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EDITORS' ACKNOWLEDGEMENT
KATE ROBERTSON, JONATHAN BRIGHT & GRAHAM SMITH

JILIR is predicated upon collaboration. Collaboration between disciplines, allowing us to showcase world-leading scholarship at the intersection of international law and international relations. Collaboration between schools, with the Munk School of Global Affairs and the University of Toronto Faculty of Law offering us a shared intellectual home and a deep pool of talented student volunteers. Collaboration amongst our staff – 80 in total – who worked together seamlessly to bring this issue to print. And most e and forbearance through many months and many rounds of revisions.

We owe a particular debt of gratitude to our predecessors, Louis Century and Tim Hughes, both of whom worked tirelessly to improve the Journal and its operations. We are certain that the incoming Editors-in-Chief – Caroline Senini, Liting Cong, and Sean Tyler – will do the same, leaving JILIR a better journal for their tenure.

Our student editorial staff remains the foundation of JILIR. From the many Associate Editors who enthusiastically participated in JILIR for the first time this year, to the Senior Editors who so ably led our discussions, we extend a heartfelt thank you. Our business manager, Meghan Bridges, went above and beyond, as did our team of outstanding Executive Editors: Jordan Katz, Andrew Max, and Ash-Lei Lewandoski. As always, our faculty advisors – Professors Audrey Macklin and Steven Bernstein – provided us with sage guidance and mentorship, while our Senior Advisory Board continues to showcase the generosity of spirit – and time – that have allowed JILIR to thrive.

International law and international relations are fluid, exciting fields. We are proud that this issue captures this dynamism, and speaks to some of the most pressing issues facing the global community: the laws of armed intervention, climate change governance, human trafficking, and the very meaning of law itself. Thanks to the exceptional efforts of our staff and our authors, it has been our privilege to see this issue take shape.

Kate Robertson, Jonathan Bright & Graham Smith
Editors-in-Chief

Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense

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I. INTRODUCTION

On May 2, 2011, United States Navy SEALs entered Pakistani territory, allegedly without Pakistan's consent, to "capture or kill" Osama Bin Laden. Soon after, President Obama announced that the United States had "conducted an operation that killed Osama bin Laden, the leader of Al-Qaeda, and a terrorist who's responsible for the murder of thousands of innocent men, women, and children."[1] Pakistan vehemently objected to a "violation of its sovereignty",[2] as it has also done for drone strikes carried out within its territory by the United States.[3] The United States, on the other hand, defended the legality of its actions.[4] Later on, it advocated that under international law it can continue to kill United States citizens associated with Al-Qaeda, whenever they "pose an imminent threat of attack to the United States" in host states without host state consent if that state is "unable or unwilling" to suppress the "threat".[5] No such limitation has been specified for the killing of non-state actors who may not be United States citizens – that is, the overwhelming majority of non-state actors targeted.

This situation is not unprecedented. Non-state actors, such as Al-Qaeda, operating within weak states such as Afghanistan and Somalia ("host states") are often suspected of launching attacks against states such as the United States ("victim states"). These victim states have at times directly attacked such actors within the territory of the host state, without the host state's consent, alleging that the latter is unwilling or unable to prevent attacks. In the past decade alone, the United States has used predator drones to target suspected militants in Pakistan, Somalia and Yemen;[6] the United Kingdom has used predator drones to target suspected militants in

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[1] Carrie Lyn D Guymon, Digest of United States Practice of International Law, (2011), online: Office of the Legal Adviser United States Department of State <http://www.state.gov/documents/organization/194113.pdf>.

[2] Owen Bowcott, Osama bin Laden death: Pakistan says US may have breached sovereignty, (5 May 2011), online: The Guardian <http://www.guardian.co.uk/world/2011/may/05/osama-bin-laden-pakistan-us-sovereignty>.

[3] "US urged not to cross 'red line' in Fata", Dawn (6 February 2013), online: <http://dawn.com/2013/02/06/us-urged-not-to-cross-red-line-in-fata/> (online version of article in prominent Pakistani newspaper).

[4] Harold Hongju Koh, The Lawfulness of the U.S. Operation against Osama bin Laden, (May 19 2011), online: Opinio Juris <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>; Alan Silverleib, The Killing of Bin Laden: Was it Legal?, (2 May 2011), online: CNN World <http://articles.cnn.com/2011-05-04/world/bin.laden.legal_1_al-qaeda-leader-bin-cia-director-leon-panetta?_s=PM:WORLD> ("The raid 'was conducted in a manner fully consistent with the laws of war,' White House Press Secretary Jay Carney told reporters. Carney declined to offer specifics, but said 'there is simply no question that this operation was lawful. … (Bin Laden) had continued to plot attacks against the United States.'").

[5] United States Department of Justice, White Paper, *Lawfulness of a Lethal Operation Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, (undated), at 2, online: NBC News <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf>.

[6] Larisa Epatko, Controversy surrounds increased use of U.S. Drone Strikes, (10 October 2011), online: PBS Newshour <http://www.pbs.org/newshour/rundown/2011/10/drone-strikes-1.html>.

Afghanistan;[7] Israel has targeted Hezbollah in Lebanon;[8] Pakistan has attacked suspected militants operating out of Afghanistan;[9] and Kenya has attacked Al-Shabaab militants in Somalia.[10] Recently, Ethiopia entered Eritrean territory to "wipe out bases used by militants who it contends have attacked Ethiopian targets".[11] Even President Karzai once boasted that Afghanistan would send troops into Pakistan to reign in militants that were engaging in cross-border attacks if Pakistan would not act.[12]

Such self-defence has been very costly. Drone strikes carried out by the United States in Pakistan have killed at least 475 civilians, including 176 children, and the presence of drones in the sky continues to "terrorize" civilians.[13] The 2006 Israeli invasion of Lebanon in response to Hezbollah's killing of three and abduction of two Israeli soldiers cost the lives of some 1000 Lebanese.[14] A Turkish air raid in 2011 targeting suspected members of the Kurdistan Workers Party ("PKK") inside Iraq killed thirty-five civilians.[15] In June 2011, Pakistan's shelling of Afghanistan in pursuit of militants cost the lives of forty-two civilians and the flight of over 12,000 people for shelter.[16]

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[7] Louisa Brooke-Holland, *Unmanned Aerial Vehicles (drones): an introduction* (United Kingdom House of Commons International Affairs and Defence Section, Standard Note SN06493, 5 December 2012), online: United Kingdom Parliament <http://www.parliament.uk/briefing-papers/SN06493.pdf>.

[8] Conal Urquhart & Chris McGreal, *Israelis invade Lebanon after soldiers are seized*, (12 July 2006), online: The Guardian <http://www.guardian.co.uk/world/2006/jul/12/israelandthepalestinians.lebanon>.

[9] AFP, *Afghans accuse Pakistan over fresh border shelling*, (25 September 2011), online: Dawn <http://dawn.com/2011/09/25/afghans-accuse-pakistan-over-fresh-border-shelling/>.

[10] David McKenzie, *Kenya vows to hit Al-Shabaab across Somali border*, (16 October 2011), online: CNN <http://articles.cnn.com/2011-10-16/africa/world_africa_kenya-somalia_1_al-shabaab-qaeda-somali-capital?_s=PM:AFRICA>.

[11] Jeffrey Gettleman, *Ethiopia hits at bases run by militants in Eritrea*, (15 March 2012), online: New York Times <http://www.nytimes.com/2012/03/16/world/africa/ethiopian-troops-enter-eritrea.html?_r=2&ref=world&>.

[12] Carlotta Gall, *Karzai threatens to send soldiers into Pakistan*, (16 June 2008), online: New York Times <http://www.nytimes.com/2008/06/16/world/asia/16afghan.html?_r=2>.

[13] Chris Woods & Christina Lamb, *Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals*, (4 February 2012), online: The Bureau of Investigative Journalism <http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/>; Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Center, *Living Under Drones: Death, Injury and Trauma to Civilians from United States Drone Practices in Pakistan*, (September 2012), online: Living Under Drones <http://livingunderdrones.org/> [*Living Under Drones*].

[14] Anthony Shadid & Scott Wilson, "Hezbollah Raid Opens 2nd Front for Israel", *The Washington Post* (13 July 2006) online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/12/AR2006071200262.html>; "2006: War in Lebanon" *The Guardian* (20 August 2006) online: The Guardian <http://www.guardian.co.uk/world/gallery/2008/jan/30/lebanon.israelandthepalestinians> (timeline of 2006 conflict in Lebanon by Guardian newspaper).

[15] "Turkish Jets Hits PKK Targets in Northern Iraq" Xinhuanet (12 February, 2012) online: Xinhuanet <http://news.xinhuanet.com/english/world/2012-02/12/c_131405793.htm>.

[16] Hamid Shalizi, Hundreds of Afghans protest against Pakistan shelling, (11 July 2011), online: Reuters <http://uk.reuters.com/article/2011/07/11/uk-afghanistan-protests-shelling-idUKTRE76A1V320110711> ("As many as 12,000 Afghan civilians have fled villages along the border with Pakistan since mid-June, seeking refuge from frequent artillery barrages fired by

Thus, while victim states have genuine security concerns about attacks carried out by non-state actors, host states too need protection from the use of force by powerful victim states. Yet, as this article explains, extant scholarship on using force in ineffective host states has been fixated on the security of the victim state at the expense of the host state. First, despite the heavy human toll that host states have quite clearly had to bear, scholars tend to start from the normative premise that it is the "vulnerable" victim state that always needs protection. This is despite the high number of casualties caused by victim states. Second, certain scholars have argued that the use of force by victim states within the territory of host states is justified, uncontroversial and legal even though the pedigree of the "unwilling or unable" doctrine within international law remains uncertain. The International Court of Justice (ICJ) has not recognized the doctrine, a number of scholars argue it has no place in international law, and state practice is ambiguous. Third, scholars have considered questions of doctrine in abstract isolation from the operational reality that victim states often tend to be relatively powerful states and host states, conversely, often tend to be relatively weak and therefore unable to deter victim state misbehaviour undertaken as "self-defence". Although host states may be ineffective at suppressing non-state actors that carry out unlawful activities, they are often also, due to pervasive power inequalities, equally ineffective at holding victim states to account for arbitrary determinations of ineffectiveness. Further, even if there is a willingness on the part of the international community to step in to challenge and punish a victim state's potentially spurious claim of self-defence, this may not be possible as it may not be easily observable whether, in any given case, a particular host state was indeed *de facto* ineffective. While doctrine should not handicap genuine claims of self-defence where a host state is *de facto* ineffective, it should also not become an apology for legitimating predatory or error-prone uses of force by victim states. This zero-sum tension between the two state's security interests is succinctly captured by Kimberly Trapp who writes *"where … a host State is ... unable to prevent its territory from being used as a base of terrorist operations, in contravention of its obligations under customary international law, the victim State is left with little choice. Either it respects the host State's territorial integrity at great risk to its own security, or it violates that State's territorial integrity"*.[17]

In light of the factors identified above and considering that states as diverse as the United States, Pakistan, India, Afghanistan and Kenya have used or claimed a right to use force in relatively weak states alleging self-defence, it is important to revisit the debate from a more nuanced doctrinal and policy perspective. This article takes up the task. It systematically sets out extant international legal scholarship on the use of force in ineffective host states, explains why current academic debates are incomplete and

Pakistani security forces, displaced families and the United Nations say.").

[17] Kimberley N Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors" (2007) 56 Int'l & Comp LQ 141 at 147.

proposes remedies for dealing with the problem. Section II briefly sets out international law on the use of force and the rules of state responsibility for preventing attacks launched by non-state actors from a state's territory. It also surveys scholarly analysis of state practice and decisions of the ICJ on using force in ineffective host states. Section III queries whether there is a need for doctrine in this area and critically analyzes the existing "unwilling or unable doctrine". Section IV makes a normative proposal for involving the Security Council and Counter-Terrorism Committee as fact finders and information transmitters in determinations of host state ineffectiveness, so as to ensure a higher quality of decision-making that protects the interests of victim and host states. It also explains, by using the example of the United States-Pakistan relations, how the proposals could work. Section V concludes the article.

II. INTERNATIONAL LAW ON THE USE OF FORCE AND STATE RESPONSIBILITY

1. The Use of Force

The rules prohibiting states from using force are derived from the United Nations Charter (UN Charter) and customary international law. The ICJ has stated that "the prohibition on the use of force is a cornerstone of the UN Charter"[18] and the late former ICJ President Nagendra Singh referred to the non-use of force a *jus cogens* norm of customary international law.[19] Article 2(4) of the UN Charter states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[20] Article 51 makes an exception for self-defensive uses of force stating that "nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[21] Chapter VII of the UN Charter also makes it clear that the Security Council can authorize the use of force against another state to "maintain or restore international peace and security."[22] While the ICJ reserved judgment on the issue in the *Nicaragua* case, some scholars opine that self-defence can also be exercised when an armed attack is "imminent".[23]

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[18] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* Judgment of 19 December 2005, [2005] ICJ Rep 168 at 223 [*Armed Activities*].
[19] *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, Separate Opinion of President Nagendra Singh, [1986] ICJ Rep 14 at 153 [*Military and Paramilitary Activities*] (Stating principle of non-use of force belongs to the realm of *jus cogens,* and is the very cornerstone of the human effort to promote peace in a world torn by strife.").
[20] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2(4).
[21] *Ibid*, art 51.
[22] *Ibid*, art 42.
[23] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, Merits, [1986] ICJ Rep 14 at para 194. See e.g. Oscar Scachter, "The Right of States to Use Armed Force" (1984) 82:5 & 6 Mich L Rev 1620 at 1634; Derek Bowett, "Reprisals Involving Recourse to Armed Force" (1972) 66:1 Am J Int'l L 1 at 4.

The Charter also requires that "any measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council".[24]

The purpose of the prohibition is clear: it is an all-inclusive prohibition so as to ensure that states are left with no excuse to engage in aggression. As Louise Doswald-Beck, Secretary-General of the International Commission of Jurists noted, the prohibition on force was "enshrined in the United Nations Charter in 1945 for a good reason: to prevent states from using force as they felt so inclined".[25] A United States delegate to the 1945 San Francisco conference similarly reported that "the intention of the authors of the original text was to state in the broadest terms an absolute all inclusive prohibition; ... there should be no loopholes."[26]

This right of self-defence is further subject to the customary international law requirements of necessity, proportionality and immediacy.27 Necessity governs when force can be used and requires that a victim state resort to force only when it is required to thwart an attack and when no other peaceful alternatives, such as diplomacy, remain feasible.28 Proportionality dictates that the use of force must be no more than is required to mount a defense.29 Immediacy requires that the action must be undertaken while the original armed attack is still occurring and there should be proximity in time between the start of the attack and the response in self-defence.30

While states cannot directly use force against other states, they may also not engage in indirect attacks through, for example, supporting non-state militias. The Draft Code of Offences against the Peace and Security of Mankind accordingly states that it is an offense for a state to organize or support armed bands for incursions into the territory of another state or to

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[24] Charter of the United Nations, 26 June 1945, Can TS 1945 No 7, art 51.
[25] International Commission of Jurists, Communique de Presse, "ICJ Deplores Moves Towards a War of Aggression on Iraq" (18 March 2003) online: ICJ Press Releases <http://www.icj.org/category/news/press-releases/page/73>.
[26] *Documents of the United Nations Conference on International Organization, San Francisco*, 1945 (London: United Nations Information Organisation in association with Library of Congress, 1945) at 335.
[27] See *Military and Paramilitary Activities*, *supra* note 19; Christine Gray, *International Law and the Use of Force*, 3d ed (OUP Oxford, 2008); Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed (Cambridge University Press, 2005).
[28] Gray, *supra* note 27 at 21; Dinstein, *supra* note 27 at 242.
[29] Michael Schmitt, "Counter-Terrorism and the Use of Force in International Law", in Fred L Borch & Paul S Wilson, eds, *International Law and the War on Terror*, (Newport: Naval War College International Law Studies vol 79, 2003) at 28.
[30] To illustrate how these conditions interact, see e.g. *Military and Paramilitary Activities*, *supra* note 19, at 122-123. The ICJ, in examining the legality of the use of force by the United States, opined that the conditions of necessity and proportionality were not fulfilled as the United States had acted several months after the presumed armed attack and when alternative methods for eliminating the danger were available. Compare this to the use of force after 9/11. Even in that case, the United States did not act immediately; it acted after almost a month. However, the armed attack on 9/11 and its magnitude were more clearly visible to the international community. Also, it was apparent that the United States had attempted to negotiate with the Taliban government in the month preceding the invasion. Hence, in this case, the delay might have been more acceptable.

tolerate the use of its territory as a base of operations by such armed bands.[31] States also have a duty to "refrain from organizing or encouraging the organizing of irregular forces or armed bands ... for incursion into the territory of another State".[32] Thus, depending on the level of control a state exercises over a non-state actor, armed attacks by the actor may be attributable to that state, which could itself become a legitimate target of self-defence.[33]

2. The Responsibility of States to Prevent Attacks

Each state also has a secondary obligation to prevent non-state actors from executing armed attacks against other states from within their territory. The ICJ has ruled in the seminal *Corfu Channel* case that a state must "not allow knowingly its territory to be used for acts contrary to the rights of other states".[34] That is, "[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."[35] Reiterating this obligation, pre and post 9/11 Security Council Resolutions[36] impose binding obligations on states to take extensive counter-terrorist measures,[37] "call also on the international community to redouble their efforts to prevent and suppress terrorist acts"[38] and "call upon all states to prevent such [criminal] acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature".[39] However, this duty of prevention is not absolute.[40] Rather, it requires due diligence[41]

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[31] "Report of the International Law Commission covering the work of its sixth session, 3 June-28 July 1954" (UN Doc A/2693) in 2 *Yearbook of the International Law Commission 1954*, vol 2 (New York: UN, 1959) at 150.
[32] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8028, (1970), 121 at 123.
[33] See *Military and Paramilitary Activities*, *supra* note 19 at 55.
[34] *Corfu Channel Case (United Kingdom of Great Britain v Albania)*, Merits, [1949] ICJ Rep 4 at 22 [*Corfu Channel Case*].
[35] *Trail Smelter Case (United States of America v Canada)* (1938, 1941), 3 RIAA 1905 at 1963 (Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail BC).
[36] See e.g. SC Res 1267, UNSCOR, 1999, UN Doc S/INF/55, 148; SC Res 1363, UNSCOR, 2001, UN Doc S/INF/57, 268; SC Res 1373, UNSCOR, 2001, UN Doc S/INF/57, 291 [SC Res 1373]; SC Res 1566, UNSCOR, 2004, UN Doc S/INF/60, 54 [SC Res 1566]; SC Res 1368, UNSCOR, 2001, UN Doc S/INF/57, 290 [SC Res 1368]. Also preambles to Security Council Presidential Statements on terrorism state: "The Security Council reaffirms that terrorism constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed." See also Statement by the President of the Security Council, UNSCOR, 2006, UN Doc S/PRST/2006/56 at 1; Statement by the President of the Security Council, UNSCOR, 2005, UN Doc S/PRST/2005/3 at 1; Statement by the President of the Security Council, UNSCOR, 2004, UN Doc S/PRST/2004/37 at 1 (using language identical to Jan. 18, 2005 resolution).
[37] SC Res 1373, *supra* note 36.
[38] SC Res 1368, *supra* note 36 at para 4.
[39] SC Res 1566, *supra* note 36 at para 3.
[40] RJ Erickson, *Legitimate Use of Military Force against State-Sponsored International Terrorism*, (Maxwell Air force Base: Air University Press, 1989) at 79; Richard B. Lilich & John M. Paxman, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities" (1977) 26 Am U L Rev 217 at 230; Robert Barnidge, *Non-State Actors and Terrorism: Applying the Law of State*

and is thus an obligation of means, not of result.[42] Whether the standard has been met depends, in each case, on a number of inter-related factors including the foreseeability of risk,[43] the means the state possesses[44] to prevent the harm and whether there was an opportunity to prevent the harm.[45]

In terms of foreseeability of risk, in the Alabama Arbitration of 1871, the tribunal declared that due diligence was to be exercised in "exact proportion to the risks" to which the belligerents may be exposed.[46] That is, a state should assess the probable risk of a harmful event occurring and is not obligated to divert all its resources towards preventing harm where the probability of occurrence may be minimal. A state that does not possess the means required to exercise due diligence to the degree necessary to prevent the harm will not be held responsible.[47] A state must also have the opportunity to prevent the injury. For example, the standard will be lower if the harmful activity occurs in a part of the state's territory where the "transportation and manpower" necessary for protecting[48] victims is not available. As Sohn and Baxter have pointed out, other factors that may be relevant in assessing the extent of the duty will depend on the territory in question, the nature of its terrain, the population and the "degree of civilization" of the area claimed.[49]

It is clear then that the duty to suppress illegal conduct carried out by non-state actors must be applied in a flexible manner for host states that may be ineffective in meeting their due diligence duty due to lack of means. Sarah E. Smith argues that such states are not culpable if their power is not sufficient to control private actors.[50] Although they were writing in the 1970s—before the period of marked global emphasis on terrorism—Lilich and Paxman also essentially argued that "when no reasonable possibilities exist for preventing the activities, it may be proper to conclude that "[i]mmunity follows inability."[51]. As for states that are unwilling rather than unable – that is they possess the means to prevent attacks but opt not to do so – whether or not they have satisfied the due diligence test is a more complex question. For example, is a state unwilling to act because the costs

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Responsibility and the Due Diligence Principle, (T.M.C. Asser Press 2007).
[41] Lilich & Paxman, *supra* note 40 at 230-231.
[42]Tom Ruys and Sten Verhoeven, "Attacks by Private Actors and the Right of Self-Defense" (2005) 10 Journal of Conflict and Security Law 289.
[43] See Lilich & Paxman, *supra* note 40 at 230.
[44] See *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), [1980] ICJ Rep 3* at 34. See also Lillich & Paxman, *supra* note 40 at 230.
[45] *Ibid* at 246.
[46] *Alabama Claims arbitration* (May 8 1871), reprinted in J.B. Moore, A Digest of International Law, vol 7 (Washington: Government Printing Office, 1906) 1059.
[47] See Lilich & Paxman, *supra* note 40 at 270.
[48] See *ibid* at 230.
[49] Louis Sohn & Richard Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (Draft No. 12 with Explanatory Notes, 1961) 134 at 137.
[50] Sarah E. Smith, "International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism" (2003) 56 Okla L Rev 735.
[51] See Lillich & Paxman, *supra* note 40 at 270.

of prevention outweigh its benefits, or is that state unwilling because it sympathizes with the ideology of the non-state actor? In the former situation it may still be acting diligently while in the latter, it will likely not be. Although some scholars have suggested a move towards strict liability for ineffective host states,[52] it is important that an analysis of the reasons for why a state is unwilling continues to factor into determinations of state responsibility for ineffectiveness. For example, it is questionable why a developing host state should be legally obliged to divert a disproportionate amount of resources towards guaranteeing the security needs of a powerful victim state when it is unable to do so for its own citizens.

3. Self-Defense within Ineffective Host States: A Gray Area?

If a host state is not responsible for a non-state actor's attacks, can a victim state nevertheless use force within that host state's territory to target non-state actors? The ICJ has opined in the *Armed Activities of Congo* case and *Wall Advisory Opinion* that where attacks by a non-state actor cannot be attributed to a host state, the use of such force without obtaining the host state's consent would be illegal and therefore cannot be justified on grounds of ineffectiveness.[53] Interestingly, Trapp has offered an alternative interpretation of the ICJ's decision in *Armed Activities of Congo*, arguing that the decision should not at all be interpreted as prohibiting the use of force within ineffective host states but rather as prohibiting the use of force *against* host states unless the armed attack can be attributed to the host state.[54] Other scholars have also been critical of the ICJ's stance.[55] Scholars remain divided on the question. Some scholars agree with the ICJ that mere inability to prevent a terrorist attack does not automatically legitimate a resort to force within that state.[56] Among others, the late Antonio Cassese and Mary Ellen O'Connell subscribe to this view. Other scholars are of the view that necessity allows the victim state to use force in self-defence, arguing that it "may be legitimate to take military action against terrorists in states that are

[52] Renee Vark, "State Responsibility for Private Armed Groups in the Context of Terrorism", online: (2006) 11 Juridica International <http://www.juridicainternational.eu/public/pdf/ji_2006_1_184.pdf>; Vincent Proulx, "Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks" (2005) 23 Berkeley J Int'l L 615.

[53] *Armed Activities*, *supra* note 18 at 168; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at 194. It should be noted, that both of these opinions were delivered after 9/11, and thus it is clear that the court was cognizant of state practice and scholarship in the area, yet it did not support such a doctrine.

[54] Trapp, *supra* note 17.

[55] See, e.g. Michael Schmitt comments in "International Law and the Use of Drones," Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 21 October 2010 (arguing that "not only was the Court ignoring post 9/11 state practice, but that there was nothing in the text of the Article 51 which would indicate that an armed attack cannot be launched by a non-state actor"); Theresa Reinold," State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11" (2011) 105 American Journal of International Law at 244 (noting that "conservative pronouncements on matters of self-defense--to the effect that private acts need to be attributed--are increasingly out of touch with post-9/11 state practice").

[56] Antonio Cassese, "The International Community's Legal Response to Terrorism" (1989) 38 ICLQ 589; Mary O'Connell, "Lawful Self Defence to Terrorism" (2002) 63 U Pitt L Rev 889.

either unwilling or unable to meet their legal obligations … to prevent terrorists from using their territory as launching pads for attacks on other countries".[57] For these scholars, the state's involvement in the armed attack would affect only the choice of targets, not the legitimacy of force itself. That is, unless the attack was attributable to the host state or the host state impedes self-defence by the victim state, it cannot itself be targeted but non-state actors within its territory can be targeted without the host state's consent.[58] Kimberly Trapp, Greg Travalio, Noam Lubell, Michael Schmitt and Yoram Dinstein are proponents of this view.[59]

Although at first glance the two opposing sets of views may seem irreconcilable, the boundaries are not that rigid. For example, Mary O'Connell, citing the cases of Israeli action against Hezbollah and Turkish and Iranian action against Kurdish insurgents, has stated that where a state "is unable to prevent on-going attacks, some limited force may be used to prevent future attacks."[60] Cassese also wrote that although a state that cannot control non-state actors may not itself bear responsibility, "may not oppose its sovereign rights to any foreign State that intends lawfully to use force" against the non-state actors.[61] There has also been dissent within the ICJ. Judge Kooijmans in dissent wrote that, "if armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require."[62] Judge Kooijmans, dissenting also in the *Wall Advisory Opinion*, stated that the refusal by the Court to recognize such a right of self-defence ran against Security Council Resolutions 1368 and 1373 which "recognize the inherent right of individual or collective self-defense without making any reference to an armed attack by a State."[63]

Four scholars have also undertaken a review of state practice. Theresa

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[57] *New Threats and the Use of Force* (Copenhagen: Danish Institute for International Studies, 2005) at 46, online: Danish Institute for International Studies <http://www.diis.dk/sw12399.asp>; see also Elizabeth Wilmshurst, "The Chatham House Principles of International Law on the Use of Force by States in Self-Defence" (2005) 55 ICLQ 963.

[58] It is questionable how, in practical terms, non-state actors can be targeted within the host state without injury being caused to the host state. For example, even targeted drone strikes, which proponents advocate are a precise mode of warfare, have caused a significant amount of civilian deaths and economic damage to civilians in Pakistan.

[59] Trapp, *supra* note 17; Greg Travalio & John Altenburg, "State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force" (2003) 4 Chi J Int'l L 97; Dinstein, *supra* note 27 at 247; Michael N Schmitt, "'Change direction' 2006: Israeli operations in Lebanon and the International Law of Self-Defense" (2008) 29 Mich J Int'l L 127 at 161 [Schmitt, "Change Direction"]; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (New York: Oxford University Press, 2010) at 42.

[60] Mary Ellen O'Connell, "Evidence of Terror" (2002) 7 J Conflict L & Security 19 at 29.

[61] Antonio Cassese, 2nd ed, *International Law* (Oxford: Oxford University Press, 2005) at 472.

[62] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Separate Opinion of Judge Kooijmans, [2005] ICJ Rep 306 at 314; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Separate Opinion of Judge Simma, [2205] ICJ Rep 334 at 338 (concurring with Judge Kooijmans).

[63] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, [2004] ICJ Rep 219 at 229-230.

Reinold finds that because victim states "proffered various legal rationales or, in some cases, none at all"[64] when using force in the territory of a host state, it is difficult to draw conclusions about the status of the doctrine by looking at state practice, but nevertheless she observed that "states are making indiscriminate use of the unwillingness and inability scenarios to justify military action".[65] A report by the Danish Institute for International Studies has also stated that "limited preventive military actions against Al Qaeda in weak states have generally been met with acceptance, if not outright support, from the international community".[66] Tom Ruys and Sten Verhoeven, two other scholars who have studied state practice, note that, in the first 40 years of the UN Charter, victim states were generally condemned in their uses of force in ineffective host states.[67] In fact, the authors found that the Security Council often condemned incursions, many undertaken by Israel. However, after the Cold War, "states have frequently escaped condemnation by the Security Council and have even received occasional support from other states."[68] Ruys and Verhoeven conclude, however, that the use of force in another state's territory without the attribution of an armed attack to it or substantial involvement of that state in an armed attack remains controversial and is not yet settled.[69]

Ashley Deeks is another scholar who has addressed the issue. She relies on many of the same instances of state practice as the previously mentioned scholars, yet reaches a remarkably different conclusion. Deeks argues that "[m]ore than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat."[70] In reaching this conclusion, however, she fails to adequately engage with the ICJ's decisions to the contrary in the *Armed Activities of Congo* and *Wall Opinion* cases or acknowledge the body of scholarship that cuts against her argument. Indeed, even in terms of state practice, of the thirty-six cases Deeks cites since 1817 involving extra-territorial uses of force against non-state actors, she notes that only five countries, Israel, the United States, the United Kingdom, Russia and Turkey have "specifically invoked the 'unwilling or unable test' or a closely related concept."[71] This fact, coupled with her admission that she has not found a single case "in which states clearly assert that they follow the test out of a sense of legal obligation (i.e., the *opinio juris* aspect of custom)"[72] dilutes

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[64] Reinold, *supra* note 55 at 29.
[65] *Ibid*.
[66] *New Threats and the Use of Force*, *supra* note 57 at 48.
[67] Tom Ruys & Sten Verhoeven, "Attacks by Private Actors and the Right of Self-Defense" (2005) 10 J Confl & Sec L 289.
[68] *Ibid* at 296.
[69] *Ibid* at 319-320.
[70] Ashley Deeks, "Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense" (2012) 52 Va J Int'l L 483 at 486.
[71] *Ibid* at 549.
[72] *Ibid* at 502, n 70; for a useful critique of Deeks' argument, see also Kevin Jon Heller, " Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test", Opinio Juris (15 Dec 2011),

Deeks' claim further. Certainly one must be especially careful of ascribing *ex post* legal views to legitimate behaviour of states when the states themselves have not explicitly or implicitly indicated that they are acting pursuant to legal obligation. That is, *opinio juris* is needed for the purposes of creating "novel rights or unprecedented exceptions".[73]

It is thus fair to summarize then that the legality of the "unwilling or unable" doctrine under international law, remains, as Jack Goldsmith has written, "unsettled".[74] Considering that a right of self-defence in effective host states does not have any foundations in treaty law, its existence as customary law is debated, the ICJ has refused to recognize it and victim states' uses of force in allegedly ineffective host states have not met with universal approval, it can only be safely asserted that the rules in this area remain murky. That is, while it is accurate to claim that, "[t]he assertion of a limited right to violate a nation's borders to deal with a serious terrorist threat that the host nation is unwilling or unable to deal with is likely to be sympathetically received by most nations",[75] *lex lata* it cannot be said with confidence, as Deeks asserts, that the "unwilling or unable" doctrine is at present an established rule of international law.

III. UNPACKING THE "UNWILLING OR UNABLE" DOCTRINE

1. Need for Doctrine

As state weakness and fragility persists, "safe havens" and "ungoverned spaces" within weak states may provide non-state actors with a base from which to engage in armed attacks against other states.[76] It is therefore not surprising that the 2002 United States National Security Strategy stated that the country was "threatened less by conquering states than ... by failing ones".[77] Also, the list of states that have either targeted non-state actors

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online: Opinio Juris < http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>.

[73] *Military and Paramilitary Activities*, *supra* note 19 at 277.

[74] Jack Goldsmith, "Fire When Ready" *Foreign Policy* (19 March 2012), online: <http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready> (conceding that the test was not settled under international law and stating "this standard is not settled in international law, but it is sufficiently grounded in law and practice that no American president charged with keeping the country safe could refuse to exercise international self-defense rights when presented with a concrete security threat in this situation. The 'unwilling or unable' standard was almost certainly the one the United States relied on in the Osama bin Laden raid inside Pakistan").

[75] Gregory M Travalio, "Terrorism, International Law, and the Use of Military Force" (2000) 18 Wis Int'l LJ 145 at 171; see also Christian J Tams, "The Use of Force Against Terrorists" (2009) 20 EJIL 359 at 381 (asserting that "the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state. Instead debate has shifted towards issues of necessity and proportionality").

[76] James A Piazza, "Incubators of Terror: Do Failed and Failing States Promote Transnational Terrorism?" (2008) 52 Int'l Stud Q 469 at 470 ("States rated highly in terms of state failures, irrespective of the type of state failure experienced, are more likely to be targeted by terrorist attacks, more likely to have their nationals commit terrorist attacks in third countries, and are more likely to host active terrorist groups that commit attacks abroad").

[77] *The National Security Strategy of the United States of America*, September 2002, online: The White House Archives - President George W Bush <http://georgewbush-whitehouse.archives.gov/

beyond their borders or expressed a willingness to do so include not only traditionally strong states such as the United States, Russia and Israel but also weaker African countries such as Rwanda, Uganda and Kenya and nuclear arch-rivals, Pakistan and India. Furthermore, as drone technology becomes financially and technically more accessible and the legal regime on using force becomes more permissive, it is almost certain that the number of states using force and the geographic scope of such force will continue to expand.[78] In fact, it has been suggested that non-state actors and as many as fifty countries are actively looking to develop drone technology.[79]

It is thus imperative that such uses of force be regulated within a clear international legal framework and the debate be moved beyond abstract questions of doctrine to focus on optimally balancing the security preferences of victim and host states without privileging either unduly. Whether or not the current doctrine is satisfactory, *some* regime is certainly needed to regulate uses of force in ineffective host states. While it is true that doctrine can be abused by states, this is not in itself a good reason to avoid having rules. As Rosalyn Higgins has argued, in a similar vein, concerning whether or not there should be a doctrine of humanitarian intervention:

> Many writers argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims to the right to self-defense. That does not lead us to say that there should be no right of self-defense today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.[80]

To critique and propose viable alternatives to doctrine, it is important to elaborate the doctrine that is currently discussed by scholars as a starting point. Ashley Deeks states that a victim state must take the following steps before it can use force to target non-state actors in the territory of an ineffective host state:

> The victim state must (1) attempt to act with the consent of or in cooperation with the territorial state; (2) ask the territorial state to address the threat itself and provide adequate time for the latter to respond; (3) assess the territorial state's control and capacity in the relevant region as accurately as possible; (4) reasonably assess the means by which the territorial state proposes to suppress the threat; and (5) evaluate its prior (positive and negative)

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nsc/nss/2002/>.

[78] Alejandro Sueldo, "The coming drone arms race" *Politico* (11 April 2012), online: Politico <http://www.politico.com/news/stories/0412/75011.html>; William Wan & Peter Finn, "Global race on to match U.S. drone capabilities", *The Washington Post* (4 July 2011) online: The Washington Post <http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html>.

[79] David Cortright, "The scary prospect of global drone warfare", Editorial, *Cable News Network* (19 October 2011) online: CNN International <http://edition.cnn.com/2011/10/19/opinion/cortright-drones/index.html?hpt=hp_c2>.

[80] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995) at 247.

interactions with the territorial state on related issues".[81]

Other scholars have expressed similar views. Michael Schmitt argues that "before a state may act defensively in another [state's] territory, it must first demand that the state from which the attacks have been launched act to put an end to any future misuse of its territory. If the sanctuary state either proves unable to act or chooses not to do so, the state under attack may, following a reasonable period for compliance (measured by the threat posed to the defender), non-consensually cross into the latter's territory for the sole purpose of conducting defensive operations."[82] Noam Lubell has also written that once the victim state has exhausted co-operative measures and yet the "[ineffective] state is not taking effective measures against the non-state actor, either due to lack of willingness or ability, forcible measures can be taken on that state's territory."[83]

2. *Lack of Clarity*

A lack of any substantive clarity robs the "unwilling or unable" doctrine of much of its efficacy in guiding state behaviour. In principle, it is easy to agree with the broad proposition that where State X is ineffective in preventing its territory from being used to launch attacks against State Y, and State Y has attempted to "co-operate" reasonably without a satisfactory outcome, State Y should have some practical recourse, perhaps involving force even, to remedy such failure. That is, is it not unreasonable to propose, as a matter of abstract policy, that if a state is "too weak ... to prevent these operations ... that Utopia must patiently endure painful blows, only because no sovereign State is to blame for the turn of events."[84] However, the crucial question of when precisely a host state can accurately be considered to be "unwilling or unable" remains thorny. Alleging that another state is unwilling or unable/ineffective can be a very subjective claim that is open to significant manipulation, particularly because a state's effectiveness to deal with non-state actors may often not be easily observable to other states and thus provides greater room for conflicting and self-serving interpretations. For example, while repeated and persistent cross-border attacks may *prima facie* constitute some evidence of a state's ineffectiveness, many related questions will still require resolution: is the source of the attack as alleged, since no state is involved? Has the victim state provoked it? Is the host state making efforts to arrest or punish the actors responsible? Is the victim state acting prematurely and possibly worsening the situation? Has it engaged in a *bona fide* effort to co-operate with the host state? Absent certainty as to whether these questions have been addressed internally by the victim state, the legality of any use of force remains in doubt.

Further, a test that requires the self-interested victim state to "attempt" to co-operate with another state to address a "threat" or to "reasonably"

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[81] Deeks, *supra* note 70 at 506.
[82] Schmitt, "Change Direction," *supra* note 59 at 161.
[83] Lubell, *supra* note 59 at 42.
[84] Dinstein, *supra* note 27 at 245.

assess the host state's capacity only weakens the already inadequate legal protection for weak states within the international system. It is so vague so as to allow a victim state to justify any number of fact patterns as self-defence. When has a host state co-operated? A victim state could subjectively deem another state ineffective because it required more time or disputed the evidence upon which the victim state was relying. Alternatively, it could argue that the host state's proposal to arrest rather than kill the non-state actor is not sufficient to protect the victim state because it does not trust the judicial or law enforcement system of the host state and so forth. Similarly, a host state could erroneously claim that it is co-operative and effective even when it cannot suppress harmful conduct perpetrated by non-state actors. For example, for sake of argument, Russia may not be able to exercise a high degree of control over a remote part of its territory in Siberia. When should we say Russia is ineffective? Is seeking more time to deal with the problem indicative of inability? How much time is unreasonable? How many times does a state have to be unable to prevent the attacks before force should be authorized in its territory? If a state is improving its capacity, is it still unable? Realistically, all states may be "unable" at some point to prevent attacks just as "all states consistently fail some portions of their population."[85]

Deeks argues that the victim state's approach in soliciting co-operation must be that of a "reasonable state" in that it must give the host state a "reasonable amount of time in which to respond to that threat" and make a "reasonable assessment of territorial control and state capacity".[86] However, there is little reason to think that the vagueness of such a test can be remedied by hoping that the victim state acts reasonably in self-defence – no state would claim that its own behaviour was unreasonable. Pakistan denies ineffectiveness to suppress Al-Qaeda on its territory while the United States continues to imply the opposite. Yet, this was most definitely the rationale that the United States relied on to justify its operation against Bin Laden within Pakistani territory.[87] Pakistan also denies Indian allegations of unwillingness to suppress non-state actors allegedly targeting India. Similarly, for a number of years, Russia has been calling on Georgia to allow Moscow to directly target non-state actors in the Pankisi Gorge – a somewhat lawless region of Georgia where Chechen rebels allegedly operate – yet, Georgia continued to deny ineffectiveness.[88] Eventually, Georgia was forced to allow United States and Russian soldiers into its territory to suppress rebels. In the absence of clarity then, it will often become inevitable that the

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[85] Anna Simons & David Tucker, "The Misleading Problem of Failed States: a 'socio-geography' of terrorism in the post-9/11 era" (2007) 28:2 Third World Quarterly 387 at 387.
[86] Deeks, *supra* note 70 at 525.
[87] Marty Lederman, "The U.S. Perspective on the Legal Basis for the bin Laden Operation", Opinio Juris (24 May 2011), online: Opinio Juris <http://opiniojuris.org/2011/05/24/the-us-perspective-on-the-legal-basis-for-the-bin-laden-operation/>.
[88] Irakly Areshidze, "Chechen Incursions Prompt Flare-Up of Georgian-Russian Tension" *Eurasianet* (6 August 2002), online: Eurasia.org <http://www.eurasianet.org/departments/insight/articles/eav080702a.shtml>.

powerful victim state gets to, unilaterally and without *ex post* or *ex ante* accountability, determine what qualifies as sufficient co-operation and what counts as ineffectiveness.

As Chimmi and Anghie note, such lack of clarity in international legal rules is particularly prejudicial for the weaker states likely to be subject to this doctrine.[89] When a state's "conduct is challenged as inconsistent with a legal norm or otherwise questionable, the state … must respond— it must try to show that the facts are not as they seem to be; or that the rule, properly interpreted, does not cover the conduct in question; or that some other matter excuses non-performance".[90] This challenge, however, is only sustainable if the legal norm is reasonably clear. Making a rule precise and clear removes avenues for abuse. Even if a powerful state violates a clear test, this imposes a greater reputational cost on it than if the rule was ambiguous since it narrows the domain of argument for violation.[91] Also, it is simply harder to comply with an unclear rule, even if the state is not wilfully disobedient.[92]

A desire for clarity can also partly explain the content of international law on the prohibition of force, and in particular, the requirement that there be an armed attack before a right to self-defence can be claimed. As Louis Henkin wrote in *How Nations Behave*, an armed attack is "clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."[93] In fact, it has been acknowledged that the word 'armed' was deliberately included to reduce the occasions when force could be used, while alternatives such as 'direct attack' and 'attack' were rejected.[94] That is, armed attacks are "ordinarily self-evident ... There is rarely if ever any doubt as to whether it has occurred or by whom it was launched".[95] Thus it leaves a victim state with less room to justify an erroneous interpretation of the rules to legitimate a bogus claim of self-defence. Clarity is thus a necessary precondition for the rules to be self-enforcing and for international law to be effective.

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[89] Anthony Anghie & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J Int'l L 77 at 101 ("linguistic indeterminacies are resolved most often by resort to social context ... indeterminacy very rarely works in favor of Third World interests. Ambiguities and uncertainties are invariably resolved by resort to broader legal principles, policy goals or social contexts, all of which are often shaped by colonial views of the world.").

[90] Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998) at 119.

[91] Kenneth W. Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 Int'l Org 421; Kenneth W. Abbott et al, "The Concept of Legalization" (2000) 54:3 Int'l Org 401; Charles Lipson, "Why are some international agreements informal?" (1991) 45:4 Int'l Org 495.

[92] See Chayes & Chayes, *supra* note 90.

[93] Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979) at 142.

[94] Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Farnham, UK: Ashgate Publishing Limited, 2009) at 109.

[95] *Ibid*, quoting United States Senate, "Report of the Committee on Foreign Relations on the North Atlantic Treaty" (6 June 1949) Executive Report No 8 at 13.

3. Power Inequality and Information Asymmetry: Doctrinal Clarity Insufficient

However, even if the doctrine were clear, a victim state would often only be deterred from making erroneous claims of host state ineffectiveness if it fears that a breach may be detected and punished. That is, non-compliance must be observable. A punishment against an erroneous determination could take a number of forms: states may lower their reputational assessment of the victim state,[96] thus depriving it of the benefits of future co-operation or reducing its standing in the international community, or they may retaliate or reciprocate with a tit-for-tat response against the victim state – for example, by using force against the victim state. For any of these sanction mechanisms to work, though, two conditions must be satisfied: first, information must be available to the injured host state or other states in the international community that allows them to assess whether or not a victim state has made an unreasonable and erroneous determination of ineffectiveness. As Guzman writes" a violation of international law generates a reputational sanction only if some other country knows about the violation. It follows that a violation will lead to a smaller reputational loss if fewer countries know about it. By reducing the visibility of their violations, then, states reduce the reputational consequences"[97]. Second, once information about compliance becomes available, there must be a credible mechanism to sanction a state that acts illegally. If a victim state realizes either, that its breaches will not be detected or, even if they are detected, that they will not be sanctioned (by the imposition of reputational costs, for example), the incentives to comply with the rule in question are reduced. Unfortunately, in the case of the "unwilling or unable" doctrine, it is unlikely that both these conditions can be concurrently satisfied. While the host state may possess information about an erroneous determination, it most likely will not be in a position to credibly punish a victim state, as host states tend to be significantly weaker than victim states. Table 1 below sets out twelve incidents since 2001 when victim states used force in allegedly ineffective host states and the relative "power" of each state based on a widely used

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[96] Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984) at 106 ("Regimes rely not only on decentralized enforcement through retaliation but on government desires to maintain their reputations. … For reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to.''); Jack L Goldsmith & Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) at 90 ("States refrain from violating treaties (when they do) for the same basic reason that they refrain from violating non-legal agreements: because they fear retaliation from other states or some kind of reputational loss, or because they fear a failure of coordination."); Robert D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993) at 183 ("The sanction for violating [the norms and expectations generated by this network] is not penal, but exclusion from the network of solidarity and cooperation."); Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); see also Andrew Blandford, "Reputational Costs Beyond Treaty Exclusion: International Law Violations as Security Threat Focal Points" (2011) 10:4 Wash U Global Studies L Rev 669.

[97] Andrew T Guzman, How International Law Works: (London: Oxford, 2007) at 96.

measure of state power in international relations.[98]

TABLE: POWER ASYMMETRIES BETWEEN VICTIM STATES AND HOST STATES, 2001-2011

Year	Victim State	Power Rank	Host State	Power Rank
2001	United States	2	Afghanistan	77
2002	Russia	5	Georgia	114
2003	Uganda	80	DRC	127
2003	Israel	46	Syria	40
2004-2012	United States	2	Pakistan	13
2004	Rwanda	104	DRC	127
2006-2008	Turkey	12	Iraq	36
2006	Israel	46	Lebanon	93
2008	Columbia	32	Ecuador	71
2010	France	10	Mali	112
2011	Pakistan	13	Afghanistan	77
2011	Kenya	65	Somalia	110

As the table illustrates, in all but one instance of the use of force against non-state actors after 9/11 (2003 Israel-Syria conflict) in apparently ineffective host states, there were significant power inequalities between the victim and host state. It is thus questionable whether a victim state facing a much weaker host state in a private, adversarial and bilateral setting of such disparity would not be tempted to behave unreasonably in assessing whether the host state has been co-operative or whether it is effective in meeting its obligations.[99] It is indeed inconceivable to think that Somalia, Yemen or Pakistan would be able to punish the United States, even if it was clear to those states that the latter was making a bogus determination of ineffectiveness. Deeks notes that as a "historical matter, there appear to be few cases in which the territorial state objected to the use of force on its territory and then resorted to force in response."[100] This is hardly surprising; one would not expect a rational, but weak host state to retaliate against a much stronger state even if the victim state acted against it. Since it is unlikely that in over two centuries, a victim state has never used force unreasonably in the territory of a victim state, her finding simply confirms the hypothesis that weak host states are almost never in a position to

[98] The table is constructed from data available from a common dataset used to measure state capabilities, the Composite Index of National Material Capabilities. See J David Singer, Stuart Bremer, and John Stuckey, "Capability Distribution, Uncertainty, and Major Power War" in Bruce Russett ed, *Peace, War, and Numbers* (Beverly Hills: Sage, 1972) 19.

[99] Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16 EJIL 369 at 390 ("Bilateral negotiations are far more likely to be influenced by the superior power of one party than are multilateral negotiations, in which other states can unite and counterbalance the dominant party"); Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va J Int'l L 639.

[100] Deeks, *supra* note 70 at 533, n 164.

credibly challenge victim states that use force in their territory illegally.

Yet, this begs a question. What prevents other states from substituting for the lack of power of a weak host state by stepping in to punish a recalcitrant victim state? The problem here is that it is unlikely that credible information will be readily available to other states for them to make an informed assessment as to whether the victim state made an erroneous determination. When a state's armed forces attacks or intends to attack another state, the source of the attack, its magnitude and therefore the legitimacy of a self-defensive response is often more visible. In fact, movement of a state's troops, mobilization on the border, and statements of military and political leaders may be indicative. On the other hand, in the case of self-defence against non-state actors, there is often low-visibility as to whether or not an armed attack has actually taken place, whether the source is as alleged by the victim state and, most importantly, whether the host state is indeed ineffective at dealing with the suspected perpetrator, as claimed by the victim state. A lack of observability means that it becomes difficult for the international community to detect and therefore punish a victim state that makes arbitrary determinations.

This lack of observability can also have an opposite, yet equally perverse effect of hindering legitimate exercises of self-defence. If ineffectiveness is not visible to other states, relatively powerful host states can also "hold-up" genuine claims of self-defence by making erroneous claims of effectiveness in situations where the victim state is relatively weaker than the host state. For example, Afghanistan sometimes claims that Pakistan is ineffective at preventing non-state actor attacks against it. Even if the claim is assumed to be sound, since Pakistan's alleged ineffectiveness is not observable by the international community and Pakistan is not a state that Afghanistan can challenge, arguably Pakistan is able to block a potentially legitimate claim of self-defence. And this has historically been the case; despite allegations of ineffectiveness, Afghanistan has never used force to target non-state actors in Pakistan. Similarly, although Pakistan has been alleging for some time that India bears responsibility for attacks by non-state actors in its Baluchistan province, Pakistan has never been able to act in self-defence against its nuclear-armed neighbour, even if the allegations were true.[101]

Further, a lack of transparency in situations surrounding self-defence against non-state actors is troubling for yet another, more systemic, reason. As argued above, for international law to be effective, it must be identifiable when a state is cheating the rule, and recalcitrant states must be sanctioned even if punishment is simply reputational. If there is no transparency in state actions, other states cannot monitor behaviour, identify violations and therefore assess whether any particular state is 'cheating' the rules[102] - in this

[101] Qaiser Butt, "Balochistan conflict: 'PM's talks with leaders unlikely to succeed'", Express Tribune (7 Aug 2011), online: Express Tribune <http://tribune.com.pk/story/225958/balochistan-conflict-pms-talks-with-leaders-unlikely-to-succeed/>.

[102] Kenneth W Abbott & Duncan Snidal, "Why States Act Through Formal International Organizations" (1998) 42:1 J Confl Resolution 3 ["Why States Act"]; Helen V Milner, *Interests,*

case, the "unwilling or unable" doctrine. Kandori argues in the context of community enforcement of social norms that "a single defection by a member [then] means the end of the whole community trust, and a player who sees dishonest behaviour starts cheating all of his opponents. As a result, defection spreads like an epidemic and cooperation in the whole community breaks down".[103] The international legal system operates on a similar principle. Even states that are not harmed by the defection of another state should have an incentive to punish states that violate the rules, for fear that violations will spread and international peace and security may be jeopardized. Thus, for community enforcement to be feasible, violations of rules must be observable and identifiable by other states. If this is not happening, the efficacy of the international legal system may be eroded.

Of course, a qualification is in order here. This article has emphasized that it is important that violations of doctrine should be identifiable for doctrine to be effective in constraining state behaviour. However, if states obey international law mainly out of normative preferences, as assumed by a number of international legal scholars, rather than out of some instrumental calculations, then an "unwilling or unable doctrine" may be effective even in the face of acute informational and power asymmetries.[104] However, the fragility of the prohibition on the use of force and ubiquitous nature of state aggression in recent decades would suggest that normative constraints have been weak at best.[105] Rather, it appears that in matters of national security and defense, states may be particularly less open to moralistic or idealistic constraints of international law. Here, rational calculations of cost-benefit analysis may play a greater role in determining what action a state should take. As such, perhaps a more realistic and policy-oriented approach to matters of international security would be desirable, and a rational choice framework, as adopted in this article, could show a greater potential in diagnosing the substantive problems and framing a better legal solution to

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Institutions, and Information: Domestic Politics and International Relations (Princeton: Princeton University Press, 1997); James D Morrow, "Modeling the Forms of International Cooperation: Distribution vs. Information" 48:3 Int'l Org 387; Kenneth W Abbott, "Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements" (1993) 26 Cornell Int'l LJ 1. Literature on the economics of information also notes this problem. Actors that wish to transact with counter-parties may have imperfect information about the behaviour of other actors, leading to adverse selection, moral hazard and information monopolies that hinder beneficial co-operation in the marketplace. See generally George Akerlof, "The Market for Lemons: Quality Uncertainty and the Market Mechanism" (1970) 84:3 QJ Econ 488; Michael Spence, "Job Market Signaling" (1973) 87:3 QJ Econ 355.

[103] Michihiro Kandori, "Social Norms and Community Enforcement" (1992) 59 Rev Econ Stud 63 at 69.

[104] See e.g. Abram & Antonia Handler Chayes, "On Compliance" (1993) 47:2 Int'l Org 175 at 179; Thomas M Franck, "Legitimacy in the International System" (1988) 82:4 AJIL 705 at 706 ("[C]ompliance is secured ... by perception of a rule as legitimate by those to whom it is addressed".); Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106:8 Yale LJ 2599 at 2603 (describing a "process of interaction, interpretation, and internalization of international norms").

[105] See e.g. Michael J Glennon, *The Fog of Law: Pragmatism, Security, and International Law* (Palo Alto: Stanford University Press, 2010).

the problem of self-defence in effective host states.[106]

IV. AN ALTERNATE FRAMEWORK FOR SELF-DEFENSE IN INEFFECTIVE HOST STATES

1. The Security Council as Fact-Finder and Information Transmitter

In the last section, the article has sought to demonstrate that the unwilling or unable doctrine "contains [inherent] flaws that make it impossible to control behaviour, even if the will to do so exists."[1071] Whereas the *Caroline* case reversed "self-defense ... from a political excuse to a legal doctrine",[108] the "unwilling or unable" doctrine could be credited with doing the opposite. The article acknowledges that the threat of non-state actors perpetrating armed attacks from the territory of fragile states is real; yet, it has sought to point out that it is not the only or even the most significant threat to international peace and security. Recent experience has demonstrated however, that equally catastrophic harm to persons and property can result from victim states "defending themselves". Recognition of this fact is important to bridge the divide between scholars who flatly refuse the validity of the unwilling or unable doctrine and others who are willing to embrace this doctrine wholeheartedly in favour of victim states.

This article proposes that considering the acute power and informational asymmetries prevalent in the operation of the "unwilling or unable doctrine" and the lack of limitations on victim state behaviour, it is necessary to impose constraints on victim states if international peace and security is to be maintained.[109] It therefore proposes that, subject to existing restrictions on self-defence contained in the UN Charter and customary international law, as part of the "unwilling or unable doctrine" a victim state be permitted to use force in self-defence against non-state actors launching armed attacks from within ineffective host states, *if* the victim state is willing to bear the burden of disclosing to the Security Council why it deems the host state to be ineffective – or "unwilling or unable". Ideally, a claim of ineffectiveness would precede an act of self-defence since members of the Security Council are always "on-call".[110] However, as a second best alternative, where an

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[106] For rational choice approaches to international law, see generally Guzman, *supra* note 99; Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Cambridge: Harvard University Press, 2013).

[107] Sarah V Percy, "Mercenaries: Strong Norm, Weak Law" (2007) 61 Int'l Org 367 at 375.

[108] R Y Jennings, "The Caroline and McLeod Cases" (1938) 32 AJIL 82 at 82.

[109] Although it is beyond the scope of this article to engage the debate about pre-emptive uses of force, it firmly places itself in the spirit of the clear preferences expressed by a majority of states at the World Summit in 2005, that the rules on using force should not be relaxed. Thus, article 51 should remain the appropriate paradigm for self-defense against both, interstate armed attack and non-state actor armed attacks. See *World Summit Outcome*, UNGAOR, Res. 60/1, UN Doc A/RES/60/1 (2005) at para 77 ("We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter.").

[110] "Emergency Security Council Meeting on North Korea" *CBS News* (19 December, 2010) online: CBS News <http://www.cbsnews.com/2100-202_162-7163527.html>; "UN Holds Urgent Talks on Mali Crisis" *VOA News* (3 April, 2012) online: VOA News <http://

armed attack is imminent or has already been consummated, the reasons for ineffectiveness could be given as part of a state's self-defence reporting obligations. The article, as explored in detail below, also proposes that the Security Council should draw on substantive expertise from its Counter-Terrorism Committee (CTC) to verify whether or not a particular host state is unwilling or unable. And in the event that information is still lacking as to discerning a state's effectiveness, or the host state does not challenge the claim, the Security Council should set-up a fact-finding mission to determine the question. The article does not propose empowering the Security Council but rather utilizing the Council as a channel for facilitating information about ineffective host states for the benefit of the international community.[134] In the end, each state is to judge for itself the legitimacy of an act of self-defence by another state and if necessary, punish the recalcitrant state.

To illustrate the point briefly, when Israel launched a major attack within Lebanese territory in 2006 to target Hezbollah, its Permanent Representative to the UN wrote that "responsibility for this belligerent act of war lies with the Government of Lebanon".[111] In a subsequent Security Council meeting, the Israeli representative stated that "Israel's actions were in direct response to an act of war from Lebanon."[112] Yet, as argued earlier, while Lebanon clearly has a duty to prevent attacks against Israel, even if the "unwilling or unable" doctrine were considered settled law, Israel's self-defence in its territory would not be legitimate unless Lebanon was *de facto* unwilling or unable to prevent the attacks. Yet, Israel did not specify in unambiguous terms why it is that Lebanon should be considered responsible or even ineffective. The failure by Israel to provide any basis on which to conclude why Lebanon should be deemed ineffective meant that neither the international community nor Lebanon had the ability to counter or assess the claim. According to the proposal advanced in this article, Israel would have a right to exercise self-defence under the "unwilling or unable doctrine" only if it provided information to the Security Council concerning how it had assessed Lebanon to be ineffective. Had Israel tried to co-operate with Lebanon? Had it furnished Lebanon with necessary intelligence and given it a reasonable opportunity to arrest the perpetrators? Had it provided any evidence of communication and diplomatic exchanges with Lebanon? Had Lebanon shown a capacity and willingness to meet its international law obligations, as per the CTC's records? Provided such information, Lebanon could have then countered Israel's claim. If it were unable to do so, the Security Council could arrange a fact-finding mission to investigate Lebanon's ability and willingness. If Lebanon refused to host such a mission or could not challenge the claim adequately still, then Israel, subject to other requirements of international law, would indeed be allowed to use force

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www.voanews.com/english/news/UN-Security-Council-to-Hold-Emergency-Meeting-on-Mali-145895285.html>.

[111] *Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN SC, 61st Year, UN Doc A/60/937, S/2006/515 (12 July 2006).

[112] UNSCOR, 61st Year, 5489th Mtg, UN Doc S/PV.5489 (July 14, 2006), at 6.

within Lebanese territory.

The Security Council would at this juncture act as a fact-finder and information transmitter for the international community in determining host state ineffectiveness. This has several advantages. Not only is the victim state obliged to make its claim of ineffectiveness less opaque, but the host state also has an incentive to counter the claim. If victim and host states believe that justification will be needed for their actions, they are more likely "to provide truthful information."[113] Since information availability is crucial to ensuring state compliance with international laws,[114] the incentives for both host and victim state misbehaviour would be reduced, thereby reducing the structural weaknesses present in the unwilling or unable doctrine. If the host state is not effective, the reasons will also come to the fore and the legitimacy and necessity of victim state action will become more visible for the international community. Thus, an entrenchment of the transparency proposals of this paper would similarly have some effect in preventing the "unwilling or unable" doctrine – which may serve a valuable purpose in some cases – from being abused.

The process would also add much needed consistency and clarity to defining ineffectiveness. If the Security Council, for example, finds (whether through voluntary disclosure or a fact finding mission) that State A did not send its police forces to a remote part of its territory to suppress a non-state actors and other states disapprove of such action, then that finding would no doubt hold "precedential value" for other states in a similar situation. Similarly, if other states have disapproved of the behaviour of State B when it gave an economically poor state ten days to suppress a non-state actor when the risk of attack was far from imminent, then that also would add conceptual clarity and predictability to the concept of state ineffectiveness.

Another significant benefit of such fact-finding would of course be capacity-building for ineffective host states.[115] Many states that were at one

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[113] Arthur Lupia & Mathew D McCubbins, "Who Controls? Information and the Structure of Legislative Decision Making" (1994) 19:3 Legis Stud Q 361 at 368. ("If an information provider believes that the truth of his statement is likely to be verified, dissembling is less likely to get the information provider the outcome he desires. As a result, the more likely verification becomes, the more likely the information provider is to provide truthful information.").

[114] See Section III c, above at 21-25.

[115] David Cortright, "A Critical Evaluation of the Counter-Terrorism Program: Accomplishments and Challenges" (Paper Presented to the Global Enforcement Regimes, Transnational Organized Crime, International Terrorism and Money Laundering, at the Transnational Institute, Amsterdam, 28-29 April 2005) [unpublished] ("The requirements for implementing Resolution 1373 often involve substantial levels of training, the development of new administrative systems, and the purchase and installation of technically sophisticated equipment. Many states need help to improve policing and law enforcement systems, and to create financial regulatory mechanisms and financial intelligence units. Assistance may also be needed for the development of computerized links among security-related units, improved systems for identifying fraudulent travel documents, better mechanisms for controlling customs and immigration, and computerized equipment to screen passengers and cargo at border entry points. The Security Council's CTC has received numerous requests for assistance in these areas."); Gerald B Helman & Steven R Ratner, "Saving Failed States", *Foreign Policy* (Winter 1992-1993) 3 at 18-19 (In the context of rebuilding failed states so Helman & Ratner suggest that "the Security Council is the most efficient organ available, … but [given its] limited experience with economic and social

point fragile and on the verge of failed or failed recovered in building their administrative capacity without military intervention.[116] It is probable that the Security Council may find that a host state cannot be "rescued" or that the state is only on the margin of ineffectiveness and therefore simply needs capacity building. The Security Council may be particularly well suited to recognize where such assistance is needed and make provision for it in the same forum that it is reviewing a claim of host state ineffectiveness – this would be more efficient than dealing with capacity and capacity-building in different forums or at different times.

The proposal advanced in this article, although grounded in policy squarely fits within the framework of existing international law. The Security Council is authorized under the UN Charter to "maintain international peace and security" Further, under the UN Charter, self-defensive force must already be reported to the Security Council. Indeed, what this article proposes is that states that invoke the "unwilling or unable" doctrine to use force in other states without their consent be required to furnish reasons why they consider a host state as ineffective. Also, the Security Council should take a more pro-active role and when necessary, to set up fact-finding missions to verify host state effectiveness. It has been stated that the "Security Council has the clearest Charter authority to establish a fact-finding body."[117] Article 34 of the UN Charter also makes clear that the Security Council has investigatory powers.[118] Further, in 1991, the General Assembly passed a resolution affirming that "[t]he Security Council should consider the possibility of undertaking fact-finding to discharge effectively its primary responsibility for the maintenance of international peace and security".[119] Rosalyn Higgins has also written that the "Security Council can investigate any dispute and over the years some use has been made of fact-finding missions ... [and the] success of the fact finding missions has been variable, depending upon the co-operation of the state concerned and the

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matters" a "subgroup" might be established in the UN Secretariat "to oversee each conservatorship".).

[116] See The Fund for Peace, The Failed States Index: Frequently Asked Questions, at 10, online: The Fund for Peace <http://www.fundforpeace.org/global/?q=fsi-faq#9> ("In the 1970s, analysts predicted dire consequences, including mass famine and internal violence in India, citing rapid population growth, economic mismanagement, and extensive poverty and corruption. Today, India has turned itself around. Similarly, South Africa appeared headed for a violent race war in the 1980s, but it pulled back from the brink in a negotiated settlement that ushered in a new era of majority rule, a liberal constitution, and the destruction of its nuclear weapons program. In the past year, since the 2005 index, several countries that were teetering on the edge improved measurably.").

[117] Edward A Plunkett Jr, "UN Fact-Finding as a Means of Settling Disputes" (1969) 9 Va J Int'l L 154 at 178.

[118] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 34 ("The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.").

[119] *Declaration on Fact-Finding by the United Nations in the Field of Maintenance of International Peace and Security*, UN GA, 67th Plenary Meeting, UN Doc A/RES/46/59 (9 December 1991) at para 8.

quality of the team".[120]

2. Involving the UN Counter-Terrorism Committee

This article also suggests involving the CTC in fact-finding whether a state is ineffective. The CTC was created after September 11 to monitor counter-terrorism enforcement measures and facilitate the development of state capacity to combat terrorism.[121] The CTC "works to bolster the ability of United Nations Member States to prevent terrorist acts both within their borders and across regions".[122] Its mission, wrote one commentator, is to "raise the average level of government performance against terrorism across the globe."[123]

Almost all states are obliged to submit reports to the CTC annually since 2001. Such reports outline the efforts they have made to comply with Security Council Resolutions 1373 and 1624.[124] The CTC claims that "these reports form what many experts consider to be the world's largest body of information on the counter-terrorism capacity of each of the 192 UN Member States".[125] David Cortright writes that "CTC efforts to collect information from governments on counter-terrorism capacity and implementation have been highly successful."[126] There is little doubt that UN member state compliance with CTC reporting requests has been very impressive and indeed the CTC "has received unprecedented co-operation from States."[127] All UN member states submitted first-round reports to the CTC explaining their efforts to comply with Resolution 1373.[128] As of June 2007, 700 reports had been submitted to the CTC.[129] The CTC has also been highly successful in promoting the ratification and accession of international frameworks on counter-terrorism. Indeed, "[t]he CTC has received high levels of cooperation from UN member states…. Beginning in March 2005, the CTC started to

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[120] Higgins, *supra* note 80 at 171.
[121] For an overview of the CTC's current work, including a survey of the implementation of the Security Council Resolution 1373, see generally *Letter dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General*, UNSC, 66th Sess, UN Doc S/2011/463 (2011) [mimeo].
[122] Security Council Counter-Terrorism Committee, *Our Mandate*, online: Security Council Counter-Terrorism Committee <http://www.un.org/en/sc/ctc/>.
[123] Eric Rosand, "Current Developments: Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism" (2003) 97 AJIL 333 at 334.
[124] See Security Council Counter-Terrorism Committee, *Country Reports*, online: Security Council Counter-Terrorism Committee <http://www.un.org/en/sc/ctc/resources/countryreports.html>.
[125] *Ibid*.
[126] Cortright, *supra* note 115 at 5.
[127] Eric Rosand, "The Security Council As 'Global Legislator': Ultra Vires or Ultra Innovative?" (2004) 28 Fordham Int'l LJ 542 at 583.
[128] Rosand, *supra* note 123 at 335.
[129] CSR Murthy, The UN Counter-Terrorism Committee: An Institutional Analysis, FES Briefing Paper 15 (September 2007), at 7, online: Friedrich-Ebert-Stiftung <http://library.fes.de/pdf-files/iez/04876.pdf> (("Since September 2001, member states deposited nearly 700 accession/ratification instruments relating to 12 UN-system generated laws with regards to suppression of terrorist acts in one or other form….To put it in other words, 40 per cent of the total number of accessions and ratifications deposited during the past five decades belong to the period after the CTC was established").

conduct site visits to selected countries".[130]

Considering this, the CTC would thus have first-hand information not only about each state's compliance with international obligations to prevent non-state attacks, but more importantly about each state's ability and willingness to do so. It can thus add significant value to the fact-finding process for the Security Council. Of course, this is not to suggest that this information will be conclusive – only that the input from the CTC may need to be combined with other measures of capacity in combination with the Security Council's verification process to determine a state's ability or willingness.

A state's compliance assessment by the CTC would essentially be a function of three variables that assess a state's willingness to become effective in dealing with non-state actors. First, has a state ratified the relevant treaties or shown a determined resolve to do so? Second, has that state been able to comply with obligations under international law? Finally, the crucial question would be whether the state is *bona fide* attempting to improve its capacity annually and co-operating with data collection efforts of the CTC? Of course, the goal here is not to reduce a case-by-case nuanced assessment to a simple yes-no compliance question, but only to aid the Security Council and the international community in answering the question of compliance. Additionally, for the determinations of the CTC to be useful, its views and information about a particular state's compliance levels should be available on a continuous basis. That is, the international community must be aware of the direction a state is headed in terms of its compliance obligations for two different periods if it hopes to assist that state with improving its compliance levels or to simply sanction or outcast a state that is unwilling to do so. A state can truly be considered to be ineffective only if it persistently has poor compliance levels – for example, one or two bad years would not mean that the state is ineffective but it would highlight to victim states and the international community that the state may need assistance to prevent it from becoming permanently ineffective at suppressing non-state actors that carry out unlawful activities. Similarly, where a state is showing demonstrable signs of improvement, the victim state will need to justify its claim of ineffectiveness to a higher degree if it wishes to use force within such a state.

3. *Last Resort: Organizing Fact-Finding in Host States*

In ideal circumstances, the role of the Security Council would be passive. It would simply collect information that the victim and host states disclose voluntarily supplement it with information that the CTC possesses and in doing so, make the issue of a host state's ineffectiveness more transparent for the international community, thereby discouraging erroneous determinations. While disclosure would in many cases be voluntary as the victim and host state should both have incentives to present their

[130] Cortright, *supra* note 115 at 3.

effectiveness/ineffectiveness claims in the best lights so as to escape censure, there may be times when more active investigation and fact-finding may be necessary. Accordingly, the Security Council should act through its resolutions and request more information from states. If necessary, it could even set up fact-finding mission when faced with, for example, a host state that refuses to discuss its effectiveness or one that has not reported to the CTC for a number of years. In such cases, rather than open up the territory of that host state for intervention, considering the huge costs in terms of life and property that this has tended to entail in the past, the Council could promptly set-up a fact finding mission to determine whether the host state is *de facto* effective. This could involve a country visit to the host state by a mission, similarly structured to those undertaken for human rights violations by Human Rights Council appointed Special Rapporteurs and working groups, to assess in greater detail the situation of the host state in terms of effectiveness. The mission could gather and collate reliable information on the sites from which non-state actors are alleged to operate, such as the Federally Administered Tribal Areas of Pakistan, interview military and police personnel and review the capacity of the host state's security and intelligence apparatuses to complement information furnished by the victim state. To the extent that the host state is wary of sharing sensitive information, guarantees of confidentiality – backed by the Security Council - could be furnished. Members of the 1540 Committee and the CTC, lawyers, security, police and counter-terrorism experts drawn from neutral states and host and victim state could be part of such a mission.

In the past, the Security Council has established investigative commissions in similar situations of disputed facts. For example, the Commission of Investigation concerning Greek frontier incidents was set-up in 1946 to "ascertain the facts relating to the alleged border violations along the frontier between Greece on the one hand and Albania, Bulgaria and Yugoslavia on the other".[131] Similarly, a crisis in the Middle East in 1958 presents another relevant example of fact-finding. According to E.A. Plunkett, "[w]hen the Lebanese government charged that the United Arab Republic was involved in massive, illegal and unprovoked intervention in its affairs, the Security Council established an observer group with the quasi-military function of proceeding to Lebanon 'so as to ensure that there is no illegal infiltration of personnel or supply of arms or other material across the Lebanese borders.' The fact-finding body reported in a manner that appeared to be objective."[132] In 2008, the Security Council called for the Secretary General to send a fact-finding mission to be dispatched to the border between Djibouti and Eritrea, to verify a situation where several days of

[131] *Report of the Commission of Investigation concerning Greek Frontier Incidents Vol 3*, UN SC, 2d Year, UN Doc S/360/Rev.l (1947) at 309, online: United Nations <http://www.un.org/en/sc/repertoire/46-51/Chapter%208/46-51_08-9-The%20Greek%20frontier%20incidents%20question.pdf>.

[132] Plunkett Jr, *supra* note 117 at 166.

fighting had led to several deaths.[133] Most recently, in a matter that substantively implicates the "unwilling or unable" doctrine, the UN Special Rapporteur on counter-terrorism and human rights commenced an investigation into civilian casualties of drone strikes carried out in allegedly ineffective states. This investigation team will include respected judges, lawyers and other experts from different parts of the world, including Pakistan and the United States.[134] If a Special Rapporteur, particularly dependent on the voluntary co-operation of states, can commence a fact-finding process that potentially implicates the interests of powerful states, why could the Security Council not be able to do the same for a relatively weak host state? In fact, even modest fact-finding that is paralyzed by Security Council inaction could have great utility in altering state opinion. Take for example, the situation in Syria. There is immense disagreement between the P-5 permanent members on how to proceed. Russia and China have blocked a number of resolutions. However, even amidst all this disagreement, Lakhdar Brahimi, who the Secretary General appointed as UN-Arab League Special Envoy, has been fact-finding and transmitting information about the dire situation in Syria to the Security Council.[135] Has this broken the deadlock in the Security Council and created some kind of consensus for action? Not yet, but it is undeniable that it has been at least partly responsible for making the international community more aware about the gravity of the situation. It has also embarrassed allies of Bashar Al-Assad, such as Russia, who may otherwise have been able to support the Syrian regime openly.[136]

Of course, setting up of a fact-finding mission requires some needed cooperation from both the host state and members of the Security Council. In many cases of alleged ineffectiveness, a rational host state should be eager to demonstrate it is effective, and therefore forestall intervention. Also, since many host states tend to be some of the weakest states in the world, in cases of resistance, the Council's resolutions and authority could be brought to bear on that state without fear of upsetting a powerful state. It is also relevant to mention that the "1540 Committee" of the Security Council recently conducted a mission to the United States "to carry out a detailed fact-finding mission on how the United States implements UNSCR 1540 obligations."[137] If a powerful state such as the United States is receptive to

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[133] "Security Council calls for UN fact-finding team to visit Djibouti-Eritrea border" (25 June 2008) online: UN News Centre <http://www.un.org/apps/news/story.asp?Cr=djibouti&Cr1=border&NewsID=27162#.USJfevJIf9o>.

[134] Chris Woods & Alice K Ross, "UN launches major investigation into civilian drone deaths" (24 January 2013) online: The Bureau of Investigative Journalism <http://www.thebureauinvestigates.com/2013/01/24/un-launches-major-investigation-into-civilian-drone-deaths/>.

[135] See e.g. Louis Charbonneau, "Syria 'breaking up before everyone's eyes:' envoy tells U.N." *Reuters* (29 January 2013) online: Reuters <http://www.reuters.com/article/2013/01/29/us-syria-crisis-un-idUSBRE90S11R20130129>.

[136] See e.g. CNN Wire Staff, "Russia suspends new arms shipments to Syria" *Cable News Network* (9 July 2012) online: CNN <http://edition.cnn.com/2012/07/09/world/meast/syria-unrest>.

[137] See "United Nations Security Council Resolution 1540 Committee Visit to Washington, DC", *United States Department of State Office of the Spokesperson* (8 September 2011) online: United States

fact-finding missions to determine effectiveness, then it would seem realistic to expect weaker host states – that are much less able to resist international pressure – to be at least as willing to do the same and co-operate with the Security Council when the alternative is censure. Additionally, to the extent that the assessment will be used to identify states that require capacity building assistance, host states may have an additional incentive to comply since a publicizing of its potential ineffectiveness might support requests for aid.[138] Nevertheless, if the host state continues to resist, then it must accept responsibility if the victim state ultimately uses this as an excuse to attack non-state actors within its territory without its consent. This is only reasonable: there is no reason why the victim state's act of self-defence, if it has disclosed its reasons for alleging ineffectiveness, should continue to be blocked by a non-cooperative host state. In fact, the ICJ stated in the *Corfu Channel* case that in circumstances where a state is not able to collect evidence because the territory on which the evidence exists is within the territorial control of another state, the claimant state should "be allowed a more liberal recourse to inferences of fact and circumstantial evidence".[139]

It is of course entirely plausible that a resolution supporting a fact-finding mission may be vetoed by one of the permanent members. Yet, this risk should also not be overstated. All five permanent members of the Security Council have been victims of attacks emanating from allegedly ineffective host states and therefore have some, albeit limited, interest in co-operating.[140] A day after the attacks of 9/11, the Security Council unanimously voted for the passing of Resolution 1368, in which it "[recognized] the inherent right of individual or collective self-defense" and "condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001".[141] Yet, the interests of these states are not so homogeneous so as to simply allow a rubber-stamping of any use of force. For example, while it would be in China's interest that it retain an unlimited right to use force at will inside, say, Pakistan to target non-state actors causing disturbances in Xinjiang, it may constrain itself somewhat so as to not set a precedent for the United States to engage in similarly unconstrained action. Conversely, it would also not want to constrain the United States completely, so as to preserve a limited right of self-defence for itself in the

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Department of State <http://www.state.gov/r/pa/prs/ps/2011/09/171907.htm>.

[138] Gauthier de Beco, "Human Rights Indicators for Assessing State Compliance with International Human Rights" (2008) 77 Nor J Int'l L 23 at 28 ("States have shown themselves more willing to collect data for development indicators since they consider that the purpose of these indicators is not to criticise the government, but rather to support requests for aid.").

[139] *Corfu Channel Case*, *supra* note 34 at 30.

[140] For examples of the threat of non-state actors to other P5 members, see e.g. Michael Wines, "China Blames Foreign-Trained Separatists for Attacks in Xinjiang", *The New York Times* (1 August 2011) online: New York Times <http://www.nytimes.com/2011/08/02/world/asia/02china.html?_r=1&>; Mohammed Khan & Carlotta Gall, "Accounts After 2005 London Bombings Point to Al Qaeda Role From Pakistan", *The New York Times* (13 August 2006) online: New York Times <http://www.nytimes.com/2006/08/13/world/europe/13qaeda.html?pagewanted=all&_r=0>.

[141] SC Res 1368, *supra* note 36 at preamble-para 1.

future. This recurring tension between co-operation and conflict thus acts as a check on each victim state's unilateral claims. However, this is not to say that resolutions for fact-finding will smoothly pass through the Security Council; they may not. Yet, the potential risk of a fact-finding mission being blocked in some cases might be a necessary evil that pragmatism may require tolerating.

4. Crossing into International Relations: Can the Security Council Make a Difference?

The Security Council can significantly bolster the efficacy of the "unwilling or unable" doctrine, by injecting transparency into the process whereby ineffectiveness is determined. While this will surely not be successful in constraining all uses of force in weak host states,[142] even modest information provision can nevertheless encourage states to improve the quality of their decisions so as to screen out bad uses of force that can result from adverse selection.[143] Indeed, scholars of international relations have long acknowledged that institutions can bring the international spotlight to bear on provocative behaviour and the Security Council is particularly apt to play this role.[144] It can do so by signalling information about the legality and accuracy of a victim state's claim of host state ineffectiveness to the international community and to the victim state's own citizens that may be concerned about the foreign policy of their government.[145] In fact, some scholars view the Security Council as the only international institution that can legitimize the use of force.[146] As Ian Johnstone points out, "the Security Council is valued to the extent that all but a few states believe it serves a useful purpose for the maintenance of peace and security, despite deep reservations about its unrepresentative composition and unequal distribution of voting power. Because it is a valued institution, reputations

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[142] There is evidence that the United Nations Security Council has not fared well in preventing uses of force by powerful countries even when the legal basis for the use of force may not be robust. See e.g. Mariano-Florentino Cuéllar, "Reflections on Sovereignty and Collective Security" (2004) 40 Stan J Int'l L 211. For realist critiques of the efficacy of international institutions generally, see John Mearsheimer, "The False Promise of International Institutions" (1994) 19 Int'l Sec 5; Jack Goldsmith, "Sovereignty, International Relations Theory, and International Law", Book Review of *Sovereignty: Organized Hypocrisy* by Stephen D Krasner (2000) 52 Stan L Rev 959; Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (1999) (expressing scepticism that international law has any independent efficacy, particularly in relation to the use of force).

[143] Alexander Thompson, *Channels of Power: The UN Security Council and U.S. Statecraft in Iraq* (Ithaca: Cornell University Press, 2009).

[144] See e.g. Terrence L Chapman & Dan Rieter, "The United Nations Security Council and the Rally 'Round the Flag Effect" (2004) 46 J Confl Res 886.

[145] Domestic audiences may be looking for informational signals to assess international issues. Review of the international behaviour of a state by international institutions such as the Security Council can provide such signals. See Terrence L Chapman, "Audience Beliefs and International Organization Legitimacy", (2009) 63 Int'l Org 733.

[146] See eg Thompson, *supra* note 143; Erik Voeten, "The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force" (2005) 59 Int'l Org 527; Ian Hurd, "Legitimacy, Power, and the Symbolic Life of the UN Security Council" (2002) 8 Global Governance 35.

count there".[147] Its refusal to authorize the 2003 Iraq War should be seen as a paradigm case where it exercised this function. It not only brought to light the weak arguments being made by the United States and the United Kingdom for going to war in Iraq, but also disseminated that information globally through debates by states within the Council, thus reinforcing the scepticism of much of the international community regarding these states' intentions. Scholarly disappointment with the inefficacy of the Security Council prior to the war is based on a traditional misconception of the mandate of the Security Council as an institution "whose job is [only] to maintain peace by enforcing rules and dictating the behaviour of states.[148] However, these scholars fail to recognize the Security Council's equally important role in acting as a "talking shop."[149] It is a forum where states debate, deliberate, screen and transmit signals about the justification of any use of force. Rather than view the Security Council as acting as an enforcer of the peace, it may thus be more realistic to view it as a forum where competing claims and interpretations are subject to "peer-review" by other states. The promotion of peace, by facilitating transparency, is precisely the sort of role the Security Council is well capable of fulfilling.[150]

By acting as a fact finder and information transmitter, the Security Council, as per the proposals advanced here, screens and signals the quality of a victim state's use of force.[151] Disseminating information about state behaviour thus reduces uncertainty regarding another state's intentions and makes it difficult for states to conceal ill intentions or violations of international law. As Jervis accurately captures, "[c]o-operation is made more likely not only by changes in payoffs, but also by increases in the states' ability to recognize what other [states] are doing".[152] Transparency thus enables states to monitor behaviour, identify violations of rules and verify whether a particular state is "cheating" the rules, thereby promoting the efficacy of international law.

Such verification can also reduce the implications of power inequality

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[147] Ian Johnstone, "Security Council Deliberations: The Power of the Better Argument" (2003) 14 EJIL 437 at 477.

[148] Thompson, *supra* note 143; Thomas M Franck, "What Happens Now? The United Nations after Iraq" (2003) 97 AJIL 607.

[149] Kenneth Anderson, "United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations" (2009) 10 Chi J Int'l L 55 at 89 ("The debates over Russian intervention in Georgia, Kosovar independence or, for that matter, the Iraq War are emblematic of the talking shop role of the Security Council—and in those terms, each of those debates was a success for the Security Council, not a failure.").

[150] See Dan Lindley, *Promoting Peace with Information: Transparency as a Tool of Security Regimes* (Princeton: Princeton University Press, 2007).

[151] For informational theories of legislative organization proposing that committees are designed to serve as sources of policy-relevant information for the legislature as a whole, see Alexander Thompson, "Coercion Through IOs: The Security Council and the Logic of Information Transmission" (2006) 60 Chi J Int'l Org 1; Abbott & Snidal, "Why States Act," *supra* note 102; Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor: University of Michigan Press, 1992).

[152] Robert Jervis, "From Balance to Concert: A Study of International Security Cooperation" (1985) 38:1 World Politics 58 at 73.

between victim and host states. By taking the dispute about effectiveness away from a bilateral setting, the host state obtains a "voice" and gains opportunities for to lobby to form coalitions and organize blocking positions against more powerful victim states. Negotiating in the multilateral setting of the Security Council therefore gives weaker states greater influence,[153] as information about a state's coercive intentions spreads much more rapidly in a multilateral setting.[154]

Of course, a powerful victim state may be wary of subjecting its claim to verification by the Security Council envisaged in this article, as disclosure entails costs of sovereignty, bargaining with other states and collecting and reporting information.[155] Why then would a powerful victim state be willing to take on the additional burden of disclosing its arguments to the Security Council? It may be because victim states care about their reputation. Concerns about reputation appear to form at least part of the explanation for why even a state such as the United States does not simply engage in forcible action in states such as Yemen or Somalia without offering *any* justification of its position. Neither host states, such as Yemen and Somalia, nor the international community can directly punish the United States, and yet resources are invested in defending the use of force in allegedly ineffective host states. Why would the United States care about its reputation in the international community? Vaughn P. Shannon suggests that leaders of states "value their social standing in international society seek to avoid negative social judgments" and choose policies, behaviour, and their justifications for both accordingly.[156] Alexander Wendt argues that a state needs "collective self-esteem;" that is, is "need[s] to feel good about itself, for respect or status."[157] According to theorists such as Shannon and Wendt, maintenance of a "good or moral image" of a law-abiding state is therefore an end in itself. Since misbehaviour would be more easily detected by the system of Security Council involvement advocated for in this paper, States would thus, at least on the margin, try to avoid inviting the disapproval of other states[158] by claiming host state ineffectiveness erroneously. There are functional reasons for desiring a good reputation. It allows a state to have soft power that can be

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[153] This has been used to explain the lack of balancing against the US after the end of the Cold War. See Joseph S Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).

[154] Guzman, *supra* note 99 at 72 ("The reputational consequences of a violation will be more severe in a multilateral context—because the reputational information spreads quickly").

[155] See William B T Mock, "An Interdisciplinary Approach to Legal Transparency: A Tool for Rational Development" (2000), 18 Dick J Int'l L 293 at 301 ("There are several opportunities for costs to arise in obtaining information because information gathering has several phases. First, information must be located. Then it must be acquired. Then it must be confirmed. Then it must be analyzed. ... At each phase, an information-seeker may incur costs" [footnote omitted]).

[156] Vaughn P Shannon, "Norms Are What States Make of Them: The Political Psychology of Norm Violation" (2000) 44 Int'l Stud Q at 294.

[157] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 236.

[158] See e.g. Anthony D'Amato, "Is International Law Really Law?" (1984) 79 Nw UL Rev 1293 at 1298 (Arguing that international law is still law despite its lack of centralized enforcement because in the international system "the social-disapproval factor operates as a sanction.").

leveraged to bring other states' preferences in line with its own. This soft power can suffer if a state is perceived as using force arbitrarily or excessively against weaker states. Soft power has been identified as important for the success of United States hegemony.[159] Channelling a claim of ineffectiveness through an institution can be costly for a victim state as compared to engaging in force unilaterally and if it opts to do so, it signals to and reassures the international community that it is a relatively law-abiding state[160] while also legitimating victim state self-defence. As one commentator writes, "the mere fact that [power] is exercised through means of international law might enhance its authority" however "once it appears merely as [a state's] tool, [law] will be unable to provide them with the legitimacy they seek."[161] Additionally, if host states observe that the victim state has not engaged in bilateral coercion and behaved reasonably "this provides [host states] with an incentive to follow the resulting agreements, leads to quasi voluntary compliance, and thus lowering the costs of enforcement (pacification)."[162] Conversely, a state that realizes that the quality of its use of force is suspect or is not interested in preserving its reputation may deliberately choose not to report self-defence or submit information about state effectiveness to the Security Council, therefore signalling through its failure to report that its use of force may not be legal. Indeed, this much was acknowledged by the ICJ in the *Nicaragua* case when it stated that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense."[163] The favourable acceptance by NATO and OAS member States of the initial military response to 9/11 as a legitimate exercise of self-defence seems to have been based, at least partly, on the verifiability of the claims being made by the United States and its willingness to engage the Security Council meaningfully.

If a victim state subjected its claim to multilateral verification in an international organization, it may also mitigate other costs to the extent that such disclosure may promote assistance. For example, forty countries contributed personnel to the coalition effort in the First Gulf War, while financial contributions of $54 billion were made.[158] In contrast, due to the lack of multilateralism shown by the United States when it bombed Sudan and Afghanistan in 1998, this had the effect of "aggravating bilateral relationships all over the place" and made them "more difficult to manage".[164] Also, there is no guarantee that a victim state's power to intervene in ineffective host states will continue indefinitely. If so, it has some self-interest in regulating the rules so as to prevent other powerful states in the future from exploiting the rules if its power were to decline.

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[159] Nye, *supra* note 153.
[160] Andrew Kydd, "Trust, Reassurance, and Cooperation" (2000) 54:2 Int'l Org 325; Thompson, *supra* note 143 at 10.
[161] Krisch, *supra* note 99 at 375, 408.
[162] *Ibid* at 373.
[163] *Military and Paramilitary Activities*, *supra* note 19 at 105.
[164] Thompson, *supra* note 143 at 20.

5. Applying Fact-Finding to the United States-Pakistan Relationship

How would the proposal in this paper alter the operation of the unwilling or unable doctrine in practice in for example, the United States-Pakistan scenario? The United States has used force, including drone strikes to target suspected militants in Pakistan. The 2 May 2011 operation to capture or kill Osama Bin Laden is also a frequently invoked example of a victim state claiming a right to use force in a host state without its consent. It is also a case where the host state has repeatedly complained about violations of its sovereignty, denied that it has granted consent to the victim state, and alleges helplessness in the face of a superpower's demands. On the contrary, the victim state has at times alleged that the host has not done enough or is unable to suppress non-state actors on its territory. It is thus a paradigmatic case for assessing how the "unwilling or unable" test would be applied based on the proposals made in this article.

A use of force on Pakistani territory without its consent would *prima facie* be a case of aggression and in violation of international law. However, even absent consent, the United States' use of force in Pakistan would be legal, at least under the "unwilling or unable" doctrine, if it were responding to a specific armed attack or if it had given Pakistan the opportunity and the evidence demonstrating that the particular non-state actors had harmed the United States. What intelligence on non-state actors has been shared between Pakistan and the United States is not public. What is public is that Pakistan has repeatedly complained about a violation of its sovereignty and in fact, recently requested that the United Nations investigate drone strikes carried out on its territory.[165] In fact, it cannot be said with certainty how the United States has assessed that Pakistan is unwilling or unable, or even on what basis Pakistan would refute those claims. The result thus is a repeated cycle where the United States launches drone strikes in Pakistani territory, many civilians are killed, the victim state claims that they were militants, the host state protests the violation of its sovereignty and third party sources confirm that civilians have indeed died.[166] Pakistan is hardly a match for the military might of the United States, so even if it *bona fide* believes that the United States is behaving aggressively and it is correct, it cannot retaliate to deter the United States. On the other hand, the international community is in no better position to assess whether the United States is complying with spirit and substance of the "unwilling or unable" doctrine even if it accepts its legality. Thus, it cannot impose any costs on the United States so as to prevent potentially illegal incursions into Pakistani territory.

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[165] Owen Bowcott, "UN to Examine UK and US Drone Strikes" *The Guardian* (24 January 2013) online: The Guardian <http://www.guardian.co.uk/world/2013/jan/24/un-examine-uk-afghanistan-drone-strikes>.

[166] See e.g. Chris Woods, "Drone War Exposed – The Complete Picture of CIA Strikes in Pakistan" (10 August 2011) online: The Bureau of Investigative Journalism <http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/>; "The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2013" (2013) online: New America Foundation <http://counterterrorism.newamerica.net/drones>; *Living Under Drones*, *supra* note 13.

How would other states know whether the United States action in Pakistan is legal or illegal? The rather vague nature of the "unwilling or unable" test, as discussed above, leaves other states with little or no information as to the legality of force used by a victim state and could allow victim states to cloak aggressive or error-prone uses of force as self-defence. Quite possibly, the United States could be coercing Pakistan or Pakistan could be falsely feigning an ability or willingness to deal with non-state actors when that is not the case. Hundreds of civilians have already lost their lives amidst this cycle of finger pointing.

Adopting the proposal advanced in this article, the "unwilling or unable" doctrine would still be the correct test applied to judge the legality of the use of force, but decision-making would likely be more transparent with less danger of predation or error. Under the proposed system, if the United States sought to invoke the controversial "unwilling or unable" doctrine, it would need to disclose to the Security Council why it judges Pakistan to be "unwilling or unable". Such a disclosure could be in the form of diplomatic letters and exchanges between the states that evidence that the United States provided Pakistan with evidence about the source of the threat and a reasonable opportunity to counter the non-state actor threat. It could also include replies or non-replies from the Pakistani government or a diplomatic refusal to provide a helpful defense of its position. If the United States suspects complicity between some Pakistani state actors and non-state actors, then it could disclose that evidence. The United States might wish to provide intelligence gathered showing links between the state and militants or visible signs of complacency to tackle them or a refusal to accept technical or military capacity building assistance that could be used to target non-state actors. Pakistan would also have the opportunity to challenge the determinations and disprove allegations of ineffectiveness in the Security Council. Pakistan might do so by demonstrating that it has been doing the best it can with the resources at its disposal; it could point to arrests of non-state actors and the military, civilian and financial losses that it has suffered in the process to demonstrate its will to suppress non-state actors. If Pakistan refuses to furnish evidence of its effectiveness or the information provided is inadequate, the Security Council would set-up a fact-finding mission that would investigate these matters in greater detail, within Pakistan's territory. The goal of this fact-finding mission would be to determine conclusively whether or not Pakistan is ineffective. This scrutiny would depend to a significant extent on the quality of information being delivered by both states, but more importantly, by Pakistan. If the information disclosed by either state within the Security Council were of a low quality, it would signal misbehaviour and ill intentions. Thus, if Pakistan is feigning effectiveness when it really is not able to contain the threat, there is a higher probability that its claim would be challenged. In addition, since the CTC would be involved, Pakistan may find it harder to make false claims about its willingness to comply with anti-terrorism obligations because the CTC would possess firsthand knowledge about its compliance record.

Ultimately, if it becomes apparent that Pakistan is indeed ineffective,

then that finding would have adverse long-term consequences for Pakistan in relation to the United States, which would of course be able to legitimate its self-defensive uses of force against non-state actors within Pakistan's territory. A finding of ineffectiveness would not only legitimate force within Pakistani territory but it would also invite sanctions from the international community that would now be able to more accurately assess Pakistan's effectiveness. On the other hand, if it appears that the United States has genuinely not given Pakistan an opportunity to deal with the suspects or if Pakistan is refusing to deal with the non-state actors because of the poor or speculative quality of the information provided by the United States, then that would also become visible to other states and they could instead sanction the United States for misbehaviour. To be sure, both states will still, at least, initially need to cooperate bilaterally. But, if the proposal in this article were accepted, there would be an additional, more robust multilateral check to prevent bad-faith determinations and false claims of co-operation.

The point here is that the process of determining ineffectiveness will be partly removed from a bilateral, potentially coercive private setting to a multilateral one where the United States and Pakistan will both be subject to some scrutiny in the court of state opinion – albeit limited – by the international community and the Security Council.

V. CONCLUSION

The international legality of using force against non-state actors in weak host states without host state consent is unclear, yet victim states have used force on a number of occasions. While victim states have reasonable grounds to fear that non-state actors based in host states may attack them, there is much evidence to suggest that victim states are also quite capable of causing significant destruction within host states. Yet, by ignoring the unequal international environment in which the doctrine operates and by focusing narrowly on doctrinal questions, extant scholarship has largely marginalized the security concerns of host states and heavily privileged the security preferences of victim states.

This article argued that unless "ineffectiveness", i.e. a state's inability or unwillingness, becomes observable by the international community, the "unwilling or unable" doctrine may continue to be of limited efficacy in constraining arbitrary uses of force against weaker host states. Borrowing from international relations literature, it is thus proposed that if a victim state asserts a yet unsettled right to use self-defensive force in an ineffective host state, it should be required to disclose to the Security Council why it considers the particular host state to be ineffective. It is also suggested that the Security Council should act as a fact-finder and transmit information to the international community as to the accuracy of the victim state's claim. For this purpose, in addition to information voluntarily disclosed by the victim and host state, the Security Council should seek information on a host state's effectiveness from the CTC and, if necessary, set-up fact-finding missions to verify host state effectiveness.

Such verification can significantly improve decision making under the "unwilling or unable" doctrine. By acting as fact-finder and information

transmitter, the Security Council could screen and signal the quality of the claim of ineffectiveness for the benefit of the international community. Since this would increase transparency of state behaviour, particularly on the margin, the proposed system would materially hinder victim states from engaging in uses of force predicated on erroneous pretexts of host state ineffectiveness while also encouraging host states that have a poor record of compliance to move towards compliance.

The goal of this article is to identify the issues and offer a practical and balanced solution to the problems surrounding extra-territorial self-defence against non-state actors. In doing so, the article does not naively suggest that it will be an easy task to implement these proposals or that they are a panacea for the "unwilling or unable" doctrine. Unfortunately, the issue of self-defence against non-state actors lends itself to no easy or perfect solutions. Nonetheless, the proposal advanced in this article represents what would be a marked improvement over continuing with the operation of the "unwilling or unable" doctrine in its current form. Further, to the knowledge of the author, while legal scholarship has considered doctrinal issues in some depth already, it has thus far failed to produce proposed means by which the problems identified might be remedied. This article is a first attempt to fill this lacuna. As such, the suggestions contained in this article should be viewed as one proposed framework inviting further thought and elaboration in order.

Modern-Day Slavery?
A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev

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I. Introduction

Slavery and trafficking in persons continue to draw global attention, fostering debates in sociological, political, academic and legal circles. Governments, in particular, value being seen on the global stage as working to combat the trafficking of human beings to and from their territories. With prosecution of traffickers difficult in many jurisdictions, civil society organizations and others always welcome efforts by regional courts to hold governments accountable for their failure to fulfil their counter-trafficking international obligations, or those by domestic courts to find traffickers guilty.

What is at risk, however, in this desire to identify traffickers and grant remedies to victims, is a judicial interpretation of slavery and trafficking alien to their meaning in international law. The increasing tendency by academics and researchers,[1] journalists,[2] the United Nations,[3] governments,[4] civil society organisations[5] and other policy makers[6] to label human trafficking as a form of modern-day slavery is a powerful tool to attract support for this objective; but is also a concerning trend. In this conflation of trafficking and slavery the key elements that distinguish the two concepts are often lost, including in efforts to raise public awareness; to implement policies and programs designed to prevent trafficking; and to protect and provide reintegration assistance to its victims.

In this article, we look specifically at the judicial treatment of the

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[1] Jonathan Martens, Maciej Pieczkowski & Bernadette van Vuuren-Smyth, *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* (Pretoria: International Organization for Migration, 2003); Jennifer Burn, Sam Blay & Frances Simmons, "Combating Human Trafficking: Australia's Responses to Modern Day Slavery" (2005) 79 Austl LJ 543; Anne Gallagher, "Contemporary Forms of Female Slavery" in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law*, vol 2 (New York: Transnational Publishers, 2000) 487; Louise Brown, *Sex Slaves: The Trafficking of Women in Asia* (London: Virago, 2000).

[2] Benjamin E. Skinner, "The New Slave Trade", *Time* 175:2 (18 January 2010) 54.

[3] UNODC, *A Global Report on Trafficking in Persons* (2009), online: United Nations Office on Drugs and Crime <http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf> at 6.

[4] US White House Office of the Press Secretary, Media Release, Remarks by President Obama to the Australian Parliament (14 November 2011) online: White House <http://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>; see also Ministerio de Justicia y Derechos Humanos de la Nación (Argentina) and UNICEF, *Trata de personas. Una forma de esclavitud moderna* (2012) at 1, online: United Nations Children's Fund <http://www.unicef.org/argentina/spanish/Trata2012%281%29.pdf>.

[5] HRW, A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, online: Human Rights Watch <http://www.hrw.org/en/news/1994/01/30/trafficking-burmese-women-and-girls-brothels-thailand>; National Human Trafficking Resource Center, Human Trafficking Cheat Sheet (2009), online: Polaris Project <http://www.polarisproject.org/index.php>.

[6] European Commission, *Together Against Trafficking in Human Beings*, online: European Union Anti-Human Trafficking Website <http://ec.europa.eu/anti-trafficking> (Quoting Cecilia Malmström, the European Union Commissioner for Home Affairs, as stating that human trafficking "can be classified as a modern form of slavery".). To its credit the Group of Experts on Action against Trafficking in Human Beings of the Council of Europe has not used this expression in its two official reports published so far.

concepts of slavery and trafficking, with a critical review of Australian and European case law. The case against Victorian brothel owner Ms Wei Tang was the first jury conviction under the slavery offences in Australia's *Criminal Code* (Cth).[7] This conviction was subsequently appealed (Court of Appeal of the Supreme Court of Victoria) and finally upheld by Australia's High Court in 2008.[8] The case of *Rantsev v Cyprus and Russia*[9] was the second time the European Court of Human Rights (hereinafter the European Court or ECtHR) addressed human trafficking, but its first substantive analysis of the issue.

Both the cases of *Tang* and *Rantsev* deal with cross-border movement of women for the provision of sexual services and are two of the few examples across the globe of superior courts adjudicating on the so-called issue of "modern day slavery". As we will explain, both cases involved facts that appeared, at face value, to contain some elements of the crime of human trafficking; yet neither Court was expressly adjudicating on the question of human trafficking but rather on the question of slavery. There are clear parallels in the experiences of the five Thai sex workers in Australia, discussed in *Tang*, and Ms Rantseva's experience in Cyprus, as well as an evident desire of both courts to protect migrant sex workers who find themselves in situations of exploitation. Both courts attempt to do so by using slavery provisions as the legal tool to find the States of Cyprus and Russia and the accused, Ms Tang, at fault. These cases, therefore, lend themselves to a comparative study of the facts and law.

From a victim's point of view, the outcome of the ECtHR's decision is a positive one, with Mr Rantsev receiving some form of recognition for the violations of his rights as the father of Ms Oksana Rantseva, who was found dead in Cyprus on 28 March 2001. The case of Tang is more difficult to couch in such terms. Indeed, while two of the five women who were sex workers in Ms Tang's Melbourne brothel stayed on to work in the brothel after their "debts" were paid, we do not know what happened to the other three. It is therefore difficult to discern the extent to which the ruling of the Australian High Court could be considered a victory for these women.[10] Nonetheless, both cases have received significant praise from various groups, particularly the human rights movement, for offering redress for crimes that are typically difficult to prosecute at the national level.[11]

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[7] Andreas Schloenhardt, Case Report on *R v Wei Tang*, (2009) 23 VR 332, online: University of Queensland, TC Beirne School of Law <http://www.law.uq.edu.au/documents/humantraffic/case-reports/wei_tang.pdf>.

[8] *The Queen v Tang*, [2008] HCA 39, 237 CLR 1, 82 ALJR 1334, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, rev'g [2007] VSCA 134.

[9] *Rantsev v Cyprus and Russia*, No 25965/04 [2010] ECHR 22, 51 EHRR 1 [*Rantsev*].

[10] See *VXAJ v Minister for Immigration & Anor* [2006] FMCA 234. One of the five women had applied for a Protection Visa on the basis that she assisted with the prosecution and feared for her own life and that of her family if she was forced to return to Thailand. It was held by Chief Magistrate Pascoe that the decision of the Refugee Review Tribunal to uphold an earlier decision denying her a visa was erroneous.

[11] INTERIGHTS' Legal Practice Director Andrea Coomber welcomed the judgment stating: "The European Court has confirmed that human trafficking is an affront to human dignity and

Although several pieces have been written separately on each of these two cases,[12] the originality of this article lies in the comparison of these two globally significant – and often praised – cases. As noted, our main concern lies with the treatment by the Australian and European judiciaries of the concepts of slavery and trafficking when compared to the definitions articulated in international treaties. We use the facts in the Australian and European cases as the basis for our discussions of not only the intended meaning of slavery and trafficking in the relevant international instruments, but also how they should be understood in contemporary law.

In this article, we argue that both the Australian High Court and the ECtHR erred, respectively, in upholding the decision that Ms Tang's actions amounted to slavery, and in finding that there had been a breach of Article 4 of the *European Convention of Human Rights* (European Convention or ECHR) which prohibits slavery, servitude and forced or compulsory labour. As stated above, neither of the judicial bodies was looking explicitly at the question of trafficking. In the case of Tang, trafficking is treated at various points throughout the reasoning of the trial judge, Court of Appeal, and High Court, as tantamount to slavery. In *Rantsev*, given the lack of an explicit reference to trafficking in the European Convention, the ECtHR goes so far as to argue, without any substantiation, that trafficking is "by its very nature and aim of exploitation", modern-day slavery.[13] In our view, had either of these judicial bodies actually been looking at the question of trafficking,

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fundamental human rights, and as such is prohibited by the European Convention". On the same web page INTERIGHTS, and third party intervener, calls the case a "historic first judgment." International Centre for the Legal Protection of Human Rights, *Rantsev v Cyprus and Russia*, online: INTERIGHTS <http://www.interights.org/rantsev/index.html>; Nina Vallins of Project Respect called *Tang* "the most crucial test of the effectiveness of our criminal laws against … slavery ever to come before an Australian court". Project Respect, Media Release, "Sexual Slavery Laws On Trial in Landmark High Court Appeal" (9 May 2008) online: Project Respect <http://projectrespect.org.au/files/wei_tang_media_release_2008_final_WEB.pdf>. Irina Kolodizner noted that "Tang is a welcome first step for the development of an anti-slavery jurisprudence in Australia and internationally". Irina Kolodizner, "Developing an Australian Anti-Slavery Jurisprudence R v Tang" (2009) 31:3 Sydney L Rev 487 at 497. The Group of Experts on Trafficking in Human Beings of the European Commission has stated that the Rantsev decision "offers important guidance on the human rights aspects of human trafficking" and has also commented that "[i]n general, the Group approves the decision of the court". Group of Experts on Trafficking in Human Beings of the European Commission, *Opinion N° 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission On the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia* (22 June 2010), online: European Commission <http://ec.europa.eu/anti-trafficking/download.action?nodeId=9ee98429-1792-4f97-a965-a977bd16724d&fileName=Opinion+2010_06+of+the+Expert+Group+on+trafficking_en.pdf&fileType=pdf>.

[12] See Jean Allain, "R v Tang, Clarifying the Definition of 'Slavery' in International Law" (2009) 10 Melb J Int'l L 246.; Stephen Tully, "Sex, Slavery and the High Court of Australia: The Contribution of R v Tang to International Jurisprudence" (2010) 10 Int'l Crim L Rev 403; Jean Allain, "Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery" (2010) 10 Hum Rts L Rev 546; Roza Pati, "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus & Russia" (2011) 29 BU Int'l LJ 79; Vladislava Stoyanova, "Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case" (2012) 30 Nethl QHR 163.

[13] *Rantsev*, *supra* note 9 at para 281-282.

neither of the two cases could be accurately judged to be cases of human trafficking. This distinction becomes even starker when we introduce a third case, *R v Dobie*, the first conviction for human trafficking in Australia, in the latter part of this paper.

Our purpose in this article is to establish an interpretation of these principles that does not dilute the high standards required for slavery and trafficking in international law nor undermine future prosecutions. It is also our aim to provide a framework that does not exclude those who have been exploited but are not slaves. We intend to establish a standard that has a legally defined scope in order to protect the rights of defendants from instances where the concepts of slavery and trafficking are applied beyond their intended meaning. To do this, we demonstrate that labelling some situations as "seriously oppressive employment relationships,"[14] borrowing from the minority reasoning of Honourable Justice Kirby in *R v Tang*, is an approach that is more applicable to what is typically evident in cases labelled as trafficking; that is, initially voluntary negotiations by the victim to enter into a (written or otherwise documented) employment agreement. Moreover, this approach draws on legal principles that exist in many jurisdictions in destination countries, in the form of workplace regulations. It calls for more vigorous application of such laws to cases that fall outside of the realm of trafficking or slavery but where victims are deserving of redress for labour exploitation.

In the first section of this article, we provide an overview of the facts of the two cases. This overview is followed by a discussion on the meaning of trafficking and the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (UN Protocol).[15] In this same section we also touch upon trafficking-related domestic legislation in Australia and instruments of the Council of Europe. In the third section of this article, we explore the concept of slavery and the evolution of the 1926 *Convention to Suppress the Slave Trade and Slavery* (Slavery Convention)[16] and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Slavery* (Supplementary Slavery Convention)[17] In this section, we also consider how the two Conventions' key concepts related to slavery have been incorporated into Australian law and the European Convention on Human Rights (European Convention). We briefly discuss here the different manifestations of the concept of "debt bondage". In the final section, we bring together the facts and the law and highlight the gaps in evidence necessary to prove the

[14] See *The Queen v Tang*, *supra* note 8 at para 117, Kirby J.
[15] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, GA Res 55/25, UNGAOR, 55th Sess, Supp No 49, UN Doc A/45/49, (2001) Annex 2 at 60 [hereinafter UN Trafficking Protocol]. It is commonly referred to as the Palermo Protocol.
[16] *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Can TS 1928 No 5 (entered into force 30 April 1957) [hereinafter "Slavery Convention"].
[17] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 3 UNTS 226, Can TS 1963 No 7 (entered into force 30 April 1957).

essential elements of the two crimes. We conclude that the experiences of the five Thai women in Australia and that of Ms Rantseva in Cyprus were not clear cases of slavery or trafficking. Such a finding is not inconsistent with our view that, in both cases, the women involved were victims of crimes worthy of redress. In support of this conclusion, we argue for an alternative legal framework that is better suited to address crimes of this nature that do not meet the legal standards set for trafficking and slavery.

It should be noted here that we recognise the limitations of comparing two cases that involved entirely different legal procedures. However, a key common factor was that both judiciaries, if they were to find in favour of the complainants, had to fit a set of facts that more closely resembled elements of the crime of human trafficking, within the concept of slavery.

We are also aware of how the definitions of slavery at the Australian domestic level and in the European Convention differ from the international provisions and we discuss those differences. In fact, we argue that it is the particular failure of both Courts to use the international provisions to aid their "domestic" interpretation that caused flaws in the precedents that were established. In passing, we highlight the particular misunderstanding of the trial judge in the County Court of Victoria of the notion of being a victim of trafficking, that is, the scant attention given to the negotiations of the five Thai women with their traffickers and their voluntary entry into an agreement to work abroad, albeit under different conditions, in their assessment of whether Wei Tang exercised the "powers of ownership" involved in slavery.

Our key contribution to current legal debates lies in our identification of the failure of academic and legal circles to recognise how some experiences of the exploited migrant sex worker, regardless of how grave and exploitative, should not be classified as slavery or trafficking if the circumstances of the case fail to meet the legal requirements of these crimes; and yet, the victims still deserve legal redress. In these cases, we argue that courts can provide that redress by identifying and punishing exploitative labour conditions through tort remedies or, in some jurisdictions, even through criminal law.[18]

II. Tang and Rantsev: Comparative Jurisprudence on Trafficking and Slavery

1. Ms. Wei Tang and the Melbourne brothel

[18] Some countries have criminalized acts of exploitation of workers by employers or related persons. For example, in Spain criminal courts have jurisdiction to adjudicate such cases. *Criminal Code*, 1995 (Spain), Organic Law 10/1995, art 311, published in B.O.E. 281. Additionally, if so requested by the complainant, the court may grant civil compensation on the basis of tort law. *Ibid*, art 109. Another example is Australia, where imposing forced labour on migrant workers is punishable is an aggravated offence punishable by up to five years of imprisonment. *Migration Amendment (Employer Sanctions) Act* 2007 (Cth). Applicable employment conditions have also been established in the *Fair Work Act* 2009 (Cth), which is monitored by the Fair Work Ombudsman.

The now noted prosecution of Ms Tang was decided by the Australian High Court in 2008 and concerned Ms Tang's relationship with five sex workers of Thai nationality working at her licensed brothel[19] in Melbourne, Victoria. The Australian High Court upheld the judgment of the Victorian County Court that addressed allegations that, at various times between 10 August 2002 and 31 May 2003, Ms Tang possessed the five women as slaves. The Commonwealth Director of Public Prosecutions alleged that each of the five women, who had previously worked in the sex industry,[20] was understood to have voluntarily entered an agreement to work as a sex worker in Australia.[21] The agreement was engaged through a broker in Thailand, with each woman incurring a debt of between AUD$40,000 and AUD$45,000 to be paid off by working at the Melbourne brothel.[22] The Thai recruiters, from whom the contracts had been purchased, were paid around AUD$20,000 for each of the women.[23] Ms Tang paid a percentage of that sum in respect to four of the women, with the remainder paid between Ms Donoporn Srimonthon, a recruiter of sex workers who had previously worked as a sex worker in Ms Tang's brothel, and another individual.[24] Ms Tang paid no money with respect to the fifth woman.[25]

Under the agreements, the five women had their travel expenses paid and were provided with accommodation, food and incidentals while they were in Australia. Although they travelled on valid tourist visas, they had been obtained without disclosure of the women's intention to work in Australia. There was conflicting evidence as to the extent of the knowledge of the five women concerning how those visas were obtained.[26]

On arrival in Australia, the women were advised that they would be known as "contract girls", to distinguish them from the other sex workers at Ms Tang's brothel.[27] Their passports and return airline tickets were taken and placed in a locker at the brothel, apparently in the event that the brothel was raided and documents were requested by Department of Immigration officials.[28] The prosecution later contended that the documents were retained so that the women could not run away.[29] There was also disputed evidence of the women's freedom of movement outside their places of residence.[30] Ms Tang, Ms Srimonthon and the brothel manager, Mr Pick, held keys to an apartment where some of the sex workers were living.[31] Others resided in the house of another brothel manager, with three or four women sleeping in

[19] Licensed pursuant to the *Prostitution Control Act 1994* (Vic).
[20] *R v Wei Tang*, [2007] VSCA 134, at para 5, Eames J, rev'd [2008] HCA 39.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid* at para 10.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid* at para 6.
[27] *Ibid* at para 7.
[28] *Ibid* at para 8.
[29] *Ibid*.
[30] *Ibid* at para 12.
[31] *Ibid* at para 11.

each room.[32] The five Thai women had apparently been told to remain indoors so as not to be seen by immigration officials.[33]

The brothel charged clients a basic rate of AUD$110. Of this sum, the fee of AUD$110 was divided between Ms Tang (AUD$43) and the owners of the contract for the particular sex worker. The debt for each of the "contract girls" was reduced at the rate of AUD$50 per client. The women were allowed one "free" day per week but were permitted to work on that day if they chose, and they could retain any earnings they made. Two of the five women paid off their debts after approximately 6 months, at which time their passports were returned. These two women were subsequently free to choose their hours of work and accommodation and were paid for their sex work.[34] This is a key fact discussed further below.

The brothel was raided on 31 May 2003. Ms Tang was found guilty of five counts of possessing a slave and five counts of using a slave, contrary to s 270.3(1)(a) of the *Criminal Code Act 1995* (Cth)[35] by the Victorian County Court. The Court of Appeal of the Supreme Court of Victoria rejected a number of grounds of appeal. If upheld, they would have resulted in an acquittal on all counts. The Court of Appeal did uphold one ground of that appeal: that the directions given to the jury were inadequate, quashed each conviction, and ordered a new trial on all counts. It held that the jury should have been instructed that the prosecution had to prove that Ms Tang had the knowledge or belief that the powers being exercised were through ownership, as well as proving an intention to exercise those powers. The prosecution appealed to the High Court and Ms Tang sought special leave to cross-appeal on three grounds against the order for a new trial, calling instead for an outright acquittal.

The primary point of contention for consideration by the High Court was whether or not the trial judge should have instructed the jury of the need to establish a certain state of knowledge or belief on the part of Ms Tang as to the source of the powers she was exercising, in addition to an intention to exercise those powers. On this point, the majority of the High Court concluded that the prosecutor did not need to prove what Ms Tang knew or believed about her rights of ownership or that she knew or believed that the women were slaves. The Court unanimously refused special leave on the third ground, which was that the Court of Appeal failed to hold that the jury's verdicts were unreasonable or could not be supported by the evidence; this is the ground mainly analysed in this article, as it is the one directly related to the concept of slavery.

2. Violations of the Rights of Mr. Rantsev by Cyprus and Russia

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[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid* at paras 9, 14.
[35] Ms Srimonthon was also charged with two counts of slavery trading and three counts of possessing a slave. She pleaded guilty and was finally sentenced by the Victorian Supreme Court of Appeal to six years of imprisonment, with a non-parole period of two and a half years.

The First Section of the ECtHR released its judgment in the case of *Rantsev v Cyprus and Russia* on 7 January 2010, six years after the filing of the original petition. The situation that led to the case concerned a Russian citizen, Ms Oxana Rantseva, who was found deceased on 28 March 2001 in Cyprus and whose father later filed a joint complaint against Cyprus and Russia for their responsibility for the violation of his rights.[36]

According to the narrative of the ECtHR, before her departure from Russia, X.A., the owner of a cabaret in Limassol, Cyprus, applied for an "artiste" visa and work permit for a new employee, Ms Rantseva, annexing a copy of Ms Rantseva's passport, a medical certificate, a copy of an employment contract (apparently not yet signed by Ms Rantseva) and a bond, signed by X.A., undertaking to pay Ms Rantseva's costs should she require repatriation from Cyprus.[37]

After being granted a temporary residence permit in Cyprus, Ms Rantseva was rapidly granted a permit to work as an artiste in X.A's cabaret, which was managed by his brother, M.A. She commenced work on 16 March 2001.[38] It was only a few days later, on 19 March, that Ms. Rantseva, apparently tired and wanting to return to Russia, took all her belongings and left the apartment where she had been residing with several other cabaret workers. When told of her departure, M.A. informed the Immigration Office in Limassol that Ms. Rantseva had abandoned her place of work and residence, with the hope of having her expelled from Cyprus so that he could arrange for another woman to work in his cabaret.

On 28 March, Ms Rantseva was seen in a disco by another cabaret artist, who contacted M.A., the manager of the cabaret, who later came to the disco and collected her with a security guard. He took her to the Limassol Police station, told the police to deport her, and left Ms Ransteva at the station. However, the police found that she was not a wanted person[39] and noted that they had no record of the earlier complaint by M.A. concerning her disappearance on 19 March. Initially reluctant to return to the police station, M.A. later collected Ms Rantseva, along with her passport from the police who wrongly "confided" Ms Rantseva to his "custody".[40]

In the early hours of the morning of 28 March, M.A. took Ms Rantseva to the apartment of M.P., a male employee at the cabaret, where he lived with his wife. From here onwards, the ECtHR reports two contradictory versions. According to M.P.'s wife, Ms Rantseva was offered food and a place to rest, but other evidence suggested that she was detained against her will.[41] At around 6.30a.m. that same morning, Ms Rantseva was found dead on the street below the apartment. Her handbag was over her shoulder. The police found a bedspread looped through the railing of the smaller balcony

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[36] *Rantsev*, *supra* note 9 at para 13.
[37] *Ibid* at para 15.
[38] *Ibid* at para 16.
[39] *Ibid* at para 17
[40] See *ibid* at para 298. The Court concludes that "…they did not release her but decided to confide her to the custody of M.A".
[41] *Ibid* at paras 21-24.

adjoining the room in which Ms. Rantseva had been staying on the upper floor of the apartment building,[42] suggesting she had fallen to her death while trying to escape.

In his petition pursuant to Articles 2 (right to life), 3 (prohibition on torture or inhumane and degrading treatment or punishment), 4 (slavery, servitude and compulsory labour), 5 (right to liberty and security of the person) and 8 (right to privacy and family life) of the European Convention, Mr Rantsev contended that (i) Cyprus had not undertaken a "sufficient investigation into the circumstances of the death of his daughter"; (ii) the Cypriot police had not provided "adequate protection of his daughter while she was still alive"; and (iii) the Cypriot authorities had failed to take steps to punish those responsible for his daughter's death and ill-treatment.[43] Mr Rantsev also claimed that Cyprus had violated Article 6 (due process) because he did not have access to a court in Cyprus to obtain sufficient redress.[44] Regarding Russia, the petitioner complained under Articles 2 and 4 of the European Convention about the failure of the Russian authorities (i) "to investigate his daughter's alleged trafficking and subsequent death" and (ii) "to take steps to protect her from the risk of trafficking."[45] For the purposes of this discussion, we are only concerned with Article 4 of the European Convention, which provides: "(1) No one shall be held in slavery or servitude, and (2) No one shall be required to perform forced or compulsory labour."[46]

Before proceeding to analyse the legal norms relevant to both cases, it is important to note the existence of a significant procedural difference between *Rantsev* and *Tang*. *Rantsev v Cyprus and Russia* is a case brought by a victim – the father – who contended that the Governments of Cyprus and Russia had violated his human rights. It is not a civil complaint or criminal case against the alleged perpetrators of a crime. In fact, the ECtHR considered the absence of a proper criminal investigation a procedural violation of Article 4, inasmuch as Cyprus had failed to train law enforcement officials to initiate an investigation in cases where there were sufficient indicators of possible trafficking. Likewise, Russia's procedural failure to comply with Article 4 stemmed from its failure to undertake a criminal investigation into the recruitment aspect of cross-border trafficking. In contrast, Tang was a criminal prosecution brought by the state against Ms Tang, an individual, for her crimes against the five Thai women. The difference is important insofar as it reflects upon the limitations faced by the ECtHR in particular, whereby the Court was unable to find the individual cabaret owners – and others involved in Ms Rantseva's eventual death – criminally responsible. Put simply, the position of the ECtHR can be likened to a situation – one which

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[42] *Ibid* at para 25.
[43] *Ibid* at para 3.
[44] *Ibid*.
[45] *Ibid*.
[46] *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*, 4 November 1950, 213 UNTS 221, Eur TS 5 (entered into force 3 September 1953) [hereinafter ECHR or European Convention].

does not exist – where the Australia High Court would be called to adjudicate on the responsibilities of the Government of Australia to prevent trafficking to and from its borders and to investigate instances of alleged trafficking as they came to light.

III. The Crime of Trafficking and the UN Protocol

In the following section, we focus on the concept of human trafficking and provide an analysis of the definition of trafficking in the UN Protocol, as well as its key flaws. We subsequently look at the enactment of Australian domestic law to address trafficking to, from, and within Australia and how these provisions compare with the UN Protocol's definition. Finally, we consider the provisions on trafficking enacted by the Council of Europe.

1. The elements of the crime of trafficking: Means, method and purpose

Adopted in December 2000, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [UN Protocol] represents the most recent international consensus on the definition of the crime of trafficking and its elements.[47] The definition, although drafted to address trafficking from a criminal justice perspective, has repeatedly been cited in academic and non-academic circles, as an authoritative definition of what is entailed in the act of trafficking in human beings. In concrete terms, the UN protocol defines trafficking as:

> …the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;…[48]

This definition revolves around three separate elements: first, the movement; second, the means; and finally, the purpose of the act of trafficking. Consent is noted as "irrelevant" if any of the means listed are used to achieve it, that is, coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits.[49] For a given situation to be deemed one of trafficking all three elements (action, means and purpose) must be present, with the exception of cases involving children (under 18 years of age), where none of the means listed need to be present.[50]

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[47] For a detailed discussion on the UN Protocol and debates between feminist theorists concerning the meaning of consent and exploitation, see Ramona Vijeyarasa, "Exploitation or Expectations: Moving Beyond Consent" (2010) 7 Women's Pol'y J of Harv 11.
[48] UN Trafficking Protocol, *supra* note 15 at 3(a).
[49] *Ibid* at 3(b).
[50] *Ibid* at 3(c).

The UN Protocol's definition has been criticised extensively and has been the particular target of feminist theorists.[51] The appropriateness of this definition for importation into domestic law has also been questioned, given that it contains excessive burdens of proof and ambiguous language.[52] One difficulty is the definition's focus on the movement of people through threats, force, coercion, fraud, or deception, which does not clearly address situations where a potential migrant voluntarily uses the services of a smuggler but later finds himself or herself in a situation of exploitation, with their initial consent now put into question. The definition therefore deflects attention from what is often a blurred and false distinction between trafficking and other forms of irregular migration, a problem heightened by the fact that smuggling is defined in a separate instrument, that is, the UN *Protocol against the Smuggling of Migrants by Land, Air and Sea*.[53]

Further, many of the means listed, such as fraud or coercion, are concepts defined elsewhere in domestic and international law. However, the phrase "abuse of power or of a position of vulnerability" is undefined and adds a further complication. The *travaux préparatoires* to the UN Protocol note:

> The reference to abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved (UNODC 2006, 347).[54]

The *UN Office on Drugs and Crime Model Law Against Trafficking* provides limited assistance in defining this phrase by listing a range of examples that constitute situations where an individual has "no real or acceptable alternative". These examples include pregnancy; any physical or mental disease or disability of the person, including addiction to the use of any substance; reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability; promises or giving sums

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[51] See e.g. Elizabeth M. Bruch, "Models Wanted: The Search for an Effective Response to Human Trafficking" (2004) 40 Stan J Int'l L 1; Beverly Balos, "The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation" (2004) 27 Harv Women's LJ 137; Jo Doezema, "Now you see her, now you don't: Sex workers at the UN Trafficking Protocol negotiations" (2005) 14:1 Soc & Leg Stud 61.

[52] Beate Andrees & Mariska N.J. van der Linden, "Designing trafficking research from a labour market perspective: The ILO experience" (2005) 43:1 Int'l Migration 55 at 58; see also Ann Jordan, "The annotated guide to the complete UN trafficking protocol" International Human Rights Law Group (2002), online: Organization of American States <http://www.oas.org/atip/Reports/Traff_AnnoProtocol.pdf>.

[53] The UN Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organised Crime, GA Res 55/25, UNGAOR, 55th Sess, Supp No 49, UN Doc A/45/49, (2001) at 65 [hereinafter UN Smuggling Protocol]. It provides that the "'[S]muggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident", art 3(a). See also Vijeyarasa, *supra* note 47.

[54] United Nations Office on Drugs and Crime (UNODC), *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006), online: UNODC <http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>.

of money or other advantages to those having authority over a person; and being in a precarious situation from the standpoint of social survival.[55] This last example, in particular, offers no clarification given that it raises the question of what level of social inequality is required to render irrelevant a person's consent to engage in unsafe or illegal migration.

In addition, those who oppose the sex industry often argue that all forms of prostitution are, by definition, exploitative.[56] According to these views, even when sex work is a choice, it is driven by systematic inequality and lack of opportunities. Frequently, proponents of this view put all migration for sex work into the category of trafficking.[57] To the contrary, for those who advocate in favour of the legalisation of sex work, the migrant sex worker is seen as someone who has chosen to work in the sex industry, which can offer more income and freedom than the alternatives available to them at home. This latter argument draws a distinction between voluntary sex work and trafficking for sexual exploitation. In the context of this debate, the UN Protocol's definition leaves unanswered the question of how we should understand what is a "real and acceptable alternative".[58]

Finally, the term exploitation is defined without adequate clarity in the UN Protocol: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".[59] Once again, the definition of some of these concepts can be located elsewhere in international law; for example, forced labour appears in a number of ILO Conventions, including No. 29 on *Forced Labour*[60] and No. 105 on the *Abolition of Forced Labour*.[61] However, "the exploitation of the prostitution of others" is an undefined concept that takes us back to the feminist divide noted above. As we will see later in this paper, this vague phrasing poses great difficulties when addressing cases involving potential migrant sex workers who face exploitative and trafficking-like labour conditions in destination countries like Australia and Cyprus.

2. *Application of the Protocol in Australia and European Jurisdictions*

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[55] UNODC, *Model Law Against Trafficking in Persons* (2009), online: UNODC <http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf>.

[56] Balos, *supra* note 511; Melissa Farley, "Bad for the body, bad for the heart: Prostitution harms women even if legalized or decriminalized" (2004) 10 Violence Against Women 1087; Sheila Jeffreys, "Women Trafficking and the Australian Connection" (2002) 58 Arena Mag 44, 47.

[57] See e.g. Farley, ibid at 1094-1109; Sheila Jeffreys, "Challenging the Child/Adult Distinction in Theory and Practice on Prostitution" (2000) 2:3 Int'l Feminist J of Politics 368.

[58] See the discussions in Vijeyarasa, *supra* note 47; Balos, *supra* note 51.

[59] UN Trafficking Protocol, *supra* note 15 at 3(a).

[60] ILO Forced Labour Convention (No. 29), 1930, online: International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312174>.

[61] ILO Abolition of Forced Labour Convention (No. 105), 1957, online: International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312250>.

A. Australia

Until 2005, Australia did not have any laws specifically addressing the issue of trafficking, with the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) criminalising only slavery, sexual servitude and deceptive recruitment for sexual services (Division 270). Those "slavery-specific" provisions are the ones applied in Tang, as we will see later in this article.

On 11 December 2002, Australia became a signatory to the *UN Trafficking Protocol* and ratified it on 14 September 2005. In July 2005, the *Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005* (Cth) was introduced (Division 271) and inserted into Chapter 8 ("Crimes against humanity and related offences").[62] The definition of trafficking in Division 271, however, differs in a number of respects from the UN Protocol's definition. Considered neither clear nor comprehensive, the Australian Human Rights Commission has highlighted that the domestic laws "may not reflect the full suite of Australia's international legal obligations in this area".[63]

Division 271 provides for general and aggravated offences of trafficking; the offence of international and domestic trafficking in children; the general and aggravated offences of domestic trafficking in persons; and the offence of debt bondage. The provisions define trafficking as where a person organises or facilitates the actual or proposed entry or exit or the receipt of another person into Australia and uses force or threats to obtain the other person's compliance. The provisions broaden the mens rea of trafficking by providing that a person commits the offence where they facilitate the entry or exit of another person, and "the person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt".[64] The general offence of trafficking also includes deceit regarding the true purposes of the recruitment of the victim for entry into, or exit from, Australia.

Like the domestic slavery provisions, the provisions dealing with trafficking for sexual exploitation do not actually prohibit recruitment for the provision of sexual services in general but only under such situations as coercive recruitment. This distinction allows conformity with the legal status of prostitution in Victoria.[65] The provisions in fact suggest legislative

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[62] Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act *2005* (Cth) at s 271.2(1).

[63] Bronwyn Byrnes, "Beyond Wei Tang: Do Australia's Human Trafficking Laws Fully Reflect Australia's International Human Rights Obligations?" (Workshop on Legal and Criminal Justice Response to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice delivered at the Australian Human Rights Commission, 2009) online: Australian Human Rights Commission <http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2009/20091109_trafficking.html>.

[64] Criminal Code Amendment, *supra* note 62 at s 271.2(1B)(b).

[65] It should be noted that while the Criminal Code does not prohibit recruitment for the provision of sexual services, the Prostitution Control Act does prohibit advertisement that either induces a person to seek employment as a prostitute or encourages a person to seek employment with any business that provides prostitution services. *Prostitution Control Act*, *supra*

recognition of the migrant sex worker who enters into a contract to provide sexual services in Australia.[66] Pursuant to Section 271.2 (2B), however, the making of such arrangements will be deemed an offence of trafficking in persons if there are any indications of deceit. Indications include deceit concerning (i) the nature of the sexual services to be provided; (ii) the extent to which the other person will be free to leave the place or area of work; (iii) the extent to which the other person will be free to cease providing sexual services; (iv) the extent to which the other person will be free to leave his or her place of residence; and (v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services – the quantum, or the existence, of the debt owed or claimed to be owed.[67]

Besides being an element of trafficking, today debt bondage in Australia is considered a crime in itself through a separate provision of the Criminal Code. It targets the use of contracts to which large debts are attached in order to coerce victims to enter into sexual servitude or forced labour, including expenses alleged to have been incurred for the victim's travel arrangements (although there is no need for any kind of movement of – or intention to move – the victim for the debt bondage provisions to apply).[68] [69] Yet, it is important to note that the specific "debt bondage" offence was only introduced into the Code (s 271.8) after the commission of Ms Tang's alleged offences. Consequently, the Court could not apply the debt bondage provisions to Ms Tang's case, which may be the primary explanation for Chief Justice Gleeson terming these provisions "immaterial".[70] It should also be noted that the maximum penalty for this offence is much less severe than the offences of possession and use as a slave (s 270). However, we believe that a discussion about the nature of the debt is relevant in the context of *Tang* as the definition of slavery (s 270.1), the offence that is actually discussed in the case, makes a specific reference to when it "results from a

note 19 s 17(3).

[66] This point is specifically made in the Explanatory memorandum to the 2004 amendment regarding section 270.7 on sexual servitude: "The amended offence criminalises activity that is essentially preparatory to sexual servitude *and is not designed to capture employment disputes in the context of legalised prostitution*. That is, the deceptive recruiting offence will not capture employment disputes in the sex industry where the sex worker disputing the particular contract or arrangement has not been trafficked into Australia" (emphasis added). Explanatory memorandum to the criminal code amendment (trafficking in persons offences) bill 2004, online: Australasian Legal Information Institute < http://www.austlii.edu.au/au/legis/cth/bill_em/ccaipob2004483/memo1.html>

[67] Criminal Code Amendment, *supra* note 62, at s 271.2(2B).

[68] Jennifer Burn, Sam Blay & Frances Simmons, "Combating Human Trafficking: Australia's response to modern day slavery" (2005) 79 Austl L J 543 at 548.

[69] The law sets out a number of circumstances that courts and judges may consider to determine whether a situation of debt bondage exists. These include evidence about the economic relationship between the accused and the alleged victim, evidence of any written or oral contract or agreement, the personal circumstances of the alleged victim including whether they are entitled to be in Australia under the *Migration Act 1958* (Cth), her or his ability to speak English, and her or his physical and social dependence on the accused. Criminal Code Amendment, *supra* note 62, s 271.8(2).

[70] *The Queen v Tang*, *supra* note 8 at 5, Gleeson CJ.

debt or contract made by the person". We will explore this point further when discussing "slavery" below.

B. Europe

The 47 member states of the Council of Europe include countries of origin, transit and destination for human trafficking. On 3 May 2005, the Committee of Ministers adopted the *Council of Europe Convention on Action against Trafficking in Human Beings* [Council of Europe Convention],[71] which entered into force on 1 February 2008. At the time of publication, it has been signed by 43 states and ratified by 35.[72] The Council of Europe Convention, the first European treaty in the field of human trafficking, addresses prevention, prosecution and the protection of victims.[73] It also provides a mechanism for monitoring the implementation of the obligations it imposes.[74] It should be noted that, despite being a "European" instrument, this Convention, given its material scope, is open to the signature of non-member states.[75]

The UN Protocol's definition of trafficking was adopted in the Council of Europe Convention, although the latter's definition is seemingly broader in approach, applying "to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime."[76] To the contrary, the UN Protocol specifically supplements the UN Convention against *transnational* organised crime. The ECtHR may not use the UN Protocol as anything more than an interpretive tool, as it is bound by and may only apply the *European Convention on Human Rights* and no other international or domestic law.

At a more general level and importantly for this paper, the European Convention contains several provisions that are relevant to the issue of human trafficking, notably Article 3 (prohibition on torture or inhuman or degrading treatment), Article 4 (prohibition of slavery, servitude, forced and compulsory labour), Article 5 (right to liberty and security), and Article 8 (right to respect for private and family life). Inspired by the *Universal Declaration of Human Rights*, the European Convention in fact makes no reference to trafficking, a gap deemed "unsurprising" by the ECtHR in *Rantsev*.[77] As explained later in this paper, the ECtHR simply dismissed the absence of the term trafficking from the European Convention, opining that

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[71] Council of Europe, Committee of Ministers, *Convention on Action against Trafficking in Human Beings*, CETS No.197 16.V.2005 (2005).
[72] The status of ratifications is the responsibility of the Council of Europe Treaty Office. The current state of the process regarding the Convention on Action against Trafficking in Human Beings can be viewed on the Council of Europe's website. Council of Europe Treaty Office, *Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197*, online: Council of Europe <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.
[73] Council of Europe Convention, *supra* note 71 at art 1.
[74] *Ibid* at Chapter VII, arts 36-38.
[75] *Ibid* at art 43(1).
[76] *Ibid* at art 2.
[77] *Rantsev*, *supra* note 9 at para 277.

trafficking itself may be considered to run counter to the spirit and purpose of Article 4.[78] As such, the Court based its reasoning on the following line of thought: if trafficking goes against the very principles of Article 4, the legal standards that are applied to Article 4 can also be used to assess the alleged crime of human trafficking. If the standards required of States Parties to fulfil the requirements of Article 4 have not been met in that particular trafficking case (e.g. a thorough investigation of potential violations of Article 4), this would amount to a violation of Article 4, even though Article 4 makes no reference to trafficking itself, as we will see in Section 3.B.b below.

Before turning to the concept of slavery, it is important to recognise that the judges in both instances applied the laws by which they were bound (mainly "pure" slavery-servitude provisions). However, we argue below that both the Australian High Court and the Strasbourg Court erred in their application. In the Australian case, the Court erred by overturning the orders of the Victorian Court of Appeal for a new trial and upholding the jury decision of Ms Tang's guilt for the offence of slavery. In the European case, the Court erred by finding the government of Cyprus responsible for failing to protect Ms Rantseva from trafficking and both the governments of Cyprus and Russia responsible for failing to investigate that incident of trafficking. These interpretations resulted in two decisions that involved a misapplication of the laws by which the Australian Lower and Appellate Courts and the ECtHR were respectively bound (slavery or servitude provisions); while at the same time not applying correctly the concepts and principles outlined in international law (such as slavery, servitude, trafficking). We believe that the relevant provisions in international law could have aided the interpretation of their "domestic" law and helped to establish a more solid precedent for future cases.

One could argue that this article should exclusively focus on the interpretation of slavery-servitude provisions, as both cases were purely adjudicated on that basis. However, both Courts, at some point or another in their reasoning, use the concept of trafficking, hinting at the fact that it may be somehow related to slavery. For example, the majority in the Australian High Court specifically mentions the Rome Statute of the International Criminal Court (ICC), which entered into force in 2002, and used it to support the view that the existence of trafficking does not exclude slavery.[79] In this instance, the specific provision cited by the Court refers to the definition of enslavement in the ICC context: [enslavement is] "the exercise of any or all of the powers attaching to the right of ownership over a person ... includ[ing] the exercise of such power in the course of trafficking in persons".[80]

However, one could follow the reasoning of the High Court *a contrario*. To adequately enhance its understanding of Ms Tang's slavery case, the

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[78] *Ibid* at paras 279, 282.
[79] *The Queen v Tang*, *supra* note 8 at 24, Gleeson CJ.
[80] *Rome Statute of the International Criminal Court*, 12 July 1998, 2187 UNTS 900, art. 7(2)(b) [hereinafter Rome Statute].

Court could have looked into the concept of trafficking to see if Ms Tang was (or was not) a trafficker according to international law (in this case the UN Trafficking Protocol). After such an evaluation, had the Court found that Ms Tang's was not a case of trafficking according to international law, there would be further grounds to suggest that neither was it a case of slavery. In this respect we support the way the dissent in Tang explores the issue of trafficking in much more detail in order to use this concept to achieve a better understanding of the Australian provisions on slavery.

Regarding *Rantsev*, the ECtHR, as we will see several times in this article, simply equates the existence of trafficking with a violation of Article 4 of the ECHR, a position with which we disagree. To adequately determine if this equivalence between trafficking and slavery in Article 4 existed, the Court should have undertaken, at the outset, an analysis that allowed it to ask and answer whether this was a case of trafficking. As we will later explain, in our view the Court failed to use the UN Trafficking Protocol as an interpretive aid to assess whether Ms Rantseva was actually legally trafficked instead of simply assuming so.

IV. The Elements of the Crime of Slavery

In this section, we provide an overview of the elements of the crime of slavery as set out in the *1926 Convention to Suppress the Slave Trade and Slavery* and the *1956 Supplementary Convention to Suppress the Slave Trade and Slavery* (Slavery Convention and Supplementary Slavery Convention, respectively). We also analyse how these provisions have been incorporated into Australian domestic law and the European Convention on Human Rights.

1. The 1926 Slavery Convention and the 1956 Supplementary Convention

The prohibition of slavery was an essential element in the development of modern international law,[81] international criminal law[82] and international legal co-operation.[83] One of the key reasons for its standing as jus cogens is the general consensus in the Western world about the unacceptability of the practice, since at least the end of the 19th century.[84] As a result, it was relatively easy to build on this consensus in the 1920s, when a convention to prohibit slavery globally was canvassed,[85] including the existence of a right to be free from slavery and the absolute character of that right.[86] Those who

[81] James Scott Brown, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (New Jersey: The Lawbook Exchange Ltd, 2000) at 232.
[82] Nuremberg Trial Proceedings, Vol. 1 Charter of the International Military Tribunal, online: Avalon Project Archive <http://avalon.law.yale.edu/imt/imtconst.asp>.
[83] Richard A Wright & J Mitchell Miller, eds, *Encyclopaedia of Criminology*, vol 2 (New York: Routledge, 2005) at 796 (refers to the 'International Agreement for the Suppression of White Slave Traffic' of 1904, very relevant here).
[84] See e.g. General Act of the Brussels Conference of 1889-90, cited in the Preamble of the Slavery Convention, *supra* note 16.
[85] Slavery Convention, *supra* note 16
[86] The right to be free from slavery is a non-derogable right, see *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, arts 4-8, Can TS 1976 No 47, 6 ILM 36.

refused to conform were labelled as deviants and condemned "not only by States but by most communities and individuals as well".[87] It is our belief that the existence of such an agreement about the core concept of slavery played a major role in facilitating the relatively quick development of the Slavery Convention.

The *travaux preparatoires* indicate that, in order to obtain the broadest possible agreement, and with some states being reluctant to include in the scope of the Slavery Convention other situations akin to slavery but where no powers attaching to the right of ownership existed – such as domestic slavery and similar conditions[88] – the final text of Article 1 was particularly restrictive. Rather than a compromise between opposite positions, Article 1 can been seen as a common denominator on which every state could agree. It reads:

> For the purpose of the present Convention, the following definitions are agreed upon:
>
> (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
>
> (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

However, this definition soon became insufficient, as it was not as comprehensive as the post-World War II international community required.[89] The States Parties involved in the adaptation to the UN structure of the Slavery Convention – developed under the aegis of the League of Nations – found that the definition of slavery in the Slavery Convention relied excessively on the "powers attached" to the legal concept of the "right of ownership", leaving other extremely exploitative conditions where there was no evidence of a master-property relationship without protection.[90] To address this shortcoming, a Conference of Plenipotentiaries was convened by Economic and Social Council Resolution 608(XXI) of 30 April 1956.[91] The Conference drafted a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which was adopted on 7 September 1956 and entered into force on 30 April

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[87] Ethan A. Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society" (1990) 44:4 Int'l Org 479.
[88] Jean Allain, *The Slavery Conventions: The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Boston: Martin Nihjhoff Publishers, 2008) at 67-68.
[89] Joyce A. C. Gutteridge, "Supplementary Slavery Convention, 1956" (1957) 6:3 Int'l and Comp LQ 449; see also Jean Allain, "The Definition of Slavery in International Law" (2008-2009) 52:2 Howard L J 239.
[90] Ved P. Nanda & M.C. Bassiouni, "Slavery and Slave Trade: Steps toward Eradication" (1972) 12:2 Santa Clara Lawyer 431.
[91] United Nations Conference of Plenipotentiaries held in Geneva August 13 - September 4, 1956.

1957.[92]

The Supplementary Slavery Convention adopts a different approach altogether, listing "behaviours", such as the establishment of debt bondage, as opposed to legal concepts, such as "ownership". Article 1 provides that "whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention […] the States Parties […] shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible [the] complete abolition or abandonment" of four situations: (a) debt bondage, (b) serfdom, (c) servile marriage and (d) child servitude. Our concern in this paper revolves largely around the first situation, debt bondage,[93] defined in the Supplementary Slavery Convention as:

> (a) (…) [t]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

What we see here is that "servitude" as a concept, is not actually defined in the Supplementary Slavery Convention. Instead, a "person of servile status" is defined in article 7(b) as "a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention", that is, either (a) debt bondage; (b) serfdom; (c) servile marriage; or (d) child servitude.

Therefore, to categorise something as slavery, we need to identify the exercise of "powers attached to the right of ownership". The Slavery Convention does not pay attention to how the relationship of master-slave is established, but focuses instead on whether or not a relationship of "owner and owned" exists and what powers are exercised on the basis of that relationship. Although a list of powers is not given, it would include, for example, the power to sell a person. On the other hand, a relationship will be defined as "servitude" (within the framework of the Supplementary Slavery Convention) if it can be placed within one of four pre-established situations listed in subparagraphs (a) to (d) of Article 1 discussed above. It is important to note that a situation of servitude could also be a case of slavery and vice versa. However, this will not necessarily be the case.

2. *Application of the Slavery Convention in Australia and European Jurisdictions*

A. Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)

As noted above, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) "represented the first attempt by an Australian

[92] Supplementary Slavery Convention, *supra* note 17.
[93] This is particularly in light of the focus of the Australian courts at all levels in *R v Tang*. See discussion below.

Parliament to legislate against slavery and in a general sense, address the issue of human trafficking."[94] Prior to that, slavery was governed in Australia by 19th century legislation,[95] which failed to address the realities of modern-day slavery.[96]

The 1999 Act inserted a new Division 270 setting out the offences of slavery (s 270.3), causing another person to remain in sexual servitude (s 270.6), and deceptive recruitment into sexual services (s 270.7). *Criminal Code* (Cth) Section 270.1 defines slavery as: "The condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including *where such a condition results from a debt or contract made by the person* [emphasis added]."

Since "chattel slavery", whereby someone is *legally* bound or *legally* owned by another, a state which is obviously impossible in Australia,[97] the addition of the final phrase – "result[ing] from a debt or contract", which does not appear in the 1926 Slavery Convention – is aimed at expanding the scope of the offence to modern forms of slavery such as debt bondage or extremely exploitative contracts. However, the *Criminal Code* falls short of the Supplementary Slavery Convention by failing to define the meaning of debt. We are therefore left with the question of whether this should be interpreted as any kind of debt, or only those debts that impose particularly onerous conditions. In turn, what will be considered particularly onerous is also left undefined.

R v Wei Tang is the only case heard by the Australian High Court on the basis of Division 270 and it provides limited assistance in understanding this concept of debt.[98] Chief Justice Gleeson considered that the word "including" does "not extend the operation of the previous words but make[s] it plain that a condition that results from a debt or a contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it".[99] On that basis Chief Justice Gleeson argues that "the definition of 'slavery' in s 270.1 falls within the definition in Article 1 of the Slavery Convention, and the relevant provisions of Division 270 are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under that Convention".[100]

A key question in *Tang* involves establishing what type of 'debt' can create a condition equivalent to the powers attached to the right of

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[94] Andreas Schloenhardt (coord), *Slavery and Sexual Servitude and Deceptive Recruiting Offences* (2009) Human Trafficking Working Group, at 2, online: University of Queensland <http://www.law.uq.edu.au/documents/humantraffic/legislation/Criminal-Code-Cth-Div-270-sexual-slavery-offences.pdf.>.

[95] *Act for the Abolition of the Slave Trade*, 1807 (UK), c 36; Slave Trade Act, 1873 (UK), c 88.

[96] Austl, Commonwealth, Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize* (Report No 48) (Canberra: National Capital Printing, 1990) at 83.

[97] Schloenhardt, *supra* note 7 at 3.

[98] In the judgment of the Victorian Court of Appeal, overturned by the High Court of Australia, Justice of Appeal Eames argues that this additional phrase simply means that "A volunteer slave, in other words, is no less a slave". See *supra* note 20, Eames JA.

[99] The Queen v Tang, *supra* note 8 at para 33, Gleeson CJ.

[100] *Ibid* at para 34.

ownership. The obvious solution would have been to follow the reasoning Chief Justice Gleeson used for the Slavery Convention and to equate the term 'debt' from Division 270 to the concept of 'debt' from Article 1 of the Supplementary Slavery Convention quoted above, that is, "if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined". The majority of the Australian High Court did not make it clear, however, how they understood the concept of 'debt' in this context.[101] As noted above, the provisions on debt bondage (s 271.8) were only introduced after the alleged commission of Ms Tang's crimes, as was also the case for the trafficking provisions (s 273). Hence, the choice for the Australian courts in *Tang* was restricted to assess if Ms Tang's offences fitted into the legal definition of slavery or, alternatively, if she did not commit any crime at all.

We contend that the failure of the Australian courts to adjudicate on when and under what conditions such 'debt' will amount to the exercise of powers attaching to the right of ownership is a major shortcoming of this case. Moreover we argue that if the concept of 'debt' is not carefully contained by the definition offered by the Supplementary Slavery Convention, or another similar interpretative rule, it would be reasonable to argue that any person who receives a loan from his or her employer and in turn owes them a debt would always be in a situation of servitude. This is discussed in more detail in Section 4 below.

B. European Convention on Human Rights

The European Convention of Human Rights (European Convention) is cursory regarding slavery or servitude. Article 4, entitled "Prohibition of slavery and forced labour", simply states:

> (1) No one shall be held in slavery or servitude.
> (2) No one shall be required to perform forced or compulsory labour. [102]

Before *Rantsev*, the ECtHR had dealt with paragraph (1) of Article 4 in a substantive way only in *Siliadin v France*, a case concerning domestic service.[103] In *Siliadin*, the applicant had agreed that she would work at Mrs D's home until the cost of her air ticket had been reimbursed and that Mrs D would attend to her immigration status and find her a place at school. The

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[101] See *ibid* at para 79(5), Kirby J. In his analysis of the debt imposed on the five women, Justice Kirby pays attention to the structural inequalities possibly facing these women and how migration into sex work can act as a means of economic betterment to escape situations of inequality: "It would also arguably need to be judged in the context that the complainants voluntarily entered Australia aware of the type of work they were to perform, inferentially so as to make their lives better as a consequence and appreciating that it would result in a debt to those who had made the necessary arrangements to facilitate their travel and relocation." In this regard, the debt is partially justified, given the expenses incurred in transporting the women and arranging their visas.

[102] European Convention, *supra* note 46, art 4. Paragraph (3) details four types of labour that shall not be construed as forced or compulsory labour, which are not relevant to this discussion.

[103] *Siliadin v France*, No 73316/01, [2005] VII ECHR 545.

Court determined that "[i]n reality, the applicant became an unpaid housemaid for Mr and Mrs D and her passport was taken from her."[104] The applicant specifically requested the ECtHR to look into the wording of the Slavery Convention and the Supplementary Slavery Convention to aid in the interpretation of the European Convention.[105] The ECtHR quickly dismissed the idea of naming this situation as "classic" slavery,[106] given that there was no evident right of ownership. When dealing with servitude, however, the Court departed from paragraph (a) of Article 1 of the Supplementary Convention and considered that, for the purposes of the European Convention, "servitude" "means an obligation to provide one's services that is imposed by the use of coercion."[107]

This interpretation brings to mind the reasoning of the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) regarding the prosecution of Kunarac, Kovac and Vukovic for the crimes of (among others) "enslavement".[108] The case, famous for its definition of rape as a war crime, addressed the issue of enslavement as one of customary international law.[109] The ICTY Appeals Chamber accepted the argument that chattel slavery is impossible today,[110] but reasoned that the issue of control (understood in a general sense) over the slave – what the ECtHR identified as "coercion" or "physical or mental constraint"[111] – is what really matters.[112] To determine if that "coercion" existed – given the obvious difficulties faced in proving the existence of a threat of violence – the Appeals Chamber relied on the work undertaken by the Trial Chamber to establish a (non-exhaustive) list of "indicia of enslavement".[113] For the Appeals Chamber, the difference between chattel slavery in the Slavery Convention and enslavement in customary law would be "one of degree" of the level of destruction of the legal personality.[114]

In *Rantsev*, the ECtHR overturned in practice its position in *Siliadin* and, after noting that the European Convention does not refer to trafficking,[115] resorted to an interpretation "in the light of present-day conditions".[116] The Court continued by deciding to construe trafficking within the spirit of Article 4 of the European Convention.[117] The ECtHR therefore found "that trafficking in human beings, by its very nature and aim of exploitation, is

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[104] *Ibid* at para 11.
[105] *Ibid* at para 91.
[106] *Ibid* at para 122.
[107] *Ibid* at para 124.
[108] *Prosecutor v Dragoljub Kunarac*, IT-96-23 & IT-96-23/1-A, Appeal Judgment (12 June 2002) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf >.
[109] *Ibid* at para 116.
[110] *Ibid* at para 118.
[111] *Rantsev*, *supra* note 9 at para 276.
[112] *Prosecutor v Dragoljub Kunarac*, *supra* note 108 at para 117-119.
[113] *Ibid* at para 119
[114] *Ibid* at para 117.
[115] *Rantsev*, *supra* note 9 at para 272.
[116] *Ibid* at para 277
[117] *Ibid* at paras 277, 279.

based on the exercise of powers attaching to the right of ownership"[118] and, on that basis, considered that it was then "unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'".[119] The Court avoided discussing the concept of ownership and instead labelled trafficking as something incompatible with a democratic society and the values expounded in the European Convention.[120]

This superficial judgment of the ECtHR is nothing short of surprising. The interpretation of the ECtHR provides no differentiation between the three categories of Article 4, because trafficking is simply against the spirit of the European Convention and, particularly, Article 4 as a whole.[121] We contend here that this interpretation is inadequate for its purpose and incorrect from a legal point of view, particularly given that the Court did not evaluate if the conduct at stake was actually trafficking according to the relevant domestic or (primarily) international provisions, but simply assumed so in order to continue with its evaluation of whether there was a violation of the European Convention of Human Rights, for example, by Russia for not protecting its own citizens against the risk of slavery – understood by the court as being equivalent to the risk of trafficking.

Furthermore, by virtue of determining that this was a case of trafficking and since "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership,"[122] this newly established standard was met in relation to Ms Rantseva's relationship with the cabaret owner and manager. As such, the standards for slavery were reached and the conduct of Mr X.A., the owner of the cabaret, as well as that of the other owners of cabarets using "artiste" visas, should be considered as slave trade within the meaning of the Slavery Convention.[123] However, we do not see in the ECtHR's analysis such evidence of the powers attaching to the right of ownership. By attempting a very brief and inadequate analysis of a relationship akin to ownership by applying interchangeably the concepts of trafficking and slavery and by relying on a very general application of these concepts to Ms Rantseva's situation,[124] the court brushes over an issue which we believe is central when

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[118] *Ibid* at para 281.
[119] *Ibid* at para 282.
[120] *Ibid*.
[121] *Ibid* at para 279
[122] *Ibid* at para 281.
[123] See *Ibid* at paras 83-90, 94 (referring to reports from Cypriot Ombudsman and Council of Europe Commissioner for Human Rights).
[124] *Ibid* at paras 281-282. The Court described these general elements as follows:

> It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.

applying the language of slavery to this case.

V. Defining the Limits of Exploitative Labour, Trafficking and Slavery: Rethinking Tang and Rantsev

Chief Justice Gleeson noted in *R v Tang*, "those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy".[125] In the following section, we attempt to situate the cases of *Tang* and *Rantsev* in the terms of the UN Trafficking Protocol and Slavery Conventions. As noted above, we undertake this assessment while recognising that the UN Trafficking Protocol was not directly applicable at the domestic level in any of the relevant jurisdictions. Nonetheless, it is important to recognise the ways in which both cases fall short of the internationally agreed-upon standards of what constitutes trafficking. Our principal concern here particularly lies with the risk of diluting the gravity of the crimes of slavery and trafficking in international law and in undermining the rights of the defendant in *Tang*. As such, our purpose is to demonstrate that not only do the cases not amount to slavery, despite the reasoning of the Australian Courts and ECtHR, but nor is their evidence sufficient to unquestionably conclude that they are cases of trafficking or debt bondage.

Before continuing, it is important to note that the legal contexts in which both Courts operated have substantially changed. In the case of Australia, there were no trafficking laws in place at the time of Ms Tang's alleged crimes and the government was yet to ratify the UN Protocol. Again, in the case of Russia and Cyprus, while the Council of Europe Convention on Action against Trafficking in Human Beings models the UN Protocol in many respects, it entered into force only in 2008 and neither Russia nor Cyprus had domestic provisions to address trafficking at the time that Ms Rantseva was engaged to work in Cyprus.

To take this shift into account when analysing Tang, we briefly consider whether the trafficking provisions subsequently introduced into the Criminal Code would have applied to this case. To aid this analysis, we incidentally introduce *R v Dobie*,[126] Australia's first, and thus far only, conviction under the trafficking provisions (Division 271) of the Criminal Code (Cth). This comparison helps us to highlight the differences between a case that meets the legal requirements of trafficking (Dobie) and one (Tang) that is presumed to be trafficking, with no transparent assessment against the law (the term is used 23 times in the High Court decision) in an investigation focused on the crime of slavery.

Keith Dobie was the first person to be convicted in Australia on charges of trafficking in persons pursuant to the Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005 (Cth), which was introduced in Australia in July 2005 (Division 271). He was also charged with

[125] *The Queen v Tang*, *supra* note 8 at para 29, Gleeson CJ.
[126] *R v Dobie*, [2009] QCA 394, Fraser JA.

four counts of presenting false information to an immigration officer and one count of dealing in the proceeds of crime. Dobie organised the entry of two Thai women into Australia to provide sexual services. He was charged with trafficking offences in relation to the first woman for the period 13 November 2005 and 23 January 2006, and to the second woman, from 11 February 2006 to 17 April 2006. The judgment of the Supreme Court of Queensland reflects recognition of the two victims' voluntary negotiations with Dobie, including by text and email. The Court found that he deceived the first woman about how much work she would have to perform in Australia, and the second woman about her work schedule. The Supreme Court of Queensland determined that Dobie "intended to pressure them to provide sexual services on demand, that is to say, whenever a customer called and on any day of the week".[127] The Court also drew upon the fact that the women were sex workers in Thailand and were led to believe that they would work in Australia with levels of freedom similar to what they had experienced in Thailand. Dobie's appeal was dismissed by the Court of Appeal on 26 February 2010.

In regard to Rantsev, there is no need to perform a parallel analysis incorporating the Council of Europe Trafficking Convention because, as we noted above, the ECtHR could not have used this Convention as the legal basis for its decision and can only still apply the ECHR. It is true, however, that the ECtHR could potentially peruse the Trafficking Convention to assess the positive obligations that both states had in relation to the prevention of violations of the ECHR. As the ECtHR has established that any case of trafficking goes against the spirit of the Europe Convention, it would be reasonable to derive from here that failing to prevent trafficking is a violation of the ECHR itself.[128]

1. *Contextualising Tang and Rantsev in the Trafficking Protocol and Australian Trafficking Provisions*

As indicated above, the UN Protocol conceptualises trafficking as involving three key elements: some action related to the movement, the means of moving the individual, and the purpose for which the individual is recruited, moved, harboured in the process or recieved.

A. Movement

In both *Tang* and *Rantsev*, the movement of the women involved is easily demonstrated. All had been moved across international borders, having been recruited to work (albeit in *Tang*, under falsely obtained visas).

[127] *Ibid* at para 4.

[128] Mr Rantsev in fact contended that the Cypriot authorities were under an obligation to adopt laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. On 13 July 2007, the Government of Cyprus prohibited trafficking for the purpose of sexual exploitation and forced labour through Law 87 (I)/2007, which also contains protection measures for victims. Amendments to the Criminal Code of the Russian Federation, effective from 16 December 2003, introduced provisions criminalising the trafficking of persons (article 127(1)) and the use of slave labour (127(2)).

Accommodation was arranged in the destination countries and the women and their movements were monitored, to varying degrees, in the destination countries.

B. Means

The UN Protocol links means and consent. If any of the means listed had been used, any consent of the five Thai women and of Ms Ransteva would be irrelevant. Regarding *Tang*, there was no deception involved in the recruitment of the five Thai women, as Justice Kirby notes,[129] and nothing in the case hints at the possibility that the five women's consent was induced by threats, force, or other forms of coercion; or that abduction or fraud existed. Indeed, there are only two means that are potentially relevant here and, in our view, they are insufficiently substantiated to constitute trafficking under the UN Protocol's definition.

First, while it is arguable that the women's consent was obtained by giving payments to the recruiters in Thailand, it is equally arguable, and in our view more accurate given the facts, that the women were informed consenting adults and that their consent was not extracted as a result of the payments made by Ms Tang and her colleagues to the recruiters in Thailand. One relevant fact in this regard is the way in which each of the five women negotiated the size of her debt with Ms Tang and her colleagues.[130]

Second, it is also arguable that the five women faced situations of poverty, economic need and inequality in Thailand, that is, what could constitute positions of vulnerability. In this regard, it could be argued that the relevant means was "abuse of power or of a position of vulnerability" of the five women. This is the only interpretation that suggests that the situation was one of trafficking under the UN Protocol, as opposed to the exploitation of the labour of migrant sex workers. Yet we still face the problem of the undefined nature of the phrase "abuse of power or of a position of vulnerability", as noted earlier in this article. Justice Kirby's dissent acknowledges the economic decision-making involved in some cases of trafficking, but does so in a process of reasoning designed to highlight that such movements would not amount to slavery "if undertaken with appropriate knowledge and consent by an adult person who was able to give such consent".[131] In our view, given the uncertainty regarding Article 3(a)'s reference to abuse of a position of vulnerability, and the lack of evidence to show that the women's consent was extracted in exchange for payments given to the recruiters in Thailand, there are insufficient facts to establish any of the relevant means required by the UN Protocol.

The case of Ms Ransteva differs slightly when it comes to assessment of means because of the lack of information concerning her recruitment. The facts provided are simply too scant to determine exactly what Ms Ransteva

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[129] *The Queen v Tang*, *supra* note 8 at paras 79-81, Kirby J.
[130] *Ibid* at para 10, Gleeson CJ (regarding the facts) and para 45, Gleeson CJ (regarding the legal implications the High Court attaches to the existence of a contract).
[131] *Ibid* at para 79, Kirby J.

was therefore what she expected before she entered Cyprus. We can find evidence in the report of the Cypriot Ombudsman on the situation of "artistes" in Cyprus, cited by the European Court.[132] The report recognises that, although women travelling to Cyprus on these visas are often aware that they will be required to work in prostitution, they do not always know about the nature of the working conditions. However, from the perspective of the legal evidentiary burden, this report is insufficient to determine the specific experience of Ms Ransteva. If, from a legal perspective, the facts on record are too limited for us to reach a conclusion as to whether or not this was a case of trafficking, they were similarly too scant for the European Court. Indeed, the absence of facts was the very consequence of the lack of investigation of which the governments of Cyprus and Russia were being accused. We therefore cannot be sure if and to what extent Ms Ransteva was deceived about her future work in Cyprus.

C. Purpose

The final question to consider is that of exploitation. The question of what does and does not constitute "exploitation" in the context of sex work has divided feminist scholars and activists for decades, as noted above.[133] Is prostitution inherently a form of exploitation, or should a distinction be drawn between voluntary sex work, on the one side, which poses some risks of exploitative conditions, and forced sex work, on the other, which is always coercive and falls squarely within the realm of 'trafficking'? This question is not settled by the wording of the UN Protocol's definition of 'exploitation': "Exploitation shall include, at a minimum, the exploitation of the prostitution of others".[134] We can interpret this definition of exploitation in two ways: first, exploitation for economic benefit (i.e. to make money), or secondly, abuse of an individual. The *travaux préparatoires* offer (again) limited assistance, highlighting instead the intention of drafters to provide an open-ended definition of exploitation in the UN Protocol, with priority given to domestic legal sovereignty:

> The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.[135]

What we can discern, however, is that the definition is not intended to be a statement about the sex industry. Therefore, a key consideration is how the sex industry is regulated in domestic law. In order to determine whether the women were trafficked for the purpose of exploiting their prostitution, it would be important to confirm that the five women in *Tang* were above the

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[132] *Rantsev*, *supra* note 9 at para 85.
[133] See generally Vijeyarasa, *supra* note 47.
[134] UN Trafficking Protocol, *supra* note 15 at 3(a).
[135] UNODC 2006, *supra* note 54 at 347.

legal age of consent and that the brothels were legal places of work under Victorian law.[136] Justice Kirby suggests that an attempt to use the slavery provisions to suppress commercial sex work "based upon individual repugnance towards adult sexual behaviour" would be a contradiction of the laws of the Victorian Parliament which deem the participation of adults in the sex industry to be lawful. To do so, Justice Kirby argues, "risks returning elements of the sex industry to operate, as was previously the case, covertly, corruptly and underground".[137]

The facts do not indicate that the women were forced against their will to provide sexual services.[138] Justice Kirby also notes the absence of violence or rape, which are frequently indicators of trafficking for the purpose of sexual slavery or sexual debt bondage.[139] Particularly important is Justice Kirby's analysis of the complainant's working arrangements, with a "free day" each week to rest or to earn money. Therefore, with regard to the test for "the exploitation of the prostitution of others," and in light of the legal nature of sex work in Victoria, it is difficult to establish that the exploitation experienced by the women would give rise to a finding of exploitation under the UN Protocol.

In contrast, the case of Ms Ransteva is more complex given the lack of facts. The judgment indicates an increasing recognition that the situation of artistes in Cyprus is unacceptable. Cyprus's penal code criminalises prostitution in general, including soliciting, living off the profits of prostitution and maintaining or managing a brothel.[140] Indeed, the extracts of the report of the Council of Europe Commissioner for Human Rights' visit to Cyprus in July 2008, cited in the judgment, suggest that the nature of prostitution in Cyprus could constitute in many instances the "exploitation of the prostitution of others".[141] The European Court also concluded that there could "be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex-USSR, were being trafficked to Cyprus on artiste visas and, upon arrival, were being sexually exploited by cabaret owners and managers".[142] While it appears that Ms Ransteva was aware that she would work in the realm of the sex industry in Cyprus and that she obtained a legal visa for this purpose, the evident inability of the Cypriot authorities to ensure artiste visas were not used for

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[136] *The Queen v Tang*, *supra* note 8 at para 79, Kirby J.
[137] *Ibid* at para 121, Kirby J.
[138] See *ibid* at para 16, Gleeson CJ. In the case of The Queen v Tang, while the trial judge found that in totality the facts suggest that the women were restricted to the premises, the High Court noted that the "complainants were not kept under lock and key" and that for some of the contract workers, as time passed, "they were at liberty to go out as they wished".
[139] *Ibid* at para 79, Kirby J.
[140] See Mediterranean Institute of Gender Studies, *Mapping the Realities of Trafficking in Women for the purpose of sexual exploitation in Cyprus (Final Report)* (October 2007) at 15, online: Mediterranean Institute of Gender Studies <http://www.medinstgenderstudies.org/wp-content/uploads/migs-trafficking-report_final_711.pdf>.
[141] *Rantsev*, *supra* note 9 at para 103.
[142] *Ibid* at para 294.

trafficking or forced prostitution,[143] and the facts accepted by the Court suggest that the cabaret owners and managers could have tried to 'exploit the prostitution of Ms Ransteva' (following the wording of the Protocol).

D. General Evaluation

The following table sets out these elements in relation to the two cases under discussion in this article.

Table 1: The UN Trafficking Protocol and Its Elements

UN Trafficking Protocol	***R v Tang***	***Rantsev v Russia & Cyprus***
A. Movement	√	√
B. Means — Consent is irrelevant if any of the following are evident:		
1. Threat/Force/Coercion	**X**	**?** (Factually uncertain, Ms. Rantseva may have been forced while in Cyprus)
2. Abduction	**X**	**X**
3. Fraud	**X**	**X**
4. Deception	**X**	**X** (Factually uncertain, Ms. Rantseva may have been made to believe that the employment conditions of "Artistes" were different from what she faced in Cyprus.)
5. Abuse of Power or a Position of Vulnerability	**?** (Factually uncertain, it is not clear what the legal threshold of vulnerability should be)	**?** (Legally and factually uncertain, it is not clear what the legal threshold of vulnerability should be and factually uncertain, as facts do not explain Rantseva's personal economic circumstances).
6. Payment in relation to a	**?** (Legally uncertain,	**X**

[143] See *Ibid* at para 100, citing Council of Europe, Committee of Ministers, *Follow-up report on Cyprus (2003 - 2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights*, CommDH (2006)12 at paras 57-60, online: Council of Europe <https://wcd.coe.int/ViewDoc.jsp?id=984105>.

person in control of another (giving or receiving)	there was a payment but its legal effect was not explored)	
C. Purpose — Explotation		
1. Prostitution of others / Other forms of sexual explotation	**?** (Legally uncertain, not clear if there was "exploitation" of – the otherwise legal – prostitution)	**?** (Factually uncertain, not clear if there was explotation or even prostitution)
2. Forced Labour / Services	**X**	**X**
3. Slavery, or Practices Similar to Slavery	**?** (Factually uncertain, not clear if there was explotation or even prostitution)	√ (Factually uncertain but accepted by the ECtHR, with no distinction between slavery and servitude)
4. Servitude	**X**	√ (Factually uncertain but accepted by the ECtHR, with no distinction between slavery and servitude)
5. Removal of Organs	**X**	**X**

In summary, the proven facts in both *Tang* and *Rantsev* fall short of meeting the definition of trafficking outlined in the UN Protocol. In the case of *Tang*, neither the means nor purpose can be clearly established. In the case of *Rantsev*, the facts suggest that, if an investigation had been undertaken, Ms Ransteva's case might have met the UN Protocol's evidentiary burden; that is to say, it could have been proven that Ms Ransteva had entered a contract, but was deceived as to what she could expect from her conditions of work in Cyprus. Yet, the lack of proven facts, resulting indeed from both governments' failures to investigate, leaves many questions unanswered.

As we said before, both Courts were adjudicating on cases of slavery and not trafficking. However, reading the judgements, we get a sense that the arguments of the Lower and Appellate Australian courts and of the ECtHR were premised upon the assumption that both cases (in non-legal terms) were trafficking, a practice considered by these judicial bodies to be "modern day slavery". It is then very concerning that both cases, taking only into account the proven facts, would not even qualify as instances of trafficking according to the definition of the UN Protocol.

Furthermore, we argue that Tang would also not easily sit within the Division 271 provisions on trafficking introduced into Australian law in July 2005, after the slavery charges were laid against Ms Tang. As noted above, in the context of sexual exploitation, deception is established where the recruited person was deceived concerning either the nature of the sexual services; freedom of movement from the place where the sexual services are provided; freedom to cease providing sexual services; freedom to leave their place of residence; or concerning the quantum, or the existence, of any debt

owed or claimed to be owed. As discussed above, the five Thai women had some freedom to leave their place of work and residence, together with a "free day" each week. In regard to the question of debt bondage, two of the women had paid off their debts within six months of arrival[144] and each of the women was involved in negotiating the quantum of her debt with Ms Tang.[145]

One might attempt to argue that facts will rarely fit neatly within Division 271's provisions on trafficking. However, as demonstrated by the 2009 conviction of Mr Keith Dobie for – among others – offences relating to trafficking, it was proven that some cases fit squarely within the domestic understanding of trafficking. Mr Dobie organised the entry into Australia of two Thai women to provide sexual services in Australia. He deceived one of the women in telling her that it would be up to her to determine how much work she did in Australia, and he deceived the second in telling her that she would have two days off work every week. The Supreme Court of Queensland held that Mr. Dobie intended to pressure them to provide sexual services on demand, that is, whenever a customer called and on any day of the week.[146] The facts clearly establish the basis for a conviction under Section 271.2 (2B).

One could finally conjecture that the Australian High Court's ruling in *Tang*, even if it was not very solid in its *obiter dicta* reasoning, was mainly motivated by a desire to send a message about trafficking and, that the majority in the High Court simply did not want to allow a trafficker, in the only case to reach the highest judicial authority in Australia, to go free or risk this eventuality through a re-trial. However, the Court already knew that the new provisions on trafficking (Section 271) had been enacted and, as it was the case, that it could potentially only take a few more years to establish a strong and legally accurate precedent in Australian law for cases of human trafficking. We are not suggesting that the five Thai women in Tang were not living under a situation of exploitation, particularly in light of their rights to decent work. What we argue here is that the women were exploited, but not under conditions that could give rise to a finding of slavery – or even trafficking.[147]

2. *Contextualising Tang and Rantsev in the Slavery Convention and the Supplementary Convention*

As mentioned above, there are two different concepts within the broader idea of slavery: "slavery" and "servitude". Some situations of servitude can fit into the definition of slavery. Others may only be servitude or slavery but not both. Finally, there are other situations that can be considered to be exploitative labour but that are not tantamount to slavery or servitude.

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[144] *The Queen v Tang*, *supra* note 8 at para 79 (8) (Kirby J).
[145] *Ibid* at para 79 (10).
[146] *R v Dobie*, *supra* note 126 at para 4 (Fraser J).
[147] Further discussion in Ramona Vijeyarasa, "The Impossible Victim: Judicial Treatment of Trafficked Migrants and their Unmet Expectations" (2010) 35:4 Alternative LJ 219-220.

In this section, we follow the same pattern of reasoning to compare the facts of both cases with the international legal standards for slavery. First, we use the definition of "slavery" from the Slavery Convention and that of "servitude" from the Supplementary Slavery Convention to dissect their different elements. Second, we discuss in detail how the facts from the two judgments meet those elements. Finally, we create a matrix outlining the key elements of both in the same way we did to summarise the findings of the previous section.

Slavery: Any powers Attaching to the Right of Ownership

Slavery is arguably the more complicated concept to convert into factual elements, particularly because chattel slavery no longer exists. We must therefore define the concept of ownership, which is a legal concept. This ownership, albeit not physical, manifests itself through a series of capacities – powers – that are exercised on the basis of that ownership. Historically, the concept of property had an obvious manifestation where the slave owner possessed the legal title (as in chattel slavery).[148] However, today, at a minimum, a finding of slavery requires that the slave owner has some degree of control over the object which is possessed; in this case, the slave.

In the case of *Rantsev*, even if we were to apply the broadest interpretation of the concept of ownership, the fact that Ms Rantseva left her job and residence with no initial obstacles and that the key goal of the owner of the cabaret (M.A.) was to have her deported, implies an element of free will on the part of Ms Rantseva that is incompatible with the idea of property. However, the fact that the police requested for M.A. to collect Ms Rantseva when he failed to have her deported and gave him her passport, does suggest that, from the point of view of the Cypriot police, M.A. actually had some degree of "possession" over Ms Rantseva. However, this dimension of the idea of possession is not discussed by the ECtHR.

In regard to *Tang*, Ms Tang bought a part of the debt that the five Thai women had with their Thai recruiters. This could have been a key element of the case, as the acquisition of a personal debt could have been understood as implying some degree of ownership. Yet, Chief Justice Gleeson considered that it was irrelevant to construct what he termed a "false dichotomy" between employment and ownership as the source of the powers being exercised in relation to the existence of a debt.[149] However, it appears inaccurate to deem this a "false" dichotomy, given that the concept of servitude from the Supplementary Slavery Convention specifically refers to a debt and precisely establishes the requirements for a relationship between the services provided and nature of the debt to qualify as servitude, as explained in the following sections. Given the explicit reference to debt in Australian law (Section 270.1), the Australian Courts should have relied on the relevant international provisions to determine if the debt Ms Tang

[148] See *supra* note 97.
[149] *The Queen v Tang*, *supra* note 8 at para 45, Gleeson CJ.

bought could give rise to a situation of slavery, or akin to slavery, as provided for in the Supplementary Slavery Convention. Hence, we contend that the Australian High Court should have undertaken a more precise legal analysis of Australian law, and interpreted the concept of debt in Section 270.1 through the lens of Article 1 of the Supplementary Convention, in order to determine whether or not a situation of slavery according to Australian law (servitude in international law) existed.

Servitude: Existence of a Debt

As noted before, the Supplementary Convention identifies four cases of servitude, with the existence of a debt being the only relevant concept for our discussion. In the case of Ms Rantseva, it is not clear if a debt existed. Naturally, this makes our analysis impossible, as we cannot discuss the characteristics of a debt that may have never existed. However, there is no doubt from the narrative of *Tang* that a debt did exist. As mentioned above, at the moment of entering Australia each of the five women had incurred a debt with the Thai recruiters, which they were required to pay off by working at the Melbourne brothel. Ms Tang, D.S., and another person had paid the recruiters a total of AUD$80,000 for four of the five women (AUD$20,000 each).

Whatever inequalities pushed the women to enter into their contracts with the recruiters, which "result[ed] in a debt to those who had made the necessary arrangements to facilitate their travel and relocation",[150] it is clear nonetheless that a debt (i) existed and (ii) that it had its origin – even if at an extortionate price – in the services provided to them, that is, arranging the visas and buying their tickets to Australia. Hence, we should analyse now what type of debt that was, discussing if it met the legal requirements to constitute the basis of servitude.

A. <u>If the value of services is not applied to the liquidation of the debt</u>

Paragraphs 8 to 14 of the judgment of the majority in *Tang* detail how the value of the five women's sexual services applied to the liquidation of their debt. In fact, in the case of two of the women who paid off their debts, "the restrictions that had been placed on them were then lifted, their passports were returned, and they were free to choose their hours of work, and their accommodation."[151] It seems then clear that the debt could be liquidated through the provision of the services on which they had previously agreed and that the five women were already providing in Thailand.

B. <u>If the value of services is applied, but not reasonably assessed</u>

This is a challenging point to analyse from a moral and legal point of view and takes us back to the earlier discussion concerning what is exploitation and whether all forms of prostitution are exploitative. We should also recall the legality of prostitution in Victoria and the need to

[150] *Ibid* at para 79, Kirby J.
[151] *Ibid* at para 17, Gleeson CJ.

ascertain what would be a "reasonably assessed" fair payment for sexual services. Given that there are no hints in the summary of facts or reasoning of the High Court, this issue escapes the scope of this article.

The only conclusion we could extract from the facts is that two complainants paid their debts during the period in which they worked for Ms Tang. We cannot say what is "reasonable" regarding the value of the services provided, but it could be argued that, given the time taken to cancel the debt (six months[152]), their value may not be "unreasonable".

C. If the length of services is not limited

Based on our interpretation, the length of the services could be considered as "not limited" in two ways: (i) if the person is bound to provide services in a continuous manner, for example, if there were no agreed schedule or a limited number of services per day; or (ii) if the duration of the contract is indefinite and the provider of services cannot estimate when he or she would fulfil the contractual commitment.

Australian legislation has a general limit of 38 hours of work per week, plus "reasonable additional hours".[153] While we could use the criteria in the *Fair Work Act 2009*[154] to assess the reasonableness of those additional hours, it would wrongly place the analysis in terms of what is "unfair" – meaning unreasonable – and not what is "unlimited", which is what the Supplementary Convention requires in order to qualify the relation as servitude. As noted, the women were required to work six days per week and were offered a free day on which they could rest or earn their own income. Obviously, the desire to have their own source of income suggests there was limited choice in whether or not to work on this day off. However, a schedule did exist, and the fact that two workers had paid off their debt suggests that the term of completion of the contractual commitment could be estimated. In fact, Justice Kirby, does this estimation for us: "[a]ssuming that they worked every day of the week (as most did), [cancelling the debt in six months] would mean attending to an average of five clients a day."[155] We can then conclude that the length of services was determinable, i.e. limited, in terms of number of clients and the time required to pay off the debt.

D. If the nature of the services is not defined

It would be extremely difficult to argue that the nature of the services provided by the five Thai women was not defined, particularly given that they were already working in that sector in Thailand. Justice Kirby specifically refers to the fact that "they were not tricked into employment in Australia on a false premise or led to believe that they would be working in tourism, entertainment or other non-sexual activities."[156]

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[152] *Ibid* at para 79, Kirby J.
[153] *Fair Work Act 2009* (Cth), *supra* note 18 at s 6.
[154] *Ibid* at s 62-3.
[155] *The Queen v Tang*, *supra* note 8 at para 79, Kirby J.
[156] *Ibid* at para 79, Kirby J, citing Anna Dorevitch & Michelle Foster, "Obstacles on the Road to

However, the court could have taken a more nuanced view to assess the nature of the services and how "undefined" they should have been to meet the standard of servitude, if it had focused on the precise conditions of the sexual services. For example, if forced to have unprotected sex, the health risks involved would directly affect the definition of the nature of the agreed services. This approach would expand the concept of sexual servitude, but not unreasonably so. Such an approach would mean that undocumented migrants providing sexual services would be placed in a situation of vulnerability that could be deemed servitude if they are forced to provide a service that puts their health at risk. However, no evidence on this point was provided in the case at either the Lower Court or Appellate levels.

General Evaluation

In the following table we have compiled the elements of the definitions of both slavery and servitude:

Table 2: The Slavery Convention and Its Elements

Elements in Conventions	R v Tang	Rantsev v Russia & Cyprus
1. Slavery (1926): Any powers attaching to the right of ownership	**X**	**X**
2. Servitude (1956): Existence of a debt	**√**	**?** (Factually uncertain)
a. If value of services are not applied to the liquidation of the debt	**X**	**?** (Factually uncertain)
b. If they are applied, but they are not reasonable assessed	**?** (Factually uncertain but Justice Kirby provides some reasoning, in his minority opinion as to why they may be reasonable)[157]	**?** (Factually uncertain)
c. If the length of services is not limited	**X**	**?** (Factually uncertain)

protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law" (2008) 9 Melb J Int'l Law 1.

[157] *The Queen v Tang*, *supra* note 8 at para 79 (5) (Kirby J).

d. If the nature of the services is not defined	**?** (Factually uncertain but noted that the five women were sex workers in Thailand and not tricked into employment as sex workers, suggesting that, to some degree, the nature of the services was defined)[158]	**?** (Factually uncertain)

As we have shown, we are convinced that the judgment in *Tang* wrongly established that the situation of the five women constituted one of the universal offenses against humanity and believe that, based on the evidence, had a jury been properly directed, it should not have concluded that the case was one of slavery. In this sense, we would support the Cross-Appeal of Ms Wei Tang in that the jury verdicts were unreasonable or could not be supported having regard to the evidence.[159]

Nonetheless, we also think that Justice Kirby errs too when he states that the test for the jury to evaluate the existence of slavery/servitude was "to conclude that such circumstances bore no comparison or analogy to (even harsh) employment conditions as understood in Australia".[160] As seen before, this is not what the legal concept of servitude requires, especially in the context of servitude arising from a debt. Yet, he is right to hint to the fact that the experiences of the five Thai women constituted exploitative employment relationships, which, we argue, deserve legal redress.[161] To find that those were exploitative employment relationships and not slavery would not have exempted Ms Tang of her responsibility, but would have undoubtedly attenuated her sentence. We also argue that this should not be seen as diminishing the rights of the victims of exploitation, because this finding would evidence inadequate protection of the rights of migrant workers to decent work, including those in the sex industry, placing that burden on the Victorian authorities.

In the words of Justice Kirby, these women were economically vulnerable in Thailand and particularly vulnerable once they arrived in Australia.[162] Having legalised the sex industry in Victoria, it is unacceptable to consequently fail to provide adequate legal protections for those most vulnerable in this industry, the sex workers themselves.

Regarding *Rantsev*, the ECtHR's decision is even more problematic as one is left to wonder what really is covered now by Article 4 of the Europe Convention. Are States Parties going to be condemned on the basis of slavery-servitude provisions even in cases where none of the elements of the

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[158] *Ibid* at para 79 (1) (Kirby J).
[159] See *The Queen v Tang*, supra note 8 at para 2, Gleeson J (outlining the grounds of appeal).
[160] *Ibid* at para 81, Kirby J.
[161] Criminal or civil remedies, such as the ones presented *supra* in note 18, could be viable options to address these situations.
[162] *The Queen v Tang*, supra note 8 at para 81, Kirby J.

crime, as defined by international law, are evident, but there is just some "appearance of trafficking"? Are some legitimate decisions by foreign workers, such as the one initially taken by Ms Rantseva to accept work in Cyprus, going to be automatically prevented due to the risk they may be conducive to exploitative situations? Will countries restrict movement (typically entry but perhaps also exit) in such circumstances, as this movement risks giving rise to situations that would be a violation of the anti-slavery provisions of the ECHR? The reasoning in *Rantsev* suggest that States Parties could be indeed condemned in those circumstances and, therefore, they are obliged to prevent anything that could potentially be conducive to trafficking as this would be against Article 4. It is not easy to see how these positions really promote the advancement of human rights if they may be easily used by some Governments to deny economic migrants access to foreign labour markets.

VI. Conclusion

In this article, we have critiqued the legal standards applied by the Australian High Court and the European Court of Human Rights in *Tang* and *Rantsev* respectively. At first glance, one might see these judgments as leading to positive outcomes. Indeed, successful prosecutions for trafficking cases are rare and what may be thousands of victims are left with no legal redress. In the case of *Rantsev*, the lack of a sufficient investigation into the death of Ms Rantseva was a violation of Mr Rantsev's rights and the case also served to show the "turn a blind eye" approach of the Government of Cyprus and, to an extent, the Government of Russia to the problem of human trafficking. The case of *Tang* has shed light on the failure of Australian law to provide adequate legal protections for migrant sex workers and to prevent an individual or group of individuals from obtaining large economic gains by organising this type of work.

With both decisions revealing a series of human rights violations, it may seem unpopular to conclude that the judicial reasoning was flawed and that key legal concepts have been misapplied. Nonetheless, a deeper analysis of the key concepts in international law defining trafficking and slavery and the judicial reasoning, or gaps in reasoning, in both judgements, raises doubt as to whether either case can be considered an example of slavery or even one of trafficking.

The ECtHR did little to distinguish between trafficking and slavery, and tangential facts suggest that Ms Rantseva's experience could have constituted a case of trafficking had the necessary fact-finding taken place. However, in the case of the five Thai women working in the Victorian brothel, based on our assessment, it is unlikely that this situation could accurately be deemed trafficking under Australia's domestic provisions had they actually been in place at the time of the crimes. Had the Australian provision on slavery been interpreted according to international law, it was highly unlikely that any jury would have convicted Ms Tang.

Our concern with the judicial reasoning and findings in both cases is that what has resulted from these two judgments are precedents that distort the

meaning of slavery and trafficking, as articulated in international law, which in the case of trafficking was already fairly imprecise. As Suzan Miers notes, the use of the term "slavery" now covers such a wide range of practices that we risk making it "virtually meaningless".[163] Following the path set in *Tang* and *Rantsev*, we risk extending this problem to trafficking, and finding ourselves in the trap of violating the human rights of the defendants in pursuit of the noble aim of ensuring better protection of victims of exploitation.

We cannot highlight the errors of the courts without asking ourselves what alternatives lay open to them. In the case of *Rantsev*, the apparent detention of Ms Rantseva in the apartment from which she fell to her death suggests a *prima facie* case of inhumane or degrading conduct or, at least, some type of illegal detention that should have been properly investigated. In the case of the Australian laws on migrant workers, documented or not, insufficient attention has been paid to their labour rights and protections, which creates a high risk of exploitation. More and better protection is needed for migrant workers risking exploitative conditions of work, including providers of sexual services, whose right to legal redress should be guaranteed in law. The distortion of established legal concepts, which have already been well consolidated in international agreements, is not the best way of achieving this goal.

[163] Suzanne Miers, *Slavery in the Twentieth Century: the Evolution of a Global Problem* (Walnut Creek, CA: AltaMira Press, 2003) at 453.

Of Humanity and the Law

JOHN REYNOLDS*

Samera Esmeir, *Juridical Humanity*: *A Colonial History* (Stanford: Stanford University Press, 2012).

Through the spring of 2012, the Musée du Quai Branly in Paris hosted an exhibition entitled *Human Zoos: The Invention of the Savage*. It was a remarkable exploration of colonial constructions of racial difference through the phenomenon of the travelling human zoo. The various forms in which native 'specimens' were exhibited before voyeuristic Western audiences—circus carnivals, theatre productions, fairs, freak shows, zoos, parades, mock ethnic villages—spanned a period of almost five centuries, reaching their apogee in the late nineteenth century, and enduring until Europe's final colonial fair in 1958. With the colonial other—'the strange, the savage and the monster'—routinely showcased in enclosures and scenes alongside animals, even the most cursory analysis reveals a blurring of the lines between human and beast, between colonized person and creature. Prevailing theories of racial superiority were embedded, and conquest legitimized, through the act of 'exhibiting' the inferior genus in the form of spectacle.[1] Social, cultural and biological elements of the racial dynamic coalesced to narrate a story of the reduction of the colonized to a status less than human. This was the case in the representations of Aboriginal and American tribes, Asian and African savages;[2] it transcended traditional racial indicators to extend also to Irish itinerants.[3]

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[1] As the Quai Branly exhibition explains: "At a time when slavery gives place to imperialism, the world is divided between those who are exhibited and those who spectate."

[2] In the late nineteenth century, a mentally disabled African-American, purportedly 'caught in the Wilds of California' was labelled 'What is it?' by the Barnum circus company and put on display under the following banner: "Is it an Animal? Is it Human? Is it an Extraordinary Freak of Nature? or, is it a Legitimate Member of Nature's Works? Or is it the long sought for Link between Man and the Ourang-Outang?" In a similar vein, a performer named 'Krao' from Laos was advertised as "Darwin's missing link." In 1885, the Folies-Bergerès in Paris was the final venue for *Le Spectacle d'Aborigènes d'Australie*, a showcase of 'Male and Female Australian Cannibals' described as: "The first and only obtained colony of these strange, savage, disfigured and most brutal race ever lured from the remote interior wilds where they indulge in ceaseless bloody feuds and forays, to feast upon each other's flesh."

[3] Caricatures of the Irish as primates were common in nineteenth century English popular culture, with *Punch* magazine by no means alone in its depiction of the Irish as "the missing link between the gorilla and the Negro." *Punch* XIV (1849), at 54; *Punch* XXIV (1851), at 26, 231. See further, for example, Richard Ned Lebow, *White Britain and Black Ireland: The Influence of Stereotypes on Colonial Policy* (Philadelphia: Institute for the Study of Human Issues, 1976). The racial discourse in the Irish context serves to affirm a direct relationship between representation

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The colonized Arab other was also very much present in this story, but perhaps cast in a less overtly subhuman role. The "Egyptian Caravan" that spent two months in Paris in 1891, for instance, played on orientalist depictions of an exotic Arabia,[4] but arguably did not explicitly purport to dehumanize its troupe in the way that many other colonial performances did. While this is an opaque and unstated distinction, some visitors may have left the Quai Branly exposition with questions over the extent to which trajectories of racial discourse and constructed gradations of humanity varied across colonial time and space, and the reasons for such.

Samera Esmeir's *Juridical Humanity*,[5] a compelling account of the relationship between modern law and the human in colonial Egypt, points to a similar ambivalence in colonizer-colonized dynamics. At the same time as the "Egyptian Caravan" was traversing the metropoles of Europe, Britain was immersed in a process of wholesale legal reform in Egypt. Following the Urabi revolution and British military conquest of the country in 1882, the colonial state embarked upon a juridical venture aimed at overhauling the legal system inherited from the pre-colonial Khedive. The mission was to emancipate Egyptians from the arbitrary and inhumane cruelties of Khedival rule, and to elevate them to a status of humanity previously lacking. Positive law was the force of modernity that would generate a rupture from the arbitrary violence of the pre-colonial past. The book tells a story of how modern law engendered a concept of what the author terms 'juridical humanity' that was rooted in sensibilities of humaneness and operated to inscribe the native Egyptian within the colonial rule of law. Through this particular narrative, Esmeir probes the more general relationship between law and the human with regard to history, nature, sovereignty and violence.

Juridical Humanity is a pioneering piece of work. Prominent thinkers of Western modernity—Agamben, Arendt, Butler, Derrida, Foucault, Latour, and others—have of course extensively constructed and deconstructed the question of the 'human' and the dehumanizing designs of sovereign power (though rarely with direct reference to colonial paradigms).[6] Scholars writing

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of the other as 'biologically inferior' and the maintenance of political domination.

[4] According to Pascal Blanchard, curator of the *Human Zoos* exhibition: "Men and women of the desert, camel drivers and camels (equipped with an *amshqeb* to carry the 'women of the harem'), Swahili warriors, Berber craftsmen, Arab horsemen (with their long daggers), Bedouins in their tents, musicians and artists from British Sudan, Tunisian women dressed in festive garments and jewellery – nothing was lacking from this 'Arab Caravan'." The travelling 'caravan' was seen by 780,000 spectators before continuing on the road to Copenhagen, Milan, Munich and Vienna. Blanchard also notes that Egypt enjoyed a particular appeal in the imperial metropoles, with reconstructions of 'a Cairo street' commonplace at universal exhibitions. Pascal Blanchard, 'The Egyptian Caravan' in Pascal Blanchard, Gilles Boëtsch & Nanette Jacomijn Snoep, *Human Zoos: The Invention of the Savage* (Paris: Actes Sud, 2012) at 106. For the research that spawned and informed the production of the Quai Branly exhibition, see Pascal Blanchard, *Human Zoos: Science and Spectacle in the Age of Empire* (Liverpool: Liverpool University Press, 2008).

[5] Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press, 2012) [*Juridical Humanity*].

[6] Drawing on Giorgio Agamben's notion of *homo sacer*, Judith Butler unpacks in more explicit terms the functioning of sovereign power "to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognized laws." Agamben's

in the anti-colonial and postcolonial traditions, for their part, have trenchantly theorized the dehumanizing intentions of imperialism in the colony.[7] Esmeir navigates all of this literature and more, but plots her own distinctive course through the relatively unchartered waters of legal narratives in British Egypt.

The concept of juridical humanity both borrows from and departs from Hannah Arendt's articulation of the 'juridical person'.[8] Whereas in Arendt's account violence is a product of *exclusion* from the law (in the form of denationalization, or, *in extremis*, the camps' location outside of the 'normal' legal system), Esmeir's narration of Egypt's colonial story reads *inclusion* in the law as a hegemonic technique that facilitates its own brand of violence. In a similar vein to Arendt's portrait of exclusion, a common impulse of postcolonial scholarship is to frame the colonies as zones of lawlessness, defined by racialized power dynamics in which the native is expelled from the juridical order and excluded from humanity.[9] Colonization, on this reading, dehumanizes through a process of exclusion from the law. The project of juridical humanity described by Esmeir, in contrast, connotes a type of inscription within the law that purports to enable a process of humanization—as seen through a colonial lens—based on a liberal idealizing of the 'rule of law'. The effect of colonial law's humane reforms is a process of rendering the natives—hitherto dehumanized by their own despotism—human through the law.

But to what end? While the book "does not presume to be an explicit critique of juridical humanity",[10] Esmeir's analysis shows that this inclusivity is not driven by benevolent designs at emancipation and equality on the part of the colonial state. Rather, the cultivation of juridical humanity embodies a more nuanced technique of inscribing Egyptians within the law as "a

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paradigmatic state of exception, marked by conceptual binaries and zones of indistinction (inside/outside, norm/exception, public/private, zoē/bios), is defined as "an inclusive exclusion (which thus serves to include what is excluded)" that produces bare life through sovereign violence. This notion is applied by Michelle Farrell in her exploration of torture in Coetzee's *Waiting for the Barbarians*. The barbarian (the excluded) is civilized (included) through subjection to torture. The act of torture "signifies nothing other than the Empire's ability to render life bare and to inscribe the meaning of humanity upon the excluded body." See Judith Butler, *Precarious Life* (London: Verso, 2004) at 68; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life (1995)*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) at 21; Michelle Farrell, *On Torture* (Doctoral Thesis, National University of Ireland, Galway, 2011) [unpublished] at 284, forthcoming as *The Prohibition of Torture in Exceptional Circumstances* (Cambridge, UK: Cambridge University Press, 2013).

[7] Frantz Fanon, however, acknowledges the *attempts* of colonial discourse to confiscate the humanity of the native but refuses to accept that such rhetoric is performative or that the colonial subject can be stripped of its agency (the native 'knows that he is not an animal … he is treated as an inferior but is not convinced of his inferiority'). That is, humanity is not something that can be juridically given or taken away. See Frantz Fanon, *The Wretched of the Earth (1961)* (New York: Grove Press, 1963). In this regard, Esmeir takes a different tack, but acknowledges her indebtedness to Fanon's work on the human and colonialism nonetheless.

[8] Hannah Arendt, *The Origins of Totalitarianism* (New York: Meridian, 1958) at 447-55.

[9] See Aimé Césaire, *Discourse on Colonialism (1955)* (London: Monthly Press, 1972); Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001).

[10] *Juridical Humanity, supra* note 5 at 286.

technology of colonial rule and a modern relationship of bondage."[11] Esmeir chronicles the humanizing reforms that included the attempted elimination of torture, the abolition of the use of the *curbash* (whip), as well as decrees for more humane treatment of criminals, prisoners and animals. Here, she says, "the project of juridical humanity put pain and suffering to use."[12] While colonial law's humanitarian intervention was effected through the reduction of suffering, Egypt was the subject of parallel thought processes of modernity that produced a domain of lawful, utilitarian, *humane* violence: "Humanity is truly universalized when, in the colonies, pain is properly measured, administered, and instrumentalised. Only pain that serves an end is admitted. Useless, non-instrumental pain is rejected."[13]

Under the imperial gaze, therefore, the inhumanity of pre-colonial violence lies not in the violence itself, but in its alleged arbitrariness. Juridical humanity, in Esmeir's reckoning, did not seek to prevent pain and suffering per se, but to eliminate the prescription of disproportionate or unproductive pain. Such instrumental suffering would often (though not always) assume the form of less overt modes of wounding than torture and whipping. Here, Esmeir's analysis of British reforms in Egypt takes its cue from Michel Foucault's theorization of certain features of liberal modernity—the abolition of public torture, criminal justice reforms, the architecture of the panopticon—as new technologies of (bio)power directed more at the mind than the body. Like Foucault, Esmeir is unconvinced and unsettled by law's instrumental means-end logic, and the distinction between arbitrary cruelty and calculated productive humane violence. The impossibility of that distinction, in her final analysis, "reveals all of the law's violence as arbitrary" and signals a "collapse of ends into means."[14] Esmeir's extensive reading of the British-Egyptian colonial archive does convincingly demonstrate the thrust of juridical humanity as an attempt to frame the liberalism of colonial governance in juxtaposition to the violence of pre-colonial despotism. The form that this took—British officials ordering the cessation of torture and insisting on humane treatment of prisoners—did surpass more vacuous 'rule of law' platitudes propounded elsewhere, and subverted the narrative of empire as dehumanizing. As noted, Esmeir counters persuasively that the pre-colonial/colonial distinction is not one that holds neatly. Her account does not offer clarification, however, as to the rationale underlying the pretensions and performance of humane reforms in the Egyptian case, while in colonies elsewhere—Kenya, for instance—brutal violence against natives in detention camps would continue to be an institutionally (if not openly) prescribed practice much later into the imperial story.[15] Did colonial policy in Egypt differ on account of its arguably distinct

[11] *Ibid* at 285.
[12] *Ibid* at 111.
[13] *Ibid* at 142.
[14] *Ibid* at 288-89.
[15] See Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (London: Pimlico, 2005); David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire,* (London: Weidenfeld & Nicolson, 2005); *Mutua and others v The Foreign and*

status—protectorate as opposed to colony; occupied rather than colonized? Or did perceptions of a richer history of civilization and a different racial dynamic come into play? Esmeir describes race as "significant to the colonial encounter" in Egypt. She opts not to elaborate on what she understands as the content of that significance, but implies contours in Egypt somewhat distinct from the standard civilized/savage binaries that define much of European imperialism's relationship with the colony. Here, like the visitor to the Quai Branly exhibition, the reader may be left wanting further explanation.

The text, however, consciously directs its focus elsewhere and emerges as an exceptional piece of scholarship from the points of view of both legal history and legal theory. It was, the author informs us, a decade in the making, and the magnitude of her undertaking is laid bare by the depth of historical research and richness of analysis permeating the manuscript. Although not situated explicitly or exclusively on the terrain of international law, the subject matter of *Juridical Humanity* resonates with third world approaches to international law (TWAIL) scholarship and may have benefited from further engagement with that field. While touching upon one particular aspect of Antony Anghie's work on the temporalities of legal positivism and coloniality,[16] Esmeir does not delve any further into the expanding body of TWAIL literature.[17] Readers familiar with that literature will ponder the extent to which Esmeir sees her conception of juridical humanity mirroring Anghie's own work on Vitoria and Spanish colonization of the Americas in the sixteenth century. In contrast to other contemporaneous European jurists who "characterised the Indians as heathens, and animals", Vitoria recognized their humanity. This "recognition of the humanity of the Indians has ambiguous consequences because it serves in effect to bind them to a natural law which, despite its claims to universality, appears derived from an idealised European view of the world."[18] Falling short of the European standard of civilization required to administer a legitimate state, the 'Indians' would violate this law by virtue of their very existence, identity and cultural practices. On the basis of such violation, Spanish travel, trade, conquest and sovereignty is justified. Thus, perhaps akin to Britain's legal reforms in Egypt, Vitoria's humanizing legal doctrine is one that inscribes to deprive, that includes to exclude.

Esmeir's historical deconstruction of law as a surface of contestation in a transformed political environment certainly chimes with contemporary debates around the fluid, and severely strained, revolutionary process in

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Commonwealth Office, [2012] EWHC 2678 (QB).

[16] *Juridical Humanity, supra* note 5 at 34-35.

[17] In addition to Anghie, the work on colonialism and international legal doctrine of scholars such as R.P. Anand, C.H. Alexandrowicz, Bhupinder Chimni, James Gathii and Makau Mutua carries resonance with Esmeir's field of inquiry. In the specific context of modern Egyptian legal history, Amr Shalakany's work bears noting here.

[18] Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27:5 Third World Q 739 at 743. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 13-31.

Egypt. Legal reform has arisen as central to that process, with post-Mubarak political forces having chosen "law as the privileged form through which to bargain with each other"; no sooner had the public space opened up for the political to re-emerge as an autonomous sphere "than that sphere became annexed by the legal."[19] While Esmeir acknowledges law's counter-revolutionary impulses in the form of "legal technology that functions to prevent revolution against the law and to assert state power",[20] her characterization of juridical humanity performing itself while at the same time producing its own critique points to law's repression/resistance double move: "[t]his is why modern law has become such a powerful technology of government *and* a tool of emancipatory struggles."[21] The structural contradictions within the law are thus revealed. The final chapter of *Juridical Humanity* elucidates the 'exceptional legalities'—martial law, military tribunals, special commissions—of British rule that produced a hybrid colonial liberal legal regime, split between its ideals of humanity and its factual violence. The Mubarak regime's thirty years of authoritarian rule were grounded in a state of emergency paradigm descended from Britain's legal ordering of modern Egypt. Where juridical humanity is a process that chains the human to the law and to the state, it takes, Esmeir tells us, "a particular kind of rebellion, not just any rebellion, to break these chains."[22] The Tahrir intifada shook the post-colonial state out of a stupor that was rooted in a prosaic and "endless"[23] emergency. Itself a central target of the protestors' demands, the state of emergency was extended by the Supreme Council of the Armed Forces in 2011, ended by Parliament in 2012, and partly reinstated by President Morsi in January 2013. Legal contestations will continue. It remains to be seen whether Egypt's revolutionary protest movements will ultimately be remembered as (the beginnings of) what Walter Benjamin envisaged as a "real state of emergency" aimed at decisive rupture from permanent normalized emergency, rather than its mere regulation and containment.[24] For this, clearly, has been the aim; to borrow Esmeir's language, the protests "affirm a subject who rejects the system of bondage with the state and the law."[25] They seek, that is, to reclaim humanity from juridicality.

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[19] Lama Abu Odeh, "Of Law and the Revolution" *Georgetown Law Faculty Publications and Other Works* (2012), Paper 1047, online: <http://scholarship.law.georgetown.edu/facpub/1047>.
[20] *Juridical Humanity, supra* note 5 at 3.
[21] *Ibid* at 289 [emphasis added].
[22] *Ibid* at 11.
[23] Sadiq Reza, "Endless Emergency: The Case of Egypt" (2007) 10:4 New Crim L Rev 532 at 532-53.
[24] Walter Benjamin, "On the Concept of History," in Howard Eiland & Michael W Jennings, *Walter Benjamin: Selected Writings, Vol 4: 1938–1940* (Cambridge, MA: Harvard University Press, 2003) at 389, 392. See also John Reynolds, "The Political Economy of States of Emergency" (2012) 14:1 Or Rev Int'l L 85 at 128-30.
[25] *Juridical Humanity, supra* note 9 at 291.

Global Warming Gridlock

MARK PURDON*

Book Review: *Global Warming Gridlock - Creating More Effective Strategies for Protecting the Planet* by David Victor

David Victor's recent book, *Global Warming Gridlock*, is a must-read for anyone serious about addressing climate change, and will appeal to international relations scholars who are interested in why climate change has proven so difficult to solve. Representing Victor's second major treatise on climate change politics in ten years,[1] *Global Warming Gridlock* encapsulates his latest thinking on the issue. Notably, it was selected in 2011 as one of *The Economist's* 'Books of the Year' and will resonate with a larger audience than much climate change scholarship. It is a book that needs to be taken seriously. Victor also writes in an uncompromising yet clear manner that readers of different political backgrounds will find direct, compelling and provocative.

While there is much to admire in Victor's book, its major limitation is that it emphasizes institutional design and policy issues over more fundamental politics. Victor's main argument is that in adopting an institutional design that worked for the relatively simple problem of the ozone layer, the architects of international climate change policy have relied on the "wrong tools for the job".[2] Because climate change is a more expensive and complex issue, the politics bear stronger similarities to issues of international trade. But as other international relations scholars have argued, even if one agrees that the (dying) *Kyoto Protocol* is not an optimal institution, "the fundamental question remains why the Kyoto Protocol was designed this way."[3] Probing the fundamental political assumptions of the book—namely that state capabilities to address climate change correlates with state interests in doing so[4]—would enrich what is otherwise an excellent investigation of climate change policy.

The book is comprised of nine chapters that review various aspects of current climate change policy, in order to explain the current gridlock and map out a new strategy. For those pressed for time, the overview offered in Chapter 1 offers a succinct summary of the book's main arguments. In

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[1] See David G Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming* (Princeton: Princeton University Press, 2001) [Victor, *The Collapse*].

[2] *Ibid* at 208.

[3] Frank Grundig, "Patterns of International Cooperation and the Explanatory Power of Relative Gains: An Analysis of Cooperation on Global Climate Change, Ozone Depletion, and International Trade" (2006) 50 International Studies Quarterly 781 at 791.

[4] Victor, *Global Warming Gridlock*, *supra* note 2 at 12.

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Chapter 2, Victor seeks a fresh approach by explaining why many assumptions about climate change politics have been wrong. Or, as Victor puts it, he 'slays' the myths that scientists, environmentalists, and engineers have assumed about climate change politics but which actually hinder efforts.[5] Briefly, scientist have promoted the myth that science can determine 'dangerous' levels of emissions which should then be adopted by policy-makers, environmentalists have framed climate change as an 'environmental' problem which has led "to the use of models from the history of environmental diplomacy" that don't work well with international economic policy,[6] and engineers have focused too much on the invention of emissions-reducing technology and not the political challenges of their deployment. These myths are problematic because "[t]hey perpetuate the belief that if only societies had 'political will' or 'ambition' they could tighten their belt straps and get on with the task. The problem isn't just political will".[7] The tone is vintage Victor, potentially off-putting to the scientists, environmentalists and engineers working on climate change, but altogether refreshing. The downside is that Victor risks offending some of his intended audience.[8]

The meat of the book, however, is Chapters 3-6, where Victor reviews strategies for regulating emissions, promoting technological change as well as for adaptation, geoengineering and triage. In Chapter 3, Victor convincingly explains why policies for regulating emissions in the developed world do not follow the advice of economists, who often advocate for some variation of a carbon tax. Victor explains that politicians need to build coalitions amongst the electorate, and these efforts would be frustrated "if the policy imposes highly visible, painful costs on well-organized groups"[9] like a carbon tax. In reality, a variety of approaches are used, including cap-and-trade, taxes, subsidies, and direct regulation, which makes it difficult to know the costs and the impact on actual emissions levels. This insight—that politics prevent the adoption of predictable climate policy—ties into Victor's long-standing critique of the *Kyoto Protocol*'s 'targets and timetables' approach to climate change. Because the regulation of emissions is in practice complicated by political calculations and diverges from the costs predicted by economists, governments find it difficult to make credible commitments to emission reduction targets. The result is that politicians either commit to targets they know they can easily achieve, but which are often not ambitious enough to make a real impact on emission trajectories, or they adopt targets

[5] *Ibid* at xxxiii.
[6] *Ibid* at 31.
[7] *Ibid* at 5.
[8] For example Victor writes in the preface to the book: "Chapter 2 explains why most of the key players in the climate debate [scientists, environmentalists, international climate negotiators, and engineers] are deluded by myths about their own importance. Those myths make it hard to focus on how the policy process really works. Chapter 2 slays them." David G Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (Cambridge: Cambridge University Press, 2011) at xxxiii [Victor, *Global Warming Gridlock*]. There are many more, which enliven a rather sombre book topic.
[9] *Ibid* at 66.

that push the deadline for action well into the future.

Victor therefore believes that current climate change negotiators have it backwards: identifying ends and not means. He emphasizes that it is important to identify what governments can actually do, and then use this to inform international negotiations: the "likely structure of national policies should drive the design of international commitments".[10] However, while this formulation appears true for certain countries, especially Canada which has abandoned its Kyoto aspirations, it does not seem to fit the situation of climate leaders like the United Kingdom and Germany.[11] Victor is silent on the issue of why some countries have been able to make the Kyoto Protocol approach work and not others.

Chapter 4 focuses on how developed countries could better engage with developing countries to reduce emissions. While there are discussions of carbon tariffs (p.85-86) and official development assistance (ODA),[12] the focus here is on the Clean Development Mechanism (CDM). Victor has been a leading critic of the *Kyoto Protocol*'s carbon offset system, pointing out the CDM's administrative weaknesses. However, too much of the evidence in Victor's critique of the CDM is anecdotal. Statements such as "host governments soon figured out that the best strategy [to generating carbon credits] was to manipulate local policies so that hypothetical baselines would be high"[13] are more assertive than the evidence warrants.[14] For example, there are significant methodological problems with the way Michael Wara and Victor arrive at their conclusions in their 2008 working paper on the CDM.[15] Studies using more systematic methods have pointed in another

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[10] *Ibid* at 75.

[11] Since 1990, emissions in Germany and the United Kingdom are down by 25% and 23% respectively. A not insignificant part of the United Kingdom's reductions have been due to the discovery of offshore natural gas (M Balat,"Greenhouse Gas Emissions and Reduction Strategies of the European Union" (2010) 5(2) Energy Sources, Part B: Economics, Planning, and Policy 165.), but much of the rest of its reductions reflect the priority that climate change has achieved within the United Kingdom (see Susan Owens, "Learning across Levels of Governance: Expert Advice and the Adoption of Carbon Dioxide Emissions Reduction Targets in the UK" 2010 20(3) Global Environmental Change 394.). Similarly, some have held that Germany's reductions are due to German reunification (Joseph E Aldy, Scott Barrett & Robert N Stavins, "Thirteen plus one: a comparison of global climate policy architectures" (2003) 3(4) Climate Policy 373 at 380.); however, given the extent of reductions, it is difficult to explain this entirely as 'hot air' from the former East Germany (see Ian Bailey, "Market Environmentalism, New Environmental Policy Instruments, and Climate Policy in the United Kingdom and Germany" (2007) 97(3) Annals of the Association of American Geographers 530, and Bettina Schrader, "Greenhouse Gas Emission Policies in the UK and Germany: Influences and Responses" (2002) 12 European Environment 173).

[12] Victor, *Global Warming Gridlock*, *supra* note 2 at 87-90.

[13] *Ibid* at 92.

[14] See e.g. *ibid* at 95, n 18, which directs readers to a number of newspaper articles. The other evidence that Victor relies upon are two working papers (Michael W Wara& David G Victor, *A Realistic Policy on International Carbon Offsets* (Program on Energy and Sustainable Development Working Paper 74, Stanford University, 2008); Gang He & Richard K Morse, *Making Carbon Offsets Work in the Developing World: Lessons from the Chinese Wind Controversy* (Program on Energy and Sustainable Development Working Paper 90, Stanford University, 2008), one of which was published later as Michael Wara, "Measuring the Clean Development Mechanism's Performance and Potential" (2008) 55 UCLA L Rev 1759.

[15] My basic critique is that more information about the development context in which CDM

direction. In a recent study ironically written by former colleagues of Victor's at Stanford, Junjie Zhang and Can Wang present convincing evidence that the CDM has not been manipulated by Chinese authorities. Rather, CDM emissions baselines changed for reasons unanticipated by CDM project developers.[16] My own research on the CDM in least developed countries indicates that the price of carbon has not risen to a high enough level such that the price signal is easily observable by CDM regulators; the effectiveness of CDM projects is difficult to measure with monitoring tools currently available.[17]

In Chapter 5 Victor presents a compelling vision for a global technology policy, which he rightly observes has not been given sufficient attention because of misplaced optimism that the *Kyoto Protocol* would sufficiently incentivize innovation. The *Kyoto Protocol* was designed to 'pull' technology forward by putting a price on carbon, but with prices low it has actually resulted in little more than "tinkering at the margins with existing technologies".[18] As an alternative, he maps out a two-stage approach that emphasizes (*a*) the need to push promising technologies across the 'valley of death' to commercial success, and (*b*) prevent them from being locked out by special interest groups beholden to current technologies.

For the first problem, Victor suggests providing government support for promising technologies to take them across the valley of death between basic research and commercial viability.[19] This suggests a more active industrial policy: "[i]n reality, crossing the valley of death is all about picking winners because picking everything isn't viable".[20] There is no silver bullet for the second problem of technological lock out—"Every country and market is different".[21] Information and regulatory obstacles that frustrate the adoption of new technologies will not be easily solved, but mapping where lock outs occur across the economy would be one step in the right direction.

Finally, while emphasizing that technology policy will be closely aligned with national capabilities and interests, Victor does offer some suggestions about how international coordination might direct this towards climate change. He, however, always emphasizes that any new technological 'push' policy needs to be coordinated with an appropriate 'pull' policy—cap-and-

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projects are situated is necessary before passing judgement on individual projects. See my discussion of the methods used by Wara and Victor in Mark Purdon, "State and Carbon Market in Least Developed Countries: Carbon Finance in the Land-Use Sector and State Power in Tanzania, Uganda and Moldova" (Paper delivered at the 2012 Annual Meeting of the American Political Science Association, New Orleans, 30 August—2 September 2012) [Purdon, "State and Carbon Market"].

[16] At page 149, these authors write: "This is not to say that project developers intentionally manipulate additionality requirements. Rather, it is the current CDM baseline methodology that fails to predict future emissions in a fast changing economy" (Junjie Zhang & Can Wang, "Co-benefits and additionality of the clean development mechanism: An empirical analysis" (2011) 62(2) Journal of Environmental Economics and Management 140.).

[17] See Purdon, "State and Carbon Market", *supra* note 15.

[18] Victor, *Global Warming Gridlock*, *supra* note 2 at 117.

[19] *Ibid* at 137-139.

[20] *Ibid* at 146.

[21] *Ibid* at 154.

trade, carbon tax, or regulation—to avoid "wrongheaded priorities, waste and distraction".[22]

In Chapter 6, he addresses some of the more disturbing topics in climate change politics: adaptation, geoengineering and triage. The climate change policy community has been slow to broach these issues because of the risk of appearing to admit defeat on mitigation.[23] While dark, discussion of these issues is necessary. Regarding adaptation, Victor casts doubt on the effectiveness of targeted adaptation efforts, echoing arguments made by Franck Lecocq and Zmarak Shalizi that the 'spatial uncertainty' of future climate change damage makes proactive adaptation allocations difficult in comparison to mitigation.[24] Given that it is highly uncertain how much resources will be needed for adaptation and when and where, it is more prudent to promote economic development because "richer is safer".[25] Victor concludes that the "task of helping countries become more adaptive to climate change is quite similar to economic development".[26] Victor's discussion of geoengineering is insightful for its review of the political and governance problems that too often are only an afterthought in this highly technical field. The political challenge of geoengineering is mustering a serious international research programme to begin vetting various options: "mobilizing careful assessment of geoengineering options and side effects will require governments to make politically controversial decisions, such as to fund and test candidate geoengineering systems and debate how to assess the results".[27] The governance problems that Victor addresses are motivated by the insight that the geoengineering card might be played by a single country and, therefore, fundamental rules need to be begin to be formulated now before any state "first reaches for the thermostat".[28]

In Chapters 7 and 8, Victor moves to explain why climate change negotiations have achieved such little progress and identifies a way forward. The essence of Victor's argument is that climate negotiators adopted the "wrong tools for the job".[29] Early climate change analysts, including Victor himself,[30] relied too heavily on the *Montreal Protocol on Substances that Deplete the Ozone Layer* as an inspiration for the design of climate change policy. Specifically, climate change diplomats erred in striving for universal membership, adopting an emission reduction target approach abiding by strict timetables, insisting on a legally binding treaty, and failing to adopt a

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[22] *Ibid* at 118-119.
[23] Roger Pielke et al, "Climate change 2007: Lifting the taboo on adaptation" (2007) 445 Nature 597.
[24] Zmarak Shaliziand & Franck Lecocq, "To Mitigate or to Adapt: Is that the Question? Observations on an Appropriate Response to the Climate Change Challenge to Development Strategies" (2010) 25(2) The World Bank Research Observer 295.
[25] Victor, *Global Warming Gridlock*, *supra* note 2 at 174.
[26] *Ibid* at 181.
[27] *Ibid* at 192.
[28] *Ibid*.
[29] *Ibid* at 208.
[30] *Ibid* at 232.

viable enforcement mechanism.[31] But the costs and complexity of climate change make the politics more akin to the international trade regime, particularly that of the General Agreement on Tariffs and Trade (GATT)/World Trade Organisation (WTO) negotiations. The GATT started out as a club of "a limited number of countries whose interests (and capabilities) were sufficiently aligned to allow cooperation. Over time, experience and success have allowed deeper and wider cooperation".[32]

Informed by the GATT/WTO experience, Victor maps out a new strategy for climate change in Chapter 8. The centrepiece of Victor's new strategy is "climate ascension deals" (CADs) – a club-like negotiating structure of contingent commitments inspired by the GATT/WTO. Each CAD is to represent an offer from key countries about the policies and measures they may adopt depending upon the commitments of others. The value of CADs over the CDM is that they would allow deals between developed and developing countries regarding mitigation actions to move beyond difficult-to-measure emission reduction credits. Instead of carbon finance being the only carrot on the table, a wider array of incentives can be used, including "technology cooperation, market access, and security guarantees" that "may usually be more valuable and also politically easier for [developed countries] to mobilize and administer".[33]

Important to Victor's overall argument is the novelty of CADs. Are they really new in the climate change arena? First, CADs bear many similarities to nationally appropriate mitigation actions (NAMAs)—the likely successor to the CDM being now negotiated at the United Nations.[34] NAMAs were first referred to in the 2007 *Bali Action Plan*, but the actual details of how they will be implemented are still being developed.[35] In an important departure from the CDM however, NAMAs can be financed through carbon credits but also 'supported' through other, as yet undefined, means. The prospect of supported NAMAs or the combination of credited and supported NAMAs appears to be a response to deficiencies in the carbon markets like those identified by Victor. Second, it is likely CADs will face many of the same problems that have confronted the CDM. As Victor himself writes,"[t]he real difficult negotiations [surrounding CADs], of course, will focus on the credit that enthusiastic countries should earn from these deals, the obligation that reluctant nations would undertake in exchange, and the mechanisms for tracking whether countries actually honor their pledges".[36] This dynamic

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[31] *Ibid* at 209-210.
[32] *Ibid* at 214.
[33] *Ibid* at 244.
[34] Yuri Okubo, Daisuke Hayashi & Axel Michaelowa, "NAMA crediting: how to assess offsets from and additionality of policy-based mitigation actions in developing countries" (2011) 1 Greenhouse Gas Measurement and Management 37; South Pole Carbon, *How to Develop a NAMA by Scaling-up Ongoing Programmatic CDM Activities on the Road from POA to NAMAs* (Berlin: KfWBankengruppe, 2011).
[35] For the latest information, see: United Nations Framework Convention on Climate Change, *Early submission of Information to the NAMA Registry Prototype*, online: UNFCCC <http://unfccc.int/cooperation_support/nama/items/6945.php>.
[36] Victor, *Global Warming Gridlock*, *supra* note 2 at 252.

closely mirrors the problems facing the CDM. In order to make his argument more convincing, Victor will need to present a plausible argument as to why the monitoring and enforcement of CADs would be significantly different from the perverse incentives and information asymmetries that he identifies with the CDM. Unfortunately, this consideration is left unformulated in the book.

These issues surrounding CADs point to a weakness in what is otherwise an excellent book. Victor presents no serious explanation for developed countries to support CADs (or any international climate change efforts) other than the assumption that they are 'enthusiastic' about addressing climate change. But the reasons for their enthusiasm are never explained. Victor's assumptions about the distribution of state interests and capabilities for climate change are briefly outlined in the introduction.[37] Victor reminds us that "the full list of factors that determine interests is long" and rattles off a number that are likely relevant to different states' approaches to climate change; however, he concludes, quite openly, that a "full-blown theory of national interests would need to look at all such factors".[38] Nonetheless, he asserts that "[t]he capabilities of governments to regulate emissions is highly correlated with interests".[39] This assumption allows for a division of the world into two categories: 'enthusiastic' and 'reluctant' countries.[40] Yet perhaps to the surprise of some readers, the group of enthusiastic countries "now includes the US and essentially all members of the OECD [including Canada]".[41]

The upshot is that by assuming that state capabilities and interests are correlated—distinguishing between enthusiastic and reluctant countries—Victor is able to focus on issues of institutional design in explaining global warming gridlock rather than more fundamental political factors. But are capabilities and interests really correlated? On this question, other international relations scholars increasingly point to the high costs of climate change as a fundamental obstacle to cooperation, as such costs engender relative-gains concerns that are not easily solved through institutional design.[42] Though in Chapter 9 closing the book, Victor takes a frank look at what the failure to address climate change means for world order, including the United Nations and the great powers, the capability/interests issue I have raised remains unexplored. (His point about the need to consider international fora alternative to the UN is valid.)

Victor's political theory of climate change is ultimately ambivalent. On

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[37] *Ibid* at 9-12.
[38] *Ibid* at 9-11.
[39] *Ibid* at 12.
[40] *Ibid* at 11.
[41] *Ibid*.
[42] Grundig, "Patterns of International Cooperation and the Explanatory Power of Relative Gains", *supra* note 4; Mark Purdon, "Neoclassical realism and international climate change politics: moral imperative and political constraint in climate finance" (2013), Journal of International Relations and Development, doi: 10.1057/jird.2013.5; Sevasti-Eleni Vezirgiannidou, "The Kyoto Agreement and the pursuit of relative gains" (2008) 17 Environmental Politics 40.

balance, Victor's assumptions about state interests are common amongst neoliberal institutionalists, where the virtues of cooperation are assumed to be self-evident and states disposed to increasingly greater cooperation—despite starting from widely divergent domestic political interests.[43] In other words, neoliberal institutionalism grants international political processes greater causal weight than domestic politics in a state's determination of whether or not to cooperate. Because all states stand to benefit from the prevention of dangerous climate change, this model assumes that states will find it in their interests to cooperate to reduce emissions. But Victor's more realist assertions crop up elsewhere. For example, he also writes that "different societies will view their interests (and thus goals) in quite different ways"[44] and, later, "the level of ambition [for emissions mitigation] will vary by country because countries view the dangers of climate change and the consequences of regulating emissions differently. Their 'interests' vary".[45] Such statements contrast with the earlier assertion of a correlation between interests and capabilities. The implications of these contrasting political theories are important. If state interests in climate change mitigation are a result of their assessment of the potential cost of climate change damages vis-à-vis potential cost of mitigation, it cannot be guaranteed that all developed countries will behave 'enthusiastically' to reduce emissions.

Once we set aside assumptions of developed country enthusiasm for climate change mitigation, the essential challenge of climate change is revealed to be crafting the interests of developed countries towards global efforts of which they only reap a fraction of the benefits. But Victor has consistently bracketed this problem of 'political will' and focused on resolving problems with institutional design.[46] I agree with Victor's main argument in *Global Warming Gridlock* that better designed institutions would lead to major gains over the current state of affairs. But it is wrong to pin all problems on the institutional design on the UN and so-called 'reluctant' countries without a fuller account of state interests. One hopes Victor is right—that the rich, developed countries are enthusiastic about addressing climate change and that better designed institutions will allow them to express their enthusiasm in a more effective way. But the assumption that state interests and capabilities are correlated in climate change politics warrants closer investigation than Victor undertakes in an otherwise important book on climate change policy.

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[43] Jennifer Sterling-Folker, "Realist Environment, Liberal Process, and Domestic-Level Variables" (1997) 41 International Studies Quarterly 1.
[44] Victor, *Global Warming Gridlock*, *supra* note 2 at 31.
[45] *Ibid* at 73.
[46] In his 2001 book, Victor argued that "[t]he problems with Kyoto are not merely a matter of mustering the 'political will' to swallow a bitter pill. Rather, Kyoto's troubles originate with its architecture—strict emission targets and trading—which is especially ill suited to the fact that the level of emissions for the most important greenhouse gases is inherently unpredictable"; Victor, *The Collapse*, *supra* note 1 at 109.

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