classic example of this pattern at work. In that decision, the Supreme Court held that summary return of migrants, including asylum seekers, interdicted on the high seas does not engage the non-refoulement obligation to which the United States has committed through both its domestic and international law obligations.180 On this account, non-refoulement obligations do not apply extraterritorially.181 The Sale Court upheld an image of the border as static and fixed, standing at the territorial edges of the country. The interdiction of Haitian boats by US Coast Guard ships, which operated far away from the protected territory, was not “visible” to a Court that examined it under the classic Westphalian lens.182 The United States’ continued commitment to this legal position is clear from its response to UNHCR’s Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations, released in 2007.183

178 RED CROSS, supra note 169, at 7.
181 The presumption against extraterritoriality is deeply ingrained well beyond the context of mobility and migration. See, e.g., Kiobel v. Royal Dutch Petroleum, 568 U.S. 12 (2013). For a critical account, see generally Philip Liste, Transnational Human Rights Litigation and Territorialized Knowledge: Kiobel and the “Politics of Space,” 5 TRANS. LEGAL THEORY 1 (2014).
182 For an original account of how the functional equivalent of the border argument could have been applied in the Sale case, see Motomura, supra note 12.
183 U.S. DEP’T OF STATE, OBSERVATIONS OF THE UNITED STATES ON THE ADVISORY OPINION OF THE UN HIGH COMMISSIONER FOR REFUGEES ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES
The *Sale* ruling and the United States’ permissive stance on preemptive interdiction has received critical rebuke. The English Court of Appeals, for example, broke the semi-sacred principle of international comity among courts when it referred to the case as “wrongly decided.” Going a step further, the Inter-American Commission on Human Rights held that, contrary to *Sale*, the non-refoulement provision in the Refugee Convention “has no geographical limitations,” thus interpreting legal responsibility and jurisdiction in a more robust fashion than ever before, no longer focusing solely on territorial location (as under the static model) but also on situations whereby a state exercises “effective control” or “public power” beyond its borders. A growing number of international law and migration scholars echo this judgement call. However, these statements are non-binding and *Sale* has proven more resilient than some have predicted. It has provided indirect guidance and legitimacy for comparable jurisdictions to adopt similarly obstructive interdiction policies that “align in a control continuum...at several stages of the migrant’s journey.”184 These policies currently escape the reach of legal responsibility and accountability by claiming that non-refoulement does not apply extraterritorially.185 Australian courts, for example, have interpreted the fact that the United States has already provided justification for such a rights-restricting approach as “license” to follow suit.186

In a similar vein, the European Union’s invention of the “safe third country” concept has travelled widely and globally, inspiring, among other examples, the safe third country agreement between the United States and Canada.187 Norway’s recent designation of Russia as a “safe third country” to which asylum seekers can be returned, thus denying them access to Norway’s—and by extension, Europe’s—asylum procedures, is another example.188 In turn, the Australian policy of declaring maritime arrivals unauthorized by virtue of reaching the excision zone has inspired Canadian legislation to declare those arriving without authorization by boat as “irregular arrivals,” thereby restricting their substantive


184 MORENO-LAX, supra note 136, at 2.

185 Id.

186 As in the United States, Australian courts have determined that practices of interdicting migrants and asylum seekers on the high sea does not violate non-refoulement. See Ruddock v. Vadarlis (2001) FCA 1329 (Federal Court) (Austl.).


and procedural rights and protections. Even if eventually recognized as refugees, such arrivals face a freeze period of five years before they can apply for permanent residence. In short, ideas travel quickly and furiously across borders, especially when policymakers feel pressure to demonstrate action to counter the public perception of loss of control. For those en route or escaping from harm’s way the result is further restrictions and tightening of rights by precisely those premium democratic destinations that are globally perceived to be beacons of the rule-of-law. With such behavior advanced by the leaders of the so-called “free world,” there is real room for concern that further restrictions and tightening of controls from countries that formally adhere to the values of human rights, freedom and democracy will justify infringement on protected rights by partner States that may have less than dazzling records on human rights.

The sheer reach and magnitude of the shifting border also invites revisiting the age-old question of how to tame menacing governmental authority. As the shifting border has now become almost boundless in its conceptual framing and spatial manifestation, it has become increasingly difficult to challenge with traditional legal tools and conceptions of constitutionalism and human rights, both of which still rely on territoriality as their core grounding principle. If we seek to develop fresh legal responses to tame the rights-restricting consequences of the shifting border, we must rethink the relationship between law and territory, space and political organization—a task to which I now turn.

IV.
A NEW APPROACH

Taking into account the gravity of the problems addressed, I now turn to explore strategies by which these pervasive patterns might be challenged or changed. Because it engages the basic building blocks of the modern state—territoriality, sovereignty, and legal spatiality—this transformation entails some of the core legal and normative questions of our time.

A. On Space and Political Organization: Hannah Arendt’s Intervention

Writing after the atrocities of WWII and the Holocaust, Hannah Arendt astutely observed the following: “[s]uddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they would be assimilated, no territory where they could found a new community of their
own. This moreover, had nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization."192 While the world has changed dramatically since the publication of The Origins of Totalitarianism in 1955, the plight of refugees and displaced persons still remains one of the biggest and most pressing human rights issues of our time. For Arendt, the “right to have rights” could only be realized in the context of a political community in which we are political equals who are judged “through our actions and opinions, by what we do and say,” not on account of ascriptive factors such as ethnic lineage or descent.193 No less significant, for Arendt the tragedy of the migrants and refugees was that they had “no place on earth where [they] could go without the severest restrictions.”194 This is a problem wholly entrenched in the Westphalian system that accords exclusive sovereignty to national jurisdictions over every habitable space on earth. For Arendt, the fulfillment of political equality could only take place within a particular kind of territorially-demarcated political community: the modern state. Despite her radicalism and ground-breaking ideas, Arendt’s writing, a product of her own historical period, manifests a rather fixed and rigid vision of territoriality, corresponding to the static view of the border.

Today, paradoxically, States themselves are reinventing sovereignty and territoriality, showing a remarkable capacity to adapt to new environments. For States to do nothing in the face of large-scale global mobility pressures would counter the basic sovereign instinct to control the border. Governments and growing sectors of their populations perceive the irregular movement of people as risking the stability of the international order, and view border control as “either or both a security imperative and a life-saving humanitarian endeavor.”195 Such perceptions inform discussions of contemporary migration as a “crisis” for a multitude of actors: those seeking mobility but denied access to legal channels of entry; for neighboring countries on the brink of insolvency and political instability; for transit countries endowed with growing responsibilities to stop the flow of migration; for governmental and non-governmental humanitarian agencies carrying the brunt of meeting the fundamental needs of migrants and refugees stranded in “temporary” situations which seem to never end; and for destination countries and supranational bodies fearing “loss of control.” Ultimately, the debate over the effect of irregular movements of people also leads to conclusions of a crisis for the Westphalian order itself, since sovereignty is (unrealistically) expected to generate unbridled control over cross-border movement. In Europe, the failure to offer adequate responses to the sharp increase of asylum applications in the summer of 2015 under a common framework led to

194 ARENDT, supra note 194, at 373.
195 Bill Frelick et al., The Impact of Externalization of Migrant Controls on the Rights of Asylum Seekers and Other Migrants, 4 J. MIGRATION & HUMAN SECURITY 190, 193 (2016).
the return of internal borders. These re-erected borders combine visible and invisible elements of migration control as States attempt to regain and display their potent sovereign authority.

B. Restraining Government Authority

Today’s harsh realities reveal the inadequacy of seeking legal cover under the static conception of the border while persistently breaching it by devising far more dynamic, multifaceted and de-territorialized techniques of governance that rely largely on the flexible variability of the shifting border. In the tension between States’ skirting their constitutional and human rights obligations and their declared commitment to upholding them, an opening might be found to challenge the unresolved contradictions embedded in the shifting border.

Refuting the predictions of globalists and others about the imminent demise of borders and the waning of sovereignty, the relaxing of the linkage between territory and authority has given greater latitude for governments and regulatory agencies to develop a whole new way to decouple the sovereign act of migration regulation and control from the site of territory. What are the implications of this massive, yet still under-theorized, change of the locus of the exercise of migration control? Does the new shifting-border reality introduce not only greater restrictions but also a new range of possibilities for resistance and creative openings for action (whether by States, individuals, non-governmental actors, or the international community at large) that were impossible to imagine under the classic, static view of the border? I believe the answer is affirmative and it need not fall back on the horns of the competing yet no longer stable poles of the static-border and disappearing-border narratives.

To overcome the current impasse, we need to return to the basics—to the conceptions of sovereignty, territory, and legal spatiality—which, like Arendt’s analysis, still rely heavily on the static conception of borders in which access to territory is the crucial component.

C. Closing the Accountability Gap

We have already seen the manifold ways in which the shifting border disrupts traditional notions of sovereignty and territoriality. Instead of ignoring this reality (as is done by most accounts of migration, whether positive or normative), I wish to take the argument a step further and argue that it is more promising to borrow a page from the shifting border book, albeit subversively. The basic idea, currently more aspirational than applied, is to take advantage of the shifting border’s advanced techniques of spatial and temporal expansion in order to counter its stated goals of restriction. Thus, where a country intentionally

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197 Constitutionality and the rule of law are the foundations of legitimate government. They both empower and limit the exercise of authority by the institutions of the State.
de-links migration control activities from its geographical borders, a correlated expansion of rights and protections for the individual must follow. Three interrelated strategies would help to achieve this result: (i) expanding the extraterritorial reach of human rights, and (ii) placing the burden on destination states to deploy border representatives on intake missions to countries of origin and transit, effectively mobilizing the machinery of the shifting border in service of mobility and rights-protection; and (iii) rethinking legal spatiality to view it as a resource for rights-protection rather than a tool for exclusion. These three changes in law and thought would relax the outdated fixation on territorial access as a precondition for refuge and protection, a shift that is necessary if we are to respond to the reality of borders that move. All three components of this new approach warrant further elaboration.

a. Human Rights Follow the Shifting Border

The first method, expanding the extraterritorial reach of human rights, would function to reign in the shifting border by ensuring that core human rights and constitutional provisions that regulate and constrain the exercise of executive power would apply irrespective of the location where border control activities are exercised, whether on land, sea, or in the air. The goal is to act as if power exercised at the shifting border had been exercised within the domain of the territorial State or its actual, physical frontiers, activating the range of legal instruments and norms that constrain the state and its agents in the presence of exercising governmental authority. This does not mean that migration regulation would “resettle” at the fixed border. Rather, it may spell no less important a shift in enforcing restraint on such exercise of power, according to the basic constitutional principle that the “presence of authority does not entail the absence of constraint.”

Policymakers accept this restraining principle in most other fields of law. Furthermore, there is no inherent reason why the sovereign authority to control borders ought to entail that the “government must have virtually unrestricted power over immigration—power largely immune from constitutional constraint,  

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198 This approach has grounding in the jurisprudence of national and supranational courts as well as human rights tribunals. The European Court of Human Rights has articulated the basic principle according to which the European Convention on Human Rights “cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of the other State which it could not perpetrate on its own territory.” *Case of Issa and Others v. Turkey*, App. No. 31821/96, Judgment, Eur. Ct. H.R. ¶ 71 (Nov. 16, 2004), http://hudoc.echr.coe.int/eng?i=001-67460. This principle originally focused on military action but was gradually expanded to other contexts as well.


200 For a comprehensive analysis of the limits the Constitution places on the political branches’ “plenary power” to control immigration, see generally Shawn E. Fields, *From Guantanamo to Syria: The Extraterritorial Constitution in the age of “Extreme Vetting”*, 39 CARDOZO L. REV. 1123 (2018) (analyzing the limits the Constitution places on the political branches’ “plenary power” to control immigration).
judicial oversight and even moral objection.\textsuperscript{201} From the perspective of the individual, bringing constitutional and human rights constraints to bear on the exercise of authority at the shifting border would entail that basic procedural and substantive protections that would have applied to the encounter with a border agent at the territorial edges of the country should analogously apply if equivalent movement-control authority is exercised in a remote location.\textsuperscript{202} This first line of response is based on the rationale underlying the shifting border, namely the call to switch from the merely territorial to the jurisdictional and the functional. This proposed framework rests on human rights arguments in favor of treating effective control as the relevant basis for legal responsibility in such extraterritorial or grey-zone situations.

There are important precedents pushing in this direction. In its recent case law, the European Court of Human Rights (ECtHR) imposed juridical limits on extraterritorial migration control on the high sea. In the early 2000s, facing a tide of irregular migrants from Libya headed to the Italian coast, Italy began to conceptualize the space of the Mediterranean sea as an expanded “border zone” that could act as a buffer to mainland Italy.\textsuperscript{203} To achieve this vision, Italy and Libya signed the innocently named Treaty of Friendship, Partnership and Cooperation, which stipulated a grandiose migration control project whereby Italy would provide ships and staff to patrol the 2,000 kilometers of Libyan coastline.\textsuperscript{204} The treaty addressed neither the interdiction nor the push back of irregular migrants intercepted on the high seas, nor did it specify any human rights provisions or protections for asylum seekers. In the landmark \textit{Hirsi} case, decided in 2012, the ECtHR held that Italy had breached its protection obligations when it stopped a vessel with about 200 passengers and sent the intercepted migrants back to Libya without providing them with a chance to make protection claims. To establish whether Italy had a protective responsibility, the ECtHR had to determine whether the group of irregular migrants who filed the claim (24 of the estimated 200 migrants who were onboard the interdicted boat) were at any stage under Italy’s jurisdiction. Although the European Convention of Human Rights does not apply globally, in \textit{Hirsi} the Grand Chamber held that human rights

\textsuperscript{201} \textit{Id.}, at 53. In practice, such regulation is hard to achieve even within the domestic sphere, let alone at the transnational level.

\textsuperscript{202} The implementation of such an edict is of course highly complex as the border itself has frequently been a special region of potentially less extensive rights protections. As with other fields of law in which law applies extraterritorially, important procedural and substantive details need to be worked out, but the principle remains clear: the exercise of legal authority cannot be free from review and accountability by virtue of operating from a distance.

\textsuperscript{203} Valentina Aronica, \textit{Italy, the Mediterranean as a Political Space, and Implications for Maritime Migration Governance} (2016) (unpublished MSc dissertation, University of Oxford).

obligations do not necessarily stop at the traditional, territorially-fixed “Westphalian” border. Instead, such obligations can follow state action and thus become applicable beyond a state’s borders if and when state officials exercise “continuous and exclusive de jure and de facto control.” By focusing on the exercise of effective control, rather than asking where the act took place, the ECtHR expanded Italy’s legal liability beyond its territorial border. Moreover, it held that Italy’s failure to offer the interdicted-at-sea migrants an opportunity to make an asylum claim or challenge their removal—procedures they would have been entitled to had they actually “made it” to Italy’s shores—amounted to a breach of the Convention.

As evidenced in Hirsi, the ECtHR has rejected the rights-restricting approach adopted by the U.S. Supreme Court in Sale, in which the Court held that, under domestic or international law, the U.S. Coast Guard is not obliged to non-refoulement if irregular migrants are interdicted on the high seas and then turned back. By contrast, the ECtHR adopted a more expansive interpretation of jurisdiction, responsibility, and effective control. We saw earlier that the ability to repeatedly change the locus of migration control and act through multiple levels of governance and with various actors, both public and private, gives the shifting border its edge. Refocusing on the content, not the location, of the shifting border techniques adopted by States—which are either acting alone, in concert, or under the auspices of supranational entities such as Frontex—helps close the accountability gap, extend rights, and apply regulatory controls on otherwise “unruly” practices.

In another recent case, N.D. and N.T, which dealt with attempts by Spain to stop migrants from reaching the cities of Ceuta and Melilla (enclaves of Spain in Morocco), the ECtHR again emphasized that what matters is not how a member State defines its “operational border”, but whether those affected by such exercise of migration control were given basic procedural protections. Whereas the Hirsi case dealt with a policy of stretching the border outwards, N.D. and N.T concerns the tendency to pull the border inward, as we have seen in the U.S. example of expedited removal. Guarding against uninvited entry, Spain erected an 11.5-kilometer barrier around Melilla by building three massive fences of barbed wire, fitted with sensors and cameras, and thus separating the European Union from Africa. The three fences were located on Spanish territory, not outside it. Reminiscent, too, of the Australian concept of excised territory, Spain carved out a zone of Spanish territory in Melilla that was “non-Spain” for the purposes migration control. In this so-called operational border zone, the principle of non-refoulement did not apply.206

206 Anyone caught trying to climb the fences, crossing the area between the fences, or sitting on top of the third fence closest to the city of Melilla, was subject to a practice of “summary returns” to Morocco. These summary returns applied to third-country nationals that were “detected on the border line of the territorial demarcation of Ceuta or Melilla while trying to cross the border’s contentive elements (fences) to irregularly cross the border.” Aliens Act art. 10 (B.O.E. 2009, 10) (Spain).
A human rights group represented N.D. and N.T., Malian and Ivorian nationals who were part of a group of migrants who attempted to enter Spain via the Melilla barrier, in a challenge to Spain’s practice before the ECtHR. While there was some confusion about the precise chronology of the events at the enclosures, the basic facts were that N.D. and N.T. had succeeded in scaling the first two fences and had climbed on to the top of the third fence. After several hours, they had climbed down the third fence with the assistance of the Spanish police. Members of Spain’s Guardia Civil had immediately arrested them, and without affording them procedural treatment or opportunities to explain their identities and circumstances, had transferred them back to Morocco, where they were subsequently deported. By Spain’s account, N.D. and N.T. were stopped at the operational border and thus never reached Spain. By extension, they never entered the region and “realm” of European human rights conventions and protections. The Strasbourg court flatly rejected this claim. Interestingly, however, the ECtHR avoided a determination on whether the applicants succeeded in entering Spain, sidestepping a confrontation with a national Member State on a matter as sensitive as defining its own geographic and cartographic boundaries. Instead, it switched the jurisdictional basis altogether: from the territorial to the functional. The court held that once the applicants climbed down the third fence, they were under the “continuous and exclusive control of the Spanish authorities.” By virtue of this exercise of effective control by uniformed State officials, jurisdiction had arisen.

These legal precedents offer a glimpse into how effective control—as a functional rather than territoriality-bounded interpretation of jurisdiction—can expand the spatial reach of human rights in ways that begin to mimic the creativity and flexibility of the shifting border itself. If governments seek the “gain” of excision and the creation and fortification of constitution-free or human-rights-free zones, they cannot do so without constraints. The “pain” of judicial review and the strictures of separation of powers are the foundation of rule of law democracies. Without them, there is no check on executive power, no bulwark against arbitrary government. The extraterritorial application of constitutional and human rights protections is an indispensable mechanism to ensure that when a government acts “outside its borders, its powers are not ‘absolute and unlimited.’” While still nascent and evolving, the jurisprudence is slowly catching up with the dynamic reinvention of territorially-unbounded border control. The basic idea of having legal responsibility “follow” the versatile

208 Id.
209 Id.
211 In theory, we can imagine a legal regime establishing such responsibility wherever and whenever border migration controls take place. In practice, the case law to date is more circumscribed. It holds that when the facts clearly establish that border guards or other official agents of the State exercise effective control and explicitly breach a basic norm of human rights such as non-refoulement or fail to offer core procedural protections, legal responsibility will follow. Hirsi Jamaa v. Italy, App. No.
actions and locations of migration control is one promising path to begin to close the gap between a mobile exercise of the shifting border and an outdated system of constraints on the exercise of authority that is imagined as immobile under the confines of a static vision of territoriality.

No solution is a panacea, however. In the cat-and-mouse game that has governments extending the reach of the shifting border both inward and outward while seeking to skirt their constitutional and human rights responsibilities, these governments may again prove more adaptive and savvy than the disappearing border or demise-of-the-state globalization theories would predict. Post-Hirsi, Italy no longer sends its ships and personnel to interdict unwanted migrants in the high seas. Instead, with generous EU funding, it has trained Libyan coast guard officials to do Europe’s dirty job of closing the border. Such “outsourcing” of migration control to third countries makes it difficult to establish legal responsibility; the requisite jurisdictional link with an EU Member State is technically broken. The question of whether Italy has “proxy responsibility” under these circumstances is now the subject of litigation before the ECtHR. A coalition of human rights organizations commenced legal action against Italy on behalf of survivors of a sinking dingy carrying migrants off the coast of Libya.

The legal action alleges that the Italian authorities collaborated with Libyan Coast Guard to stop the migrants from reaching Europe by engaging in pull back operations. The core legal question at issue is whether the Italian authorities are flouting their human rights obligations by “outsourcing to Libya what they are prohibited from doing themselves.”

Additional concerns arise with the growing reliance on carrier sanctions. A series of bilateral and multilateral agreements oblige airline companies and other private for-profit actors to engage in what is essentially a quintessential act

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public exercise of migration-control authority: pre-entry clearance. Frontline airline personnel or private security guards must check whether passengers have valid passports, visas, and any other required documentation prior to departure, operating as “surrogate border guards.” In many parts of the world, these private actors are “often assisted by immigration liaison officers or officials from the destination state stationed in the departure State.” This arrangement requires the cooperation of third countries, which must authorize the deployment on their territories of these foreign immigration or liaison officers. Remarkably, while stationed aboard and jointly implementing measures of migration control, these immigration liaison officers maintain only an advisory role with regard to the controls carried out by the airline staff, thus limiting the possibility of attaching liability to their home countries. As these examples illustrate, the more layers of discretion there are, and the greater the number and variation of actors involved (public and private, at home and abroad, official and semi-official), the more difficult it is to attribute legal responsibility, even under the more expansive interpretation of effective control.

b. Shifting the Burden From the Individual to the State

If mobility is to be protected in the age of the shifting border, it is not enough for destination states merely to affirm the human rights of those under their effective control. Rather, these countries should play an affirmative role in facilitating mobility. A rights-affirming response to the shifting border implores domestic, regional, and international courts, governments and engaged publics to dig new channels for migrants seeking protection, rather than leaving these migrants to rely exclusively on the act of “touching base.”

An example may help explain this second point. In 2015, Canada emerged as one of the global “good doers” in swiftly airlifting and resettling over 25,000 Syrian refugees. Unlike Europe, these refugees did not reach its shores. Instead, the border came to them, conceptually and functionally. The Canadian government dispatched Canadian immigration officials to refugee camps in Jordan, Turkey, and Lebanon, where they conducted pre-screening interviews with and identity verification of asylum seekers. Within a matter of weeks, these reviews were completed, and Canada

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216 Gammeltoft-Hansen, Private Actor Involvement in Migration Management, supra note 91.
217 MORENO-LAX, supra note 136, at 6.
issued not only temporary travel documents to its gates, but also permanent resident visas to successful claimants. This road to citizenship provided an alternative to years of insecurity and limbo waiting for determination of their status in Europe, which would have only been possible if they were among the lucky ones who managed to reach its shores and comply with the requirements of the territoriality of asylum in order to be given such a chance in the first place.

Operating within a global paradigm of migration control, the Canadian initiative allowed the state to exercise powerful gatekeeping functions. However, it was revolutionary in deploying the shifting border “machinery” in the service of enhancing rights and securing mobility, rather than inhibiting both. This was done by shifting the burden of “touching base,” normally placed on asylum-seekers, to States and their authorized agents, moving the determination process closer to the asylum seekers wherever they are, so as to provide access-from-afar to opportunities that are otherwise open only to those who can afford to reach the actual border. Much like Canada’s reliance on the long arm of the shifting border when restricting mobility, this initiative allows decisions to occur prior to arrival and many thousands of miles away from the actual border. Affording protection extraterritorially thus retains a statist logic, exerting sovereign control over admission and membership decisions, although it is more amenable to regional and international cooperation efforts. However, shifting the burden from the individual to the state here bolsters, rather than undermines, rights and protections for those who need them most. At the same time, for the individuals selected, it provides hope, dignity, and a ticket to a new, permanent home.


Resettlement, voluntary repatriation, and local integration are the three durable solutions promoted by the UNHCR. Resettlement facilitates relocation from refugee camps in conflict zone, where the vast majority of the world’s displaced persons are presently hosted, to willing third countries that are typically far removed from the conflict zone. United Nations High Commissioner for Refugees, UNHCR Resettlement Handbook (2011), http://www.unhcr.org/46f7c0ee2.pdf.

Pre-screening and admission from abroad also keeps the resettling government in the driver seat and allows it to combine international humanitarian assistance with a message of control communicated to the domestic population. As official documents put it: “protecting the safety, security and health of Canadians and refugees is a key factor guiding the Government of Canada’s actions throughout this initiative.” Compare this tone to the sense of loss of control and images of a mounting “invasion” manifested by leaders throughout Europe, and across the political spectrum, in the current refugee crisis. Needless to say, not all countries have the luxury of prescreening and resettlement.

In the context of regional and global cooperation, countries would have to agree on how to allocate responsibilities among themselves for accepting refugees, according to what principles, and at what levels of absorption.

Such resettlement determinations usually rely on UNHCR or country-specific priority criteria; they offer more immediate relief to those who are more vulnerable, according to priority criteria. In
the refugee determination and immigration screening process without demanding that asylum seekers first reach the territory of a state or its border, processing-at-a-distance creates possibilities for claiming asylum from “distant” places. By allowing for an expansion of the spaces of protection, people escaping from harm’s way who are unable to comply with the territorial arrival dictum will gain a chance to secure international protection according to priority criteria. Given the ingenuity of the shifting border architects, “touching base” should always remain an open venue for claiming protection. Moreover, vigilance is required to ensure that states and their delegates do not use—or rather, abuse—resettlement and related measures of processing-at-a-distance as substitutes for asylum procedures activated by territorial arrival, or as an additional pretext for preventing such arrival in the first place.

None of this will be easy to achieve in the current political climate, but the point I wish to emphasize is conceptual rather than applied. Although structurally resembling the shifting border, the severance of the linkage between territory and exercise of migration control in this context is a rights-enhancing, rather than rights-restricting, legal innovation. Contrary to expectations, geographically far-flung status-determination processing, complemented by the generous issuance of humanitarian visas that facilitate safe, dignified and legal entry channels for those facing exceptional circumstances provide greater control over who gets in and under what conditions, even in the context of an unfolding crisis, than the classic insistence on linking asylum claims to territorial access. The Canadian example thus shows us the potentially rights-enhancing possibilities buried underneath the restrictive tendencies of the shifting border.226 The inversion of roles tasks States with the responsibility to reach out to the individual in need of international responding to natural disasters, other programs have now been established, either bilaterally and multilaterally, in different regions, with the Stated goal of providing greater protection for migrants by establishing mechanisms to acquire visas in countries of origin or transit. United Nations High Commissioner for Refugees, UNCHR Resettlement Handbook, supra note 222. In Brazil, for example, the government responded to a spike in human trafficking of Haitians seeking to escape the aftermath of the 2010 earthquake through a dangerous passage known as the “jungle route,” by opening in Port-au-Prince, Haiti, a visa processing facility, in cooperation with the International Organization of Migration (IOM). FATAL JOURNEYS: IMPROVING DATA ON MISSING MIGRANTS, VOL. 3, PART 2, 89–90 (Frank Laczko et al eds., 2007), http://www.bristol.ac.uk/media-library/sites/sps/news/2017/fatal-journeys.pdf. The aim of this initiative is to allow potential migrants to apply for special humanitarian permanent visas on location, rather than rely on smugglers to get them to Brazil without authorization via the deadly jungle route. The initial screening and processing in Port-au-Prince is conducted by the IOM and the ultimate visa decisions are made by Brazilian officials, offering another example of how a “humanitarian” shifting border that comes to the individual where and when she is in dire need may offer safety and security without requiring territorial arrival as a precondition. As with any such initiative, the intentions of the acting governments and related parties must be carefully scrutinized and kept in check.

226 Current recommendations, developed in the context of discussion surrounding the global compact on refugees, have called the global community to commit to the goal of resettling ten percent of the world’s refugees per year. For a concise overview, see Kevin Appelby, Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees, 5 J. MIGRATION & HUMAN SECURITY 780 (2017).
protection, and does not, as current law dictates, put the onus on them to reach the territory of a protection-granting state.

c. Legal Spatiality as a Resource

So, while Arendt is correct that political organization is at the heart of the predicament we face, I want to suggest that a productive response will reverse the order of operations; scholars and activist might think about place and space as part of the solution and then muster the political organization to follow. More importantly still, treating space as a resource, not a problem, can help avert the plight that Arendt so powerfully identified of not having a place, any place, in the world in which the rightless, the stateless, or the displaced, can find refuge. Legal reliance on static, old-school, sovereigntist conceptions of “space” for relief and refuge prevents access to new worlds of opportunity for those who need them most. It condemns many of them to the Sisyphean fate of traversing and re-traversing terrains of shifting borders, at risk of being sent back to the country of origin or transit at any point along the continuum of checkpoints and legal portals that constitute today’s migration control apparatus.

Moving the border closer to the individual to offer her protection may take various configurations. It can be the result of unilateral decision-making, as in the Canadian initiative, or a result of bilateral and multilateral agreements. Either way, the discretion of a downstream country of resettlement to act outside its border is conditional upon the consent of the upstream, refugee-hosting country to hold the interviews and screening procedures on the latter’s territory. Here we witness both the de-territorialization of legal space, as the process can, in principle, take place anywhere in the world, and its re-territorialization, as the interview must take place somewhere on the face of the earth. More comprehensive relief efforts would harness significant cooperation across national and regional borders, but so too will any feasible solution. In terms of policy-making, such programs will likely embrace burden- and responsibility-sharing initiatives, in line with the recent UN Global Compact recommendations. Future endeavors to break the exclusivity of the “touching

227 Governments themselves now routinely amend and challenge fixed conceptions of territoriality, for example, by creating special economic zones within their jurisdictions whereby distinctive legal regimes apply, or by the creation of jointly-governed border regions, in which cooperative governance is influenced by more than one set of legal norms emanating from multiple and multilevel sources.

228 Where relevant, the cooperation of the UNHCR is also elicited. The condition of consent by the country of asylum where migrants and refugees reside is vital. Otherwise, the humanitarian variant of the shifting border might be abused by States seeking to aggrandize their power in the name of protecting the vulnerable.

229 The goal is to undo or at least tame the current linkage between arbitrary geographical proximity and bearing the brunt of humanity’s dispossessed.

230 In the 2016 New York Declaration for Refugees and Migrants, the world’s leaders emphasized “the centrality of international cooperation” and further committed “to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among [s]tates.” See G.A. Res. 71/1, New York Declaration for Refugees and Migrants, ¶¶ 7, 11 (Sept. 19, 2016). While no concrete
“base” dicta will require daring political leadership that is currently in short supply; however, counter to populist and anti-immigrant rhetoric, it is in the sovereignist interest of States to create a comprehensive action plan that will allow refugees to apply from afar, as well as to keep open routes for protection that are activated upon territorial arrival.

Observing the dangers of inaction by Europe prior to the refugee crisis of 2015, François Crépeau, the United Nation Special Rapporteur on the Human Rights of Migrants, proposed at the time that EU member States, along with other Global North countries, such as Canada, Australia, New Zealand, and the United States, as well as a number of immigration countries in the South, such as Brazil, make a commitment to a meaningful refugee resettlement program that States could put into operation with the help of the UNHCR and civil society organizations according to priority criteria.231 Such a proposal was never adopted. However, its principled and prudential justification rests precisely on the logic that I have advanced here—namely, extending protection through relocation or resettlement to a wider class of people fleeing oppression and involving more non-geographically-proximate countries in the effort of relief. Such programs reach out to “people out of place” in the countries to which they have fled. In this way, they encompass those who have not been able to comply with the survival-of-the-fittest “ordinance” demanding that they enter the territory of the affluent countries that simultaneously do everything within their powers to keep them out.

In a world where eighty-five percent of the global population of refugees and displaced persons are hosted by already struggling, resource-strapped countries in close proximity to active conflict zones, there is much to gain in breaking the current gridlock.232 Typically, when affluent States flex their legal muscles, the shifting border moves to avert uninvited entry. However, the very same techniques of reaching people before they encounter the territorial border, techniques that are currently rights-restricting, can also become rights-enhancing. Individuals in need of protection should be able to claim asylum or other forms of protection upon encountering the shifting border, which, given the logic of measures currently support this Declaration, it provides at least some aspirational commitment and the basic grammar for such a potential cooperation. Although the United States has pulled out the process, some initial progress is already under way at the global level. In 2017, the OECD International Migration Outlook has reported that “[i]n response to the growing demand for international protection, many OECD countries have increased their resettlements programmes.” OECD INTERNATIONAL MIGRATION OUTLOOK 2017, 1 (2017).


232 The commitment to more equitable burden- and responsibility-sharing has long been pushed for by the world’s developing countries, where the vast majority of the world’s refugees are hosted. See Rebecca Dowd & Jane McAdam, International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why, and How?, 66 INT’L & COMP. L.Q. 863 (2017).
pushing the border out, will likely occur far away from the territory they wish to enter.

It is important to note that the three-pronged strategy I have just described rests on the lexical priority of the first prong (human rights follow the border) over the latter two (both which aim at relocating protection operations to where vulnerable migrants are, rather than vice versa). The imperative of human rights protection at the border must take precedence to ensure that governmental authorities do not use outreach programs as fig leaves while extending the rights-restricting power of the shifting border under humanitarian guises.

CONCLUSION

The shifting border is one of the most dramatic developments currently unfolding in the world of migration and mobility control, yet it has received only scant attention. Today’s brusque encounters of moving bodies and shifting borders provide concrete illustrations to broader and more fundamental tensions in law and ethics, such as those between sovereignty and human rights, local and global obligations, the right of the state to exclude and its duty to protect. Instead of rehearsing these influential debates, this Article has sought to disrupt some of these familiar dichotomies while simultaneously investigating the grounds on which they stand.

A new approach is required to decipher the emerging code of the shifting border in a world in which prosperous “islands” of high standards of human rights, affluence and democratic governance are increasingly protected through the repressive machinery of the shifting border and “de-territorialized” migration control. The sheer reach and magnitude of the shifting border also calls for revisiting the age-old question of how to tame menacing governmental authority. As this power is almost boundless in its conceptual framing and spatial manifestation, it has become increasingly difficult to challenge with traditional legal tools and conceptions of human rights, both of which still remain territorially centered.

The analysis I have offered—especially the emphasis on territory’s malleability under the shifting border conception, now routinely and instrumentally used to help States control migration and admit the few but not the many—points to a previously unexplored path. Instead of a menacing obstacle and tool to restrict access to asylum, we can rethink the shifting border as a creative resource in the service of advancing human rights across borders. As we have seen, the shifting border is a powerful tool and States are unlikely to cede their authority over migration regulation any time soon, especially not in the current political environment.

Under such circumstances, the changes to policy and legal thinking that I have proposed offer a more promising future than the current alternatives on offer. The objective is to protect migrants’ procedural and substantive rights wherever they encounter the border while simultaneously relaxing the linkage between territory and asylum. It would lay the foundation for a conceptual and paradigm
shift that is long overdue. The better we comprehend the new logic and codebook informing the shifting border’s legal remit and its multifaceted policy instruments, the better positioned we will be to develop counter narratives and to carve out new theoretical and applied pathways to counter their deleterious effects.
Appendix
Figure 1: United States: The Shifting Border—Bleeding into the Interior

Figure 2: Canada: The Shifting Border—Stretching Outward

Figure 3: The Shifting Border – Australia’s “Excision” Map