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Feature Articles

Student Articles

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International Focus at Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

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We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

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Unravelling Power Dynamics in Organizations: an Accountability Framework for Crimes Triggered by Lethal Autonomous Weapons Systems

Tetyana Krupiy*

* Postdoctoral Fellow, McGill University. This research was supported by the Social Sciences and Humanities Research Council of Canada. I would like to acknowledge my supervisor René Provost, Charles Khamala, Robi Rado, Liliana Obregon, Emilio Cerda, Kerstin Carlson, Abigail Patthoff, Cara Cunningham, Chelsi Hayden, Desiree Slaybaugh, Rebecca Scharf, Emily Grant, Joseph Mastrosimone and Panagiota Kotzamani for their valuable feedback on the draft versions of this article. Thank you to Frédéric Mégret for generously giving his time to enable me to interview him. Moreover, I would like to thank the editors of the *Loyola University Chicago International Law Review* for the time and effort they spent on reviewing the article. The following individuals were involved with the editing process: Payal Patel, Elizabeth Watchowski, Hannah Drury, Abdul Mouneimne, Ellen Bone, Grace Luetkemeyer, Brett O'Connell, Fabiola De Armas, Sergio Juwa, Jacqueline Kofoot, Andrea Calvert, Mary Macleod, Basile Manikas, Hubert Shingleton, Stefano Rosenberg, Natalie Fine, William Dimas, Anthony Vander Kolk, Lucas Terna, Kasun Wijegunawardana, Molly Hunsinger, Melyse Mpiranya, Dimitra Katsis, and Jonathan Benowitz. Finally, I would like to thank the Social Sciences and Humanities Research Council of Canada for funding my postdoctoral fellowship.

I. Introduction

The utilization of weapon systems operating on artificial intelligence software among the armed forces and non-state actors carries an inherent risk. To illustrate the inherent risk in artificial intelligence weapon systems, imagine a scenario that begins with the deployment of a robotic artificial intelligence weapon system to search for targets in an area. This robot, generally run remotely by an operator, uses artificial intelligence to switch from a human operator run mode to an autonomous mode without requesting permission from the operator. The programmer built the software to permit the robot to switch into an autonomous mode but only after obtaining prior authorization from the operator. The developer did not anticipate that the inherent complexity of the artificial intelligence software would enable the robot to switch into an autonomous mode without obtaining an authorization from the user. The scenario unfortunately ends when the robot misclassifies a civilian as hostile in the course of operating in an autonomous mode, and fires at the civilian.

The employment of artificial intelligence weapon systems that possess a degree of autonomy for lethal force tasks is awaiting to happen. Countries including South Korea, China, the United States, United Kingdom, Russia and Israel are developing this technology.[1] The investment into artificial intelligence technologies for peacetime use by countries such as Canada will speed up the creation of artificial intelligence weapon systems.[2] There is a credible possibility that such systems may carry out unlawful attacks as a result of performing in an unintended manner. The international community uses the term "lethal autonomous weapon system" or LAWS to denote this technology.[3] This article focuses on how international criminal law may respond to the challenge posed by the circulation of undependable LAWS. The approach reflects the fact that prosecutions are a central component of remedies for the victims.[4] It seeks to overcome the challenge that it is difficult to determine who or what should be held responsible when a complex artificial intelligence system brings about a war crime.[5]

States are employing the United Nations as a venue where to discuss how to regulate this emerging technology.[6] States agree that if LAWS are to be deployed, there has to be accountability when a LAWS performs in an unin-

[1] Cesar Chelala, *The perverse rise of autonomous killer robots*, The Japan Times (Oct. 16, 2015).

[2] Andy Blatchford, *Ottawa's artificial intelligence push has some concerned over "killer robots"*, The Canadian Press (Mar. 31, 2017).

[3] The United Nations Office at Geneva, *Group of Governmental Experts on Lethal Autonomous Weapons Systems* (2013), https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE500393DF6?OpenDocument.

[4] Thompson Chengeta, *The Challenges of Increased Autonomy in Weapon Systems: in Search of an Appropriate Legal Solution* 184 (Nov. 10, 2015) (unpublished LL.D dissertation, Pretoria University) (on file with UPSpace Library, University of Pretoria).

[5] *Downloading Decision: Could machines make better decisions for us?,* CBC Radio (Jul. 12, 2017), http://www.cbc.ca/radio/ideas/downloading-decision-could-machines-make-better-decisions-for-us-1.3995678.

[6] The Convention on Certain Conventional Weapons [CCW] 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems [LAWS] (Apr. 11-15, 2016), http://www.unog.ch/80256EE600585943/(httpPages)/37D51189AC4FB6E1C1257F4D004CAFB2?OpenDocument.

tended manner and triggers an international crime.[7] Although states have not defined the term LAWS, their branches of government have enacted regulations relating to LAWS.[8] For instance, the U.S. Department of Defense Directive 3000.09 defines an autonomous weapon system as, "[a] weapon system that, once activated, can select and engage targets without further intervention by a human operator."[9] Italy's proposed definition adds another dimension. It defines a LAWS as a system that adapts to changing environment "independently of any pre-programming" and does not execute a set of pre-programmed instructions.[10] Rather, a LAWS will reach decisions on the basis of its rules and on the basis of learning from being exposed to battlefield scenarios.[11] The United Nations will continue the discussion of regulation including issues like banning models which autonomously select and engage targets without "meaningful human control."[12]

LAWS differ from current weapon systems in that they draw inferences from encountered scenarios to establish the nature of the proposed target. Presently, most states favor a proposal for human operators to retain "meaningful control" over LAWSs.[13] To determine issues of criminal accountability in cases where a

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[7] Daily FT, *Sri Lanka cautions autonomous weapons could compel states to abandon restraint and ignite on arms race*, DAILY FT, (Apr. 18, 2015), http://www.ft.lk/article/407897/Sri-Lanka-cautions-autonomous-weapons-could-compel-states-to-abandon-restraint-and-ignite-an-arms-race; Delegation of Switzerland, Statement by the Delegation of Switzerland to the Conference on Disarmament, CCW 2016 Informal Meeting of Experts on LAWS (Apr. 11-15, 2016) https://www.unog.ch/80256EDD006B8954/(httpAssets)/29BA73179A848FF5C1257F9C0042FD40/$file/2016.04.11_LAWS+CCW+General+Debate+Switzerland_as+read.pdf; Delegation of Germany, German General Statement, Statement by the Delegation of Germany to the Conference on Disarmament, CCW 2016 Informal Meeting of Experts on LAWS (Apr. 11-15, 2016), https://www.unog.ch/80256EDD006B8954/(httpAssets)/1A10EE8317A92AA4C1257F9A00447F2E/$file/2016_LAWS+MX_Towardaworkingdefinition_Statements_Germany.pdf [hereinafter Statement of Germany].

[8] Michael W. Meier, Delegation Head of the Permanent Mission of the U.S. to the U.N., U.S. Delegation Opening Remarks at CCW 2016 Informal Meeting of Experts on LAWS (Apr. 13, 2016), https://www.unog.ch/80256EDD006B8954/(httpAssets)/EFF7036380934E5EC1257F920057989A/$file/2016_LAWS+MX_GeneralExchange_Statements_United+States.pdf.

[9] U.S. DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE 3000.09: AUTONOMY IN WEAPON SYSTEMS 13 (Nov. 21, 2012), https://www.hsdl.org/?view&did=726163 [hereinafter DEP'T OF DEF. DIRECTIVE].

[10] Delegation of Italy, Towards a Working Definition of LAWS, Statement by the Delegation of Italy to the Conference on Disarmament, CCW 2016 Informal Meeting of Experts on LAWS (Apr. 11-15, 2016), https://www.unog.ch/80256EDD006B8954/(httpAssets)/06A06080E6633257C1257F9B002BA3B9/$file/2016_LAWS_MX_towardsaworkingdefinition_statements_Italy.pdf [hereinafter Statement of Italy].

[11] *Id.* at 1-2.

[12] Mark Prigg, *U.N. to Debate 'Killer Robot' Ban Next Year as Experts Warn Time is Running Out to Stop A.I. Weapons,* Daily Mail (Dec. 16, 2016, 2:50 PM), http://www.dailymail.co.uk/sciencetech/article-4042146/UN-debate-killer-robot-ban-year-experts-warn-time-running-stop-AI-weapons.html.

[13] The degrees of proposed supervision range from the operator carefully selecting in what geographical area to employ a LAWS and what types of targets it should search for to the operator intervening to override the system's assessment to prevent unlawful attacks. Delegation of Israel, Statement on Lethal Autonomous Weapons Systems (LAWS), CCW 2016 Informal Meeting of Experts on LAWS (Apr. 11-15, 2016) [hereinafter Statement of Israel], http://www.unog.ch/80256EDD006B8954/(httpAssets)/AB30BF0E02AA39EAC1257E29004769F3/$file/2015_LAWS_MX_Israel_characteristics.pdf; Statement of Germany, *supra* note 7; Statement of Italy, *supra* note 10; Delegation of the United Kingdom, Statement to the Informal Meeting of Experts on Lethal Autonomous Weapons Systems, CCW 2016 Informal Meeting of Experts on LAWS (Apr. 11-15, 2016), https://www.unog.ch/80256EDD006B8954/(httpAssets)/49456EB7B5AC3769C1257F920057D1FE/$file/2016_LAWS+MX_GeneralExchange_Statements_United+Kingdom.pdf [hereinafter Statement of United Kingdom]; Delegation of Canada, Déclaration

LAWS unlawfully employs lethal force, states look to the Geneva Conventions of 1949.[14] The Geneva Conventions of 1949 require states to take penal measures to punish individuals who committed "grave breaches of the Conventions or who ordered such grave breaches to be committed."[15] The grave breaches of the Geneva Conventions of 1949 amount to the commission of war crimes under customary international law.[16] An example of a war crime is the violation of the principle of distinction.[17] The principle of distinction requires the parties to the conflict to distinguish "at all times" between the civilian population, individuals who take a direct part in hostilities and combatants on the one hand, and between civilian objects and military objectives on the other hand.[18] LAWS could target a civilian or a combatant *hors de combat* in an unanticipated or unreliable manner.[19] A LAWS could target a civilian or a combatant *hors de combat* for numerous reasons. It could construe incorrectly the situation in front of it.[20] The pieces of code could interact in an unpredictable way.[21] A LAWS could perform in a manner the programmers did not anticipate or due to a LAWS otherwise functioning in an unreliable manner.

Individual criminal responsibility is separate from state responsibility.[22] The two regimes have different functions, address different subjects and apply different legal standards.[23] State responsibility focuses on the obligations a state owes

Nationale Du Canada, Statement by the Delegation of Canada to the Conference on Disarmament, CCW 2016 Informal Meeting of Experts on LAWS (Apr. 11-15, 2016) https://www.unog.ch/80256EDD006B8954/(httpAssets)/3B4959531DA33F78C1257F920057C4A5/$file/2016_LAWS+MX_GeneralExchange_Statements_Canada.pdf [hereinafter Statement of Canada]; Dustin A. Lewis et al., WAR-ALGORITHM ACCOUNTABILITY (2016), http://blogs.harvard.edu/pilac/files/2016/09/War-Algorithm-Accountability-Without-Appendices-August-2016.pdf [hereinafter War Algorithm Accountability].

[14] War Algorithm Accountability, *supra* note 13 at 88-89.

[15] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 41, Aug. 12, 1949, T.I.A.S. No. 3362; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, T.I.A.S. No. 3363; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287.

[16] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 568 (2005).

[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85(3)(a), Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I 1977]; Rome Statute of the International Criminal Court art. 8(2)(b)(i) and art. 8(2)(e)(i), Jul. 17, 1998, 2187 U.N.T.S. 90, (this is the case for both international and non-international armed conflicts).

[18] AP I 1977, *supra* note 17, at art. 48.

[19] Bonnie Docherty, *Losing Humanity: The Case Against Killer Robots*, HUMAN RIGHTS WATCH 31-32 (Nov. 19, 2012), https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots.31-32 (*e.g.* construing incorrectly the situation in front of it) [hereinafter Docherty].

[20] Docherty, *supra* note 19.

[21] Jason Borenstein et. al., *International Governance of Autonomous Military Robots*, XII COLUM. SCI. & TECH. L. REV. 272, 283-84 (2011), http://www.stlr.org/cite.cgi?volume=12&article=7.

[22] Int'l Law Comm'n, *Comment. 1 to Art. 58 Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001*, Rep. of the Fifty-third Session of the Int'l Law Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Vol 2 Part 2) (2001) [hereinafter International Law Commission].

[23] Beatrice I. Bonafé, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 237 (2009) [hereinafter Bonafé].

to other states (and in the case of the protection of basic rights to the international community as a whole).[24] A state that commits a wrongful act by violating its international obligations is obligated to make reparations; including compensation.[25]

On the other hand, international criminal law is designed to deter violations of the states' fundamental values by holding individuals criminally responsible for acts amounting to an international crime.[26] In addition to deterrence, there is a desire to signal that the rights of the victim matter and to restore the victims a wholesome state.[27] Of course, in practice there is an overlap between state responsibility and international criminal law when a state breaches a peremptory norm, such as the international humanitarian law (hereinafter IHL) principles.[28] In failing to comply with IHL, a state breaches its obligation to the international community as opposed to the injured state alone.[29]

Not only is the contextualization of LAWS liability important, but the determination of available remedies is also key. From its inception, the technology of LAWS has challenged our existing conception of lawful remedies. Scholars continue to debate about whether international criminal law, state responsibility or domestic tort law is a superior framework for regulation, especially when regulating instances where a LAWS brings about an unlawful killing.[30] Another area of inquiry is to which actors accountability can be ascribed under international criminal law when a LAWS triggers a war crime.[31] The question presented is whether the operator, the procurement official at the Department of Defense (or a similar body), the developer, the manufacturer or a combination of these actors is liable.[32]

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[24] International Law Commission, *supra* note 22, at Comment. 4 to Art. 58.

[25] *Id*. at Comment. 3 to Art. 1; *See* The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928), http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm [hereinafter Ger. v. Pol.].

[26] *See generally* M. Cherif Bassiouni, Introduction to International Criminal Law (2nd ed. 2012).

[27] Bonnie Docherty, *Mind the Gap: the Lack of Accountability for Killer Robots*, Human Rights Watch (Apr. 9, 2015), https://www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots; *See generally* Dinah Shelton, *Remedies in International Human Rights Law* 10 (2005).

[28] International Law Commission, *supra* note 22, at Comm. 4 to Art. 58.

[29] Bonafé, *supra* note 23, at 238.

[30] Rebecca Crootof, *War Torts: Accountability for Autonomous Weapons*, 164 U. Pa. L. Rev. 1347, at 1393 (2016); Thompson Chengeta, *The Challenges of Increased Autonomy in Weapon Systems: in Search of an Appropriate Legal Solution 184* (Nov. 10, 2015) (unpublished LL.D. dissertation, Pretoria University) https://repository.up.ac.za/bitstream/handle/2263/52365/Chengeta_Challenges_2015.pdf;sequence=1 [hereinafter Chengeta].

[31] Tim McFarland & Tim McCormack, *Mind the Gap: Can Developers of Autonomous Weapons Systems be Liable for War Crimes?*, 90 I'ntl L. Stud. 361, 376 (2014) [hereinafter McFarland]; Lambèr Royakkers & Peter; Olsthoorn, *Military Robots and the Question of Responsibility*, 5 I'tnl J. OF Technoethics 1, 5-6 (2014); Benjamin Kastan, *Autonomous Weapon Systems: A Coming Legal Singularity?*, 1 J. OF L.Tech. and Pol'y 45, 78 (2013); Vivek Sehrawat, *Autonomous weapon system: Law of armed conflict (L.O.A.C.) and other legal challenges*, 33 Computer L.& Sec. Rev. 38, 49 (2017).

[32] McFarland, *supra* note 31; Thilo Marauhn, C.C.W. Expert Meeting on Lethal Autonomous Systems, An Analysis of the Potential Impact of Lethal Autonomous Weapons Systems on Responsibility and Accountability for Violations of International Law (May 2014), http://www.unog.ch/80256EDD00

Scholars offer different answers to these questions. The International Committee of the Red Cross posits that a State bears international responsibility where the state inadequately tested the LAWS prior to fielding it or where the state conducted insufficient review for compliance of such systems with IHL.[33] Scholar Daniel Hammond favors a system where the states use the rules on state responsibility to claim compensation for pain and suffering for the victims from the state which employed LAWS instead of prosecutions.[34] In cases where an operator or commander was not acting intentionally or negligently, he argues, a moral standpoint, that the state is the most blameworthy actor by virtue of deciding whether to acquire LAWS for the armed forces.[35] Similarly, scholar Rebecca Crootoff believes that state responsibility is a superior mechanism to individual criminal responsibility because it is more effective at preventing LAWS performing unjustifiably.[36] States are in the best position to ensure that the armed forces employ LAWS in compliance with IHL.[37] In contrast, scholar Thompson Chengeta argues that individual criminal responsibility and state responsibility are complementary and important "in their own right."[38]

It is important to prosecute individuals for the commission of a war crime concurrently with conducting proceedings against the state at the International Court of Justice. Prosecutions will discourage non-state actors from developing unreliable LAWSs and will deter government officials from procuring such technologies. Importantly, states will signal that the employment of unreliable technologies affronts the values of the international community by initiating proceedings for having committed a wrongful act against states which employ flawed LAWS. Moreover, the proceedings against the state provide remedies, such as compensation, to the loved ones suffering from the loss of an individual at the arms of a defective LAWSs.[39]

This article focuses on how international criminal law may respond to the challenge posed by the circulation of undependable LAWSs. It disputes that current doctrines, such as the doctrine of command responsibility, make it possible to link the performance of LAWS to a particular individual. One of the reasons is that the nature of authority a weapon manufacturer exercises over a LAWS differs from that the doctrine of command responsibility envisages. The knowledge about how power is exercised is used to develop an accountability test to impute

6B8954/(httpAssets)/35FEA015C2466A57C1257CE4004BCA51/$file/Marauhn_MX_Laws_Speaking Notes_2014.pdf; Andreas Matthias, *The responsibility gap: Ascribing responsibility for the actions of learning automata*, 6 ETHICS AND INFO. TECH. 175, 175 (2004) [hereinafter Matthias].

33 Int'l Comm. of the Red Cross, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, 32IC/15/11 (Dec. 8-10, 2015), https://reliefweb.int/report/world/international-humanitarian-law-and-challenges-contemporary-armed-conflicts-32ic1511.

34 Daniel N. Hammond, Autonomous Weapons and the Problem of State Accountability, 15 CHI. J. OF INT'L L. 652, 669-670 (2015).

35 *Id.* at 670.

36 Crootof, *supra* note 30, at 50.

37 *Id.*

38 Chengeta, *supra* note 30, at 244.

39 Ger. v. Pol., *supra* note 25.

responsibility to various types of non-state actors who are likely to be involved in designing and manufacturing LAWS as well as to procurement officials. The non-state actors include corporations, armed groups and terrorist cells. The premise behind the discussion is that parties to the armed conflict and software developers exercise control and power over computer code on which LAWSs operate.[40] More fundamentally, the article examines how we should think of attribution in circumstances when 1) multiple teams in a single organization or numerous organizations are involved in the decision of how to design a LAWS, 2) the designer of a LAWS operates in an amorphous organizational structure as in the case of a terrorist cell, and 3) there are multiple actors who potentially have control over a LAWS.[41] This discussion will contribute to the understanding of why the doctrine of command responsibility struggles to capture within its reach the conduct of individuals who belong to terrorist cells and how international criminal law can govern the conduct of non-state actors more effectively.

Under the proposed framework, accountability is attributed to an individual or group of individuals in a leadership position who had a "substantial" or "significant" role in the decision to develop a LAWS, and in designing governance and operational structures to enable the development of LAWS. The programmer heading the team of programmers is responsible when Cassandra Steer's test is met; namely, when he or she has "control over the deliberative process of the collective" relating to the robot's software.[42] Finally, operators are liable if they had a "material" ability to acquire notice that a LAWS was about to bring about an international crime as a result of supervising the system's performance and to terminate the mission.

Section 1 explains what design LAWS are likely to have in order to lay groundwork for discussing why it is difficult to attribute the performance of LAWS to a particular individual. Moreover, this background is crucial for analyzing whether LAWS should be treated as a weapon system or is closer to a human subordinate. If LAWS can be analogized to a human subordinate, then the doctrine of command responsibility may extend to the interface between a developer, an operator and LAWS. Section 2 illuminates under what circumstances LAWS may be analogized to a weapon system and when it should be characterized as a unique category.

Section 3 argues that the definition of a superior-subordinate relationship in the doctrine of command responsibility does not capture the nature of the inter-

[40] The paper extends the work of scholars Tim McFarland and Tim McCormack, who identify developers as having control over a LAWS due to the execution of the software dictating how the control system manages sensors and weapons. The two authors do not comment on how attribution can be made to particular individuals. McFarland, *supra* note 48, at 381; Gabriella Blum, Dustin Lewis and Naz Modirzadeh argue that parties to the armed conflict and software developers express authority and power over computer code on which LAWSs operate. Unfortunately, they do not explain or justify their position in any detail. Naz K. Modirzadeh, Gabriella Blum & Dustin A. Lewis, War-Algorithm Accountability 1 (2016).

[41] McFarland, *supra* note 31.

[42] Cassandra Steer, Ranking Responsibility? Why We Should Differentiate between Participants in Mass Atrocity Crimes 34 (Amsterdam Ctr. Int'l. L. 2013).

face an operator, a programmer, a corporate director and a procurement official have with LAWS.

Section 4 links the war crime a LAWS triggers to the head programmer, senior officials in a corporation or another non-state entity, senior officials in government agency responsible for designing a robot, procurement officials and operators. To achieve this, the exercise of power in corporations, the armed forces, armed groups and terrorist cells is examined from an interdisciplinary perspective. Section 5 formulates the legal framework for locating accountability.

I. How Lethal Autonomous Weapons Systems will be Designed and will Operate

LAWS operate on a different set of principles than conventional weapon systems.[43] Understanding the functionality of LAWS is essential when differentiating between the nature of control operations have over LAWS and over conventional weapons. In turn, the nature of control an operator has over LAWS determines whether he or she may be held accountable when LAWS triggers a war crime. More broadly, the knowledge of how a LAWS functions provides a framework for investigating the difficulties in attributing performance malfunctions to programmers or to a manufacturing organization's leader. It provides a background for thinking about how we should conceptualize of attribution in the robotic context.

According to Israel, "[It] would be difficult, if at all possible, at this stage, to predict how future LAWS would look like, and what their characteristics, capabilities and limitations will be."[44] One of the approaches to enabling a machine to learn from experience is to emulate how brain cells, known as neurons, operate in the human brain.[45] Neurons communicate with one another and form networks in order to store particular information.[46] When new information is added, the architecture of the neural network and the strength of individual connections between neurons is modified.[47] As the machine is exposed to new scenarios, it gradually adjusts the weight it assigns to the connections between the neurons.[48] The manufacturer exposes the machine to real-life scenarios until it conducts itself in the desired manner.[49] Creating a large dataset with many possible scenarios enables the neural network to recognize objects.[50]

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[43] Jean-Baptiste Jeangene Vilmer, *Autonomous weapon diplomacy: the Geneva debates*, Ethics & Int'l Affairs (2016).

[44] Statement of Israel *supra* note 13, at 2.

[45] Nat'l Inst. of Neurological Disorders, *The Life and Death of a Neuron*, Neurological Disorders and Stroke (2015), https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Life-and-Death-Neuron; Matthias, *supra* note 32, at 178.

[46] Bruno Dubuc, *Plasticity in Neural Networks*, The Brain From Top to Bottom (2016), http://thebrain.mcgill.ca/flash/d/d_07/d_07_cl/d_07_cl_tra/d_07_cl_tra.html.

[47] Matthias, *supra* note 32, at 178.

[48] *Id.* at 179.

[49] *Id.*

[50] Siddhartha Mukherjee, *A.I. Versus M.D.: What Happens When Diagnosis is Automated?*, The New Yorker (Apr. 13, 2017), http://www.newyorker.com/magazine/2017/04/03/ai-versus-md.

Programmers combine neural networks with more traditional computing tools, such as the Monte Carlo tree algorithm.[51] The Monte Carlo algorithm involves a computer selecting a move based on a randomly selected sample, assigning weight to successful moves and using a tree to depict all possible decisions.[52] By estimating the likely result a particular move will produce, the program emulates abstract thinking.[53] The program AlphaGo won three times when it played an Asian strategic board game Go against Lee Sedol, considered one of the best players in the world.[54] Go players try to surround their opponents or to capture stones.[55] Significantly, AlphaGo conceptualized moves that no human player had previously thought about.[56]

The principles on which LAWS functions is distinguishable from traditional weapon systems and materiel.[57] To illustrate, unmanned aerial vehicles, or drones, relay specific information to the operators.[58] This information includes: 1) video footage of the unfolding events, and 2) information sensors, such as heat-detecting infra-red equipment, gather.[59] Remotely located pilots interpret the information the drone equipment transmits to determine whether it is lawful to target a particular individual or an object.[60] LAWS will scan their database to assess whether the characteristics of the object or individual in front of them match particular profiles.[61] When working properly, these systems mimic "abstract thinking" and develop a military strategy.[62] The fact that LAWS will carry out cognitive tasks operators previously undertook raises the question whether

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[51] Erik Leijon, *How AlphaGo (and Two McGillians) Made A.I. History*, McGill News (2016), http://web.archive.org/web/20160328164337/http://publications.mcgill.ca:80/mcgillnews/2016/03/22/how-alphago-and-two-mcgillians-made-ai-history.

[52] Guillaume Chaslot et al., *Monte-Carlo Tree Search: A New Framework for Game AI*, *in* proceedings of the fourth artificial intelligence and interactive digital entertainment conference, 216-17 (Chris Darken & Michael Mateas eds., 2008).

[53] *Id.* at 216.

[54] Leijon, *supra* note 51.

[55] *Id.*

[56] *Id.*

[57] Hammond, *supra* note 34.

[58] Defense Committee, *Written Evidence from Prof. Nicholas Wheeler*, U.K. HC 772 (2013).

[59] Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles 4-5 (2009); Human Rights Watch & Marc E. Garlasco, Precisely Wrong: Gaza Civilians Killed by Israeli Drone-launched Missiles (June 30, 2009), https://www.hrw.org/report/2009/06/30/precisely-wrong/gaza-civilians-killed-israeli-drone- launched-missiles.

[60] Matthew Power, *Confessions of a Drone Warrior*, GQ (Oct. 22, 2013), https://www.gq.com/story/drone-uav-pilot-assassination; Milan Vego, Joint Operational Warfare Theory and Practice, 66-67 (Naval War College Press 2009).

[61] Markus Wagner, *Taking Humans Out of the Loop: Implications for International Humanitarian Law*, 21 J.L. Info. & Sci. 155, 161 (2011).

[62] Leijon, *supra* note 51; M.B. Reilly, *Beyond video games: New artificial intelligence beats tactical experts in combat simulation*, UC Magazine (June 27, 2016), http://magazine.uc.edu/editors_picks/recent_features/alpha.html (According to the retired United States Air Force Colonel Gene Lee, who played against software Alpha in a simulated battlefield scenario, "I was surprised at how aware and reactive it [Alpha] was. It seemed to be aware of my intentions and reacting instantly to my changes in flight and my missile deployment. It knew how to defeat the shot I was taking. It moved instantly between defensive and offensive actions as needed.").

the nature of control an operator has over LAWS resembles a relationship between a superior and a subordinate.

Likewise, LAWS differ from current weapon systems because their mechanism of operation is fluid. As a result, programmers have limited foreseeability about how LAWS will perform in any given situation.[63] In contrast, non-autonomous weapons, such as landmines, follow a predefined set of rules and function in a predictable manner.[64] The artificial intelligence programming tool of genetic algorithm will now be used to demonstrate the malleable nature of software which enables the machine to learn.[65]

Genetic algorithms involve a program programming itself.[66] The program selects symbols and creates a chain through trial and error to create a solution to the presented problem.[67] The program subsequently evaluates whether the sequence of symbols is a suitable solution.[68] The computer rearranges the symbols until it reaches a point where it assesses that a combination of symbols provides appropriate solution to a problem.[69] The advantage of a self-programming system is that it can function in an environment that is constantly changing and where the information about the unfolding events is incomplete.[70] An outcome of this capability, however, is that the programmers and users may not foresee all possible ways in which a system may assess a scenario and how the system will reorganize its program subsequently.[71]

The lack of foreseeability regarding how LAWS will carry out the task an operator assigns to it is compounded by two factors. First, machines that learn from experience will rely on making probabilistic inferences in order to identify targets.[72] When faced with a particular situation, a machine will compare the probability of two competing hypotheses; for instance the likelihood that the object is a civilian object and the likelihood that the object is a military objective.[73] It will use mathematical theorems and large amounts of data about its prior experiences in order to determine which hypothesis is more likely to be true.[74] Because the system operates on the basis of making probabilistic calculations, the

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[63] Wendell Wallach, *Predictability and Lethal Autonomous Weapons Systems (LAWS)*, IEET (Apr. 16, 2016), https://ieet.org/index.php/IEET2/print/11873 [hereinafter Wallach].

[64] Vincent Boulanin and Maaike Verbruggen, Mapping the Development of Autonomy in Weapon Systems 9 (Stockholm Int'l Peace Res. Inst. 2017).

[65] Matthias, *supra* note 32.

[66] *Id.* at 180.

[67] Wolfgang Golubski, *Genetic Programming: a Parallel Approach*, *in* 2311 Soft-Ware 2002: Computing in an Imperfect World, 167, 195 (2002).

[68] *Id*. at 167-68.

[69] *Id.*

[70] Reilly, *supra* note 62.

[71] Wallach, *supra* note 63.

[72] Peter Margulies, *Making Autonomous Weapons Accountable: Command Responsibility for Computer-Guided Lethal Force in Armed Conflicts*, *in* Research Handbook on remote Warfare (Edward Elgar Press & Jens David Ohlin eds.) (forthcoming 2016).

[73] *Id.*

[74] *Id.* at 9.

user does not know with certainty what assessment the machine will arrive at.[75] Second, unlike conventional weapons, LAWS do not operate in a "transparent manner" because it is difficult to understand how they work and why they reached a particular decision.[76] A user may be privy to information on the machine only by observing its performance, because information stored in a neural network is not represented in terms of symbols and the weight a machine gives to a particular neural connection cannot be measured.[77]

The lack of foreseeability by a programmer how a LAWS may respond to a particular battlefield scenario creates a hurdle for attributing the performance of LAWS to him or her. A programmer could argue that LAWS did not perform as he or she intended and that there was no possibility to continuously monitor the software's performance. The software could change its composition from the moment the user had acquired it due to the LAWS incorporating encountered battlefield scenarios into its data bank.[78] Similarly, because the operator may not access the basis on which LAWS generates a particular assessment, it may be difficult to impute responsibility to him or her for failing to properly supervise the operation of the system.[79]

Government officials, programmers and members of the armed forces have a stake in ensuring that there is traceability regarding predicting how the LAWS will conduct itself and how it made a particular assessment.[80] The need for traceability means that manufacturers will develop recording boxes.[81] Given that the armed forces will have custody of LAWS, they rather than programmers are likely to be monitoring the operation of LAWS.

Before assessing whether an operator and programmer maintain liability on the ground of possessing a sufficient degree of control over the operation of a LAWS, it is necessary to enquire how we should think of the interface between a LAWS and a user. In particular, the fact that programmers draw on the knowledge about the functioning of the human body in creating software for machines with artificial intelligence gives rise to a question whether a LAWS should be characterized as a weapon system or as being closer to a human subordinate.[82] It

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[75] Zoubin Ghahramani, *Probabilistic machine learning and artificial intelligence* 452 NATURE (2015); Russ Altman, *Distribute A.I. benefits fairly*, 418 NATURE (2015).

[76] Leon Kester, *Mapping Autonomy to the Conference on Disarmament convened by United Nations*, UNOG (Apr. 15, 2016), https://unog.ch/80256EDD006B8954/(httpAssets)/29374C7829F996D1C1257F9B004A7540/$file/2016_LAWS+MX+Presentations_MappingAutonomy_Kesternote.pdf.

[77] Matthias, *supra* note 32.

[78] Wallach, *supra* note 63.

[79] Rebecca Crootoff, *Autonomous Weapon Systems and the Limits of Analogy*, *in* THE ETHICS OF AUTONOMOUS WEAPON SYSTEMS, 16 (Claire Finkelstein, et al. eds., 2017) (arguing that it is unjust to punish operators on the ground that they may be unable to prevent LAWSs from bringing about war crimes) [hereinafter Autonomous Weapon Systems].

[80] Thomas Keeley, *Auditable Policies for Autonomous Systems (Decisional Forensics)*, *in* AUTONOMOUS SYSTEMS: ISSUES FOR DEFENSE POLICYMAKERS, 214-15, (Paul D. Sharre & Andrew P. Williams eds., 2015); *id.* at 214-18.

[81] *Id.* at 221.

[82] Annie Jacobsen, *Inside the Pentagon's Effort to Build a Killer Robot*, TIME (Oct. 27, 2015), http://time.com/4078877/darpa-the-pentagons-brain/.

is pivotal to answer this question because as artificial intelligence technology evolves, states are likely to interpret the notion of "meaningful human control" over LAWS more broadly. This will lead to LAWS operating with greater degrees of autonomy.

II. Is a Lethal Autonomous Weapon System a Weapon or a Subordinate?

Although states appear to treat LAWS as any other weapon, there is a need to develop a special category for these systems. By designating robotic systems with artificial intelligence as "lethal autonomous weapons systems," states chose to treat this new technology as any other new weapon.[83] France's declaration supports this proposition.[84] Specifically, like all new weapons, LAWS must comply with IHL under the framework of article 36 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (hereinafter API 1977).[85] Article 36 API 1977 requires states to carry out a review to ensure that new weapons comply with API 1977 and other binding IHL norms prior to being deployed.[86]

Accordingly, the United States Army defines "weapon" as "chemical weapons and all conventional arms, munitions, materiel, instruments, mechanisms, or devices which have an intended effect of injuring, damaging, destroying or disabling enemy personnel or property."[87] A "weapon system" includes "the weapon itself and those components required for its operation."[88] Under the U.S. Army's definition of a weapon, LAWS is a categorically considered a weapon because operators will employ it to kill, and disable lawful targets. This categorization is consistent with the intention of the drafters of API 1977. The drafters broadly construed "weapon in the widest sense."[89] However, such a designation of LAWS lacks nuance. LAWS differ from traditional weapons because they mimic capabilities ordinarily associated with human beings, such as abstract thought, in the context of performing the task of identifying lawful targets and engaging them.

The way in which an operator uses LAWS and the control he or she retains over it should determine the categorization of LAWS as either, a traditional

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[83] Ambassador Vinicio Mati Permanent Representative of Italy to the Conference on Disarmament, Opening Statement at the C.C.W. 2016 Meeting of Experts on LAWS (Apr. 11-15, 2016); United Kingdom of Great Britain and Northern Ireland Statement to the Informal Meeting of Experts on Lethal Autonomous Weapons Systems, Opening Statement at the C.C.W. 2016 Meeting of Experts on LAWS (Apr. 11-15, 2016).

[84] Statement of the Republic of France on Elements of Intervention and General Disarmament, Opening Statement at the C.C.W. 2016 Meeting of Experts on LAWS (Apr. 11-15, 2016).

[85] AP I 1977, *supra* note 17, at art. 36.

[86] *Id.*

[87] Bernard W. Rogers & J.C. Pennington, ARMY REGULATION 27-53: REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW 1 (United States Department of the Army ed., 1979).

[88] *Id.*

[89] Claude Pilloud, et al., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1401-1402 (1987).

weapon or as a novel category. Although it is unclear what degree of control operators will exercise over LAWS, the Swiss government produced a chart indicating various possible degrees of autonomy these systems may have.[90] The Swiss government's scale envisions a low level of autonomy in terms of LAWS ranking data and in terms of an operator interpreting that data.[91] The operator will treat the results the machine generates as prime scanning the machine for unaccounted eventualities.[92] When LAWS displays data to assist the operator, it resembles a conventional weapon.[93] When employed in this mode, LAWS is like a drone which displays data for the operator to analyze. What distinguishes LAWS from a drone is that the drone's software does not process data in order to rank it.[94] Furthermore, the operator's act of manipulating LAWS to lead the system to generate data resembles pushing a button in order to deploy a weapon, such as a missile. In both cases the operator inputs an instruction and triggers the operation of a particular mechanism so that the system performs the desired task.

On the Swiss scale, a higher level of autonomy involves an operator inputting a mission into LAWS.[95] LAWS executes the mission automatically and informs the operator about the anticipated course of action so that he or she can override the machine's decision.[96] At the next level up, an operator instructs LAWS to undertake a specific mission which it executes without interacting with the user and without displaying any information.[97] At the top tier of autonomy, LAWS initiates a mission based on its assessment of its environment without human interaction.[98] The nature of the interface an operator has with LAWS with these levels of autonomy differs from that he or she has with a conventional weapon.

Even the use of new conventional weapons necessitates an operator collecting information to assess whether there are suitable targets in the area and to actualize the release of the weapon.[99] For instance, "fire and forget weapons" detect a military objective based on its signature or pre-programmed target characteristics.[100] The Israeli Harop loitering munition senses the emission of heat and radar

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[90] Mark Hoepflinger, *Presentation of Swiss Department of Defense to the Conference on Disarmament Convened by United Nations*, slide 16 (Apr. 11-15, 2016), https://unog.ch/80256EDD006B8954/(httpAssets)/4584A6AE89972A06C1257F9200531D02/$file/03+Mark+Hoepflinger_Mapping+Autonomy.pdf.

[91] *Id.*

[92] *Id.*

[93] Justin McClelland, *The Review of Weapons in Accordance with Article 36 of Additional Protocol I*, 85 Int'l. Rev. Red Cross 397, 401-06 (2003).

[94] Matthias Bieri & Marcel Dickow, *Lethal Autonomous Weapons Systems: Future Challenges*, 164 CSS Analyses in Security Policy 1, 2 (2014).

[95] Hoepflinger, *supra* note 90.

[96] *Id.*

[97] *Id*

[98] Hoepflinger, *supra* note 90.

[99] Jack M. Beard, *Autonomous Weapons and Human Responsibilities*, 45 Geo. J. Int'l L. 617, 644 (2014).

[100] *Operational Limitations of Fire-and-Forget Missiles*, Defense Update (Feb. 2007), http://defense-update.com/features/du-2-07/helicopters_3gen_missiles.htm.

signals; it attacks objects with these characteristics.[101] An operator may observe the battlefield using a camera attached to the munition to verify that the munition does not engage a civilian object.[102] On the other hand, LAWS with high levels of autonomy carry out the tasks the operator traditionally performed including collecting information, interpreting data in order to determine the nature of objects in the area, planning the execution of an attack, checking that the attack complies with IHL and releasing the weapon.[103]

The capability of LAWS to interpret cluttered environment to select targets independently of the operator's input render them closer to human decision-makers. The nature of the interface between LAWS with high degrees of autonomy and an operator resembles how a commander interacts with soldiers. Just like operators who deploy LAWS, commanders give soldiers a description of the goals to achieve while not necessarily maintaining physical contact with them.[104] However, by communicating with soldiers through means, such as radio,[105] commanders can intervene and change the course of action of their subordinates. When an operator intervenes to override the decision of LAWS, that individual is in a similar position to a commander who tells a soldier to amend his or her course of action. Another similarity is that the armed forces encourage soldiers to show initiative in determining how to best implement the goal but set the parameters within which soldiers should act.[106] Meanwhile, a LAWS autonomously selects a course of action by searching through previously encountered scenarios and by identifying a statistical rule for generating an appropriate solution fitting the scenario in front of it.[107]

Although LAWS mimics how human beings identify lawful targets, it cannot be equated with a human subordinate. When designing LAWS, artificial intelligence specialists rely on knowledge that human beings learn from being exposed to scenarios, observe how other individuals respond to the situation and formulate a strategy of how to respond to a new situation based on previous experience.[108] Individuals acquire an intuitive sense of what conduct is ethical through observing how their peers react to situations.[109] LAWS cannot be equated with a human soldier even though it learns from being exposed to various scenarios.

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[101] *Harop Loitering Munitions UCAV System*, *Israel*, AIRFORCE-TECHNOLOGY, http://www.airforce-technology.com/projects/haroploiteringmuniti (last visited Oct. 22, 2017).

[102] Eliana Fishler, *Successful Flight Demonstrations for Harop Loitering Munitions*, ISRAEL AEROSPACE INDUSTRIES (June. 7, 2015), http://www.iai.co.il/2013/32981-46464-en/MediaRoom_News.aspx.

[103] Beard, *supra* note 99, at 629.

[104] Chad Storlie, *Manage uncertainty with commander's intent*, HARVARD BUSINESS REVIEW (2010).

[105] JOHN D. BERGEN, MILITARY COMMUNICATIONS: A TEST FOR TECHNOLOGY 451 (United States Army. 1986).

[106] EYAL BEN-ARI, MASTERING SOLDIERS: CONFLICT, EMOTIONS, AND THE ENEMY IN AN ISRAELI ARMY UNIT (NEW DIRECTIONS IN ANTHROPOLOGY) 40-41 (2001).

[107] House of Commons Science and Technology Committee, ROBOTICS AND ARTIFICIAL INTELLIGENCE 6 (2016-2017).

[108] Simon Parkin, *Killer Robots: The Soldiers That Never Sleep*, BBC (July 16, 2015), http://www.bbc.com/future/story/20150715-killer-robots-the-soldiers-that-never-sleep.

[109] *Id.*

According to the scientists, recognition of objects, cognition and acquisition of knowledge require a combination of thought, experience and reliance on senses.[110] LAWS uses its sensors to gather data and processes it according to a pre-specified procedure, which resembles a knitting pattern.[111] It lacks adequate sensory or vision processing systems for separating combatants from civilians.[112] Therefore, although LAWS can mimic how a soldier performs some tasks, it lacks the complexity of the human mind. In the same vein, both reasoning and emotions are needed to make it possible for individuals to respond to a situation in line with social norms.[113] Although computer scientists Mark Riedl and Brent Harrison posit that a robot could learn to act in line with humanity's values by reading many stories and assigning weight to the conduct the main characters pursued,[114] the process of projecting how a human being responds emotionally to social norms differs from the nuanced deliberations soldiers engage in on the battlefield.

The following example illustrates why it will be challenging for LAWS to carry out deliberations soldiers engage in on a daily basis on the battlefield. Customary international law requires soldiers to disobey "manifestly" illegal orders in international and non-international armed conflicts.[115] An assessment of whether an order is unlawful requires the decision-maker to exercise agency and to engage in nuanced reasoning. For instance, the United Kingdom declared that it may undertake an illegal act in response to the enemy violating articles 51-55 API 1977, which contain provisions on the protection of the civilian population and the environment "to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles."[116] Michael Walzer's writings on the nature of military necessity suggest that the decision whether a reprisal is a necessary measure in the circumstances to compel the enemy's compliance with the law or whether alternative steps could be taken is a value judgment.[117] His argument is bolstered by the fact that were it not necessary for the decision-maker to exercise discretion in determining whether a reprisal was lawful, the insertion of the term "manifestly" before the term "unlawful" would have been redundant. Because robots do not understand social values, lack compassion, are unable to reflect on why a particu-

110 Jacobsen, *supra* note 82.

111 Noel E. Sharkey, *The Evitability of Autonomous Robot Warfare*, 94 Int'l. Rev. Red Cross 787, 788-89 (2012).

112 *Id.* at 788.

113 Antonio R. Damasio, Descartes' Error: Emotion, Reason, and the Human Brain, xii-xiv (Penguin Books 1994).

114 Alison Flood, *Robots Could Learn Human Values by Reading Stories, Research Suggests*, The Guardian (Feb. 18, 2016), https://www.theguardian.com/books/2016/feb/18/robots-could-learn-human-values-by-reading-stories-research-suggests.

115 Int'l Comm. Of The Red Cross, *Rule 154. Obedience to Superior Orders* (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule154.

116 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 3303 (Cambridge University Press. 2005) (quoting United Kingdom, Reservations and Declarations Made Upon Ratification of AP I 1977, 28 January 1998, ¶ m).

117 Michael Walzer, Just and Unjust Wars 144 (Basic Books 4 ed. 2006).

lar choice is desirable and to exercise judgment, they cannot carry out nuanced context-dependent assessments.[118] In this respect they are not equivalent to human beings.

Markus Wagner, a scholar, agrees that a distinguishing feature of LAWS is the lack of autonomy.[119] Philosophers associate human autonomy with the ability to exercise free will.[120] To have moral agency, the following conditions should be satisfied: 1) an ability to intend an action, 2) a capacity to autonomously choose the intended action and 3) a capability to perform an action.[121] In turn, the first two elements require that individuals be able to reflect on their beliefs and to choose whether to hold them.[122] At this stage robots do not possess the capabilities to reflect on what beliefs to hold. This argument is supported by the fact that after interacting with online users Microsoft's robot Tay wrote that Hitler did nothing wrong on the online platform twitter.[123] Tay's act can be explained by the fact that it gathered information and imitated the conduct of online users but lacked the ability to understand the nature and gravity of the events about which it created a post.[124] Because the robot is unable to autonomously decide whether a course of action is desirable, it arguably lacks the autonomy which human beings have.[125] More recently, Moscow-based National Research Nuclear University MEPhl Cybernetics Department Professor Alexei Samsonovich said that Russian researchers are close to developing free thinking machines which can feel and understand human emotions, understand narratives and actively learn on their own.[126] If this breakthrough in science occurs, there will be a stronger case for analogizing robots to human beings. For now, LAWS should be regarded as a unique category.[127]

On the opposite side of the debate, scholars consider soldier and LAWS akin.[128] The commanders mold soldiers by training them to obey orders.[129] By

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118 Peter Asaro, *On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making*, 94 INT'L REV. OF THE RED CROSS 687, 699-700 (2012) [hereinafter Asaro]; Tetyana Krupiy, *Of Souls, Spirits and Ghosts: Transposing the Application of the Rules of Targeting to Lethal Autonomous Robots*, 16 MELBOURNE J. OF INT'L L. 145, 50 (2015).

119 Markus Wagner, *Taking Humans Out of the Loop: Implications for International Humanitarian Law*, 21 J.L., INFO. & SCI. 1, 5 (2011).

120 Christopher P. Toscano, *"Friend of Humans": An Argument for Developing Autonomous Weapons Systems*, 8 J. NAT'L SECURITY. L. & POL'Y 1, 45 (2015).

121 David Rönnegard, THE FALLACY OF CORPORATE MORAL AGENCY 11 (Springer 2015).

122 *Id.* at 12.

123 Seth Robson, *Artificial Intelligence: Navy Works on Teaching Robots How to Behave*, GOV'T TECH. (Aug. 16, 2016), http://www.govtech.com/computing/Artificial-Intelligence-Navy-Works-on-Teaching-Robots-How-to-Behave.html.

124 *Id.*

125 Asaro, *supra* note 118, at 700.

126 *Russia on Verge of Major Breakthrough in Artificial Intelligence*, SPUTNIK NEWS (July 19, 2016), https://sputniknews.com/science/20160719/1043305617/artificial-intelligence-breakthrough.html [hereinafter SPUTNIK].

127 Autonomous Weapon Systems, *supra* note 79 at 21.

128 Geoffrey S. Corn, *Autonomous Weapon Systems: Managing the Inevitability of "Taking the Man out of the Loop"* 11, (June 14, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2450640).

framing decisions within the parameters of the commander's order, soldiers function in a similar manner to an autonomous weapon system.[130] The difference is that a commander can continuously influence the soldier through leadership, but has no input into the LAWS's software.[131] The study of Eyal Ben-Ari, an anthropologist, confirms that armed forces partially analogize the combat unit and the soldier to a machine.[132] He found that the Israeli armed forces use the metaphor of a machine to describe a battalion and how it performs.[133] The metaphor reflects the fact that a unit should act efficiently, reliably and predictably.[134] The division of labor is fixed and commanders give soldiers exact instructions regarding how they should execute the order.[135] Tomer, a paratrooper, recounts that, "I waited and then heard the next command and that was it; I didn't think, didn't deliberate. The head was like empty; there was only an expectation and uncertainty. . .Listen, you simply work like a machine, like a robot."[136]

While it is true that the military "made blind obedience culture into a high art" in the 20th century, soldiers also need to use creativity and critical analysis to adapt to changing circumstances and to respond to the enemy's actions.[137] The commanders in the Israel Defense Forces talk of soldiers who do not take initiative, do not think and automatically execute tasks in a derogative way as "little head."[138] Because soldiers exercise autonomy in deciding how to give effect to the mission goal, they cannot be equated with a machine or a weapon. In contrast, LAWS performs within the parameters the algorithm sets for it and it lacks the capacity to reflect on issues.[139] A human being can decide whether to act on the basis of emotions or logic.

Unlike LAWS, soldiers use judgment to respond to an unexpected ethically charged situation according to social norms. For instance, a commander, who sends a reinforcement unit, encounters a child who fell into a well and is asking to be rescued. There is no one else in the area who can help. Individuals rescue others despite peril to themselves even when they are not under a legal duty to do so.[140] The soldier will evaluate whether it is possible to help the child. Assuming the estimation of ten minutes is enough time to rescue the child, the soldier will further assess various factors relating to his or her ability to carry out the military

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[129] *Id*.

[130] *Id.*

[131] *Id.* at 13.

[132] Ben-Ari, *supra* note 106, at 34, 53.

[133] *Id*. at 36.

[134] *Id.* at 36.

[135] *Id.* at 37.

[136] *Id.* at 65.

[137] Dov Seidman, *Army's Basic Training is No Longer Basic: Lessons for Business*, FORBES (Apr. 21, 2014), https://www.forbes.com/sites/dovseidman/2014/04/21/armys-basic-training-is-no-longer-basic-lessons-for-business/#30718046e945.

[138] Ben-Ari, *supra* note 106, at 34.

[139] Asaro, *supra* note 118, at 700.

[140] Ben-Ari, *supra* note 106, at 34.

mission.[141] Contrastingly, LAWS lacks emotions and cognition rendering it unable to detect situations such as this one.[142] Even when a situation concerning an ethical concern arises, LAWS lacks the combination of emotions, cognition and an understanding of the basis of social values to be in a position to balance these objectives.[143] A LAWS can appropriately respond to a situation only if the algorithm and its prior experiences equip it to do so. Therefore, although LAWS can approximate how a human being performs certain tasks, it is not analogous to a human subordinate.

States should develop a new category to designate weapon systems with an artificial intelligence capability and should conclude a new treaty to govern this technology.[144] States must consider the possibility with attributing the war crime LAWS carries out to an individual. LAWS lack agency and thus, cannot form an intent to commit a crime.[145] Because international criminal law associates criminality with intentional acts, it is arguably inappropriate to hold LAWS liable.[146]

III. The Doctrine of Command Responsibility: a Poor Fit to Govern Artificial Intelligence Systems

Scholars Christopher Toscano, Heather Roff and Chantal Grut argue that the doctrine of command responsibility enables the conduct of LAWS to be imputed to a particular actor and to hold such actors accountable.[147] The doctrine of command responsibility plays an important role in preventing the commission of war crimes.[148] It imposes duties on commanders and civilian superiors to monitor the conduct of their subordinates with a view to preventing the commission of international crimes and requires superiors to punish the perpetrators.[149] This section will demonstrate that the context of LAWS calls for a development of a new accountability framework. Although the nature of the interface between a LAWS and an operator meets some of the elements of the doctrine of command responsibility, LAWS challenge assumptions underpinning this doctrine.

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[141] These factors may include: 1) how many soldiers may die if the reinforcement is delayed, 2) the likelihood of their side winning the military operation notwithstanding that they had helped the child, and 3) the value of the child's life.

[142] Docherty, *supra* note 19.

[143] Asaro, *supra* note 118; Krupiy, *supra* note 118.

[144] Autonomous Weapon Systems, *supra* note 79, at 21, 25.

[145] Ugo Pagallo, *Robots of Just War: A Legal Perspective*, 24 PHIL. & TECH. 307, 312-313 (2011).

[146] Rome Statute of the International Criminal Court, art. 30, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (July 17, 1998) [hereinafter Rome Statute] (explaining that all offences for international crimes require a culpable state of mind); Beard, *supra* note 99, at 663.

[147] Chantal Grut, *The Challenge of Autonomous Lethal Robotics to International Humanitarian Law*, 18 J. OF CON?ICT & SEC. L. 5, 18 (2013); Heather Roff, *Killing in War: Responsibility, Liability and Lethal Autonomous Robots*, *in* ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE 21ST CENTURY 14, (Fritz Allhoff, et al. eds., 2013); Toscano, *supra* note 120.

[148] This is achieved through imposing a duty on the commander to punish subordinates who committed an international crime. Prosecutor v. Halilović, IT-01-48-T T.Ch. I, Judgment, ¶ 96 (Nov. 16, 2005).

[149] Prosecutor v. Čelebići, IT-96-21-T, Judgment, ¶ 331-333 (Nov. 16, 1998).

The doctrine was formulated with a relationship between two human beings in mind, namely the superior and the subordinate.[150] It is necessary to consider whether the doctrine of command responsibility may be applied to the interface between an individual and a LAWS in light of the fact that 1) LAWS can approximate human decision-making in certain contexts, and 2) there is a degree of similarity between how operators and commanders exercise control. For the conduct of LAWS to be imputed to an individual under the doctrine one would need to show that the individual exercises authority over LAWS in the same manner as a superior over a subordinate. The doctrine of command responsibility will now be introduced to lay groundwork for this discussion.

A. An introduction to the doctrine of command responsibility

The roots of the doctrine of command responsibility date back to ancient times.[151] Charles VII d'Orleans issued an Ordinance in 1439 stating that commanders are responsible for offenses committed by their troops.[152] The modern definition of this doctrine may be found in article 86(2) API 1977, article 28 of the Rome Statute 1998, article 7(3) Statute of the International Criminal Tribunal for the Former Yugoslavia 1993 (hereinafter ICTY Statute) and in various instruments establishing international criminal tribunals.[153] Article 7(3) of the ICTY Statute states that the fact that a subordinate had committed a war crime, crime against humanity or genocide "does not relieve his [or her] superior of criminal responsibility if he [or she] knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[154] The three elements of command responsibility are: 1) the existence of a superior-subordinate relationship (either in a civilian or military context), 2) the mental element (knew or had reason to know), and 3) the failure to take necessary and reasonable steps to prevent or to punish the commission of

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[150] Prosecutor v. Halilović, IT-01-48-T T.Ch. I, Judgment, ¶ 61 (Nov. 16, 2005).

[151] Chantal Meloni, Command Responsibility in International Criminal Law 3 (T.M.C. Asser Press. 2010).

[152] Leslie Green, Essays on the Modern Law of War 283 (Transnat'l Pubs. 2d ed. 1999) (quoting Meloni, *supra* note 151, at 3-4).

[153] API 1977, *supra* note 17, at art. 86(2); Rome Statute, *supra* note 17, at art. 28; Statute of the Special Tribunal for Lebanon, Art. 3(2), S.C. Res. 1757 Annex (May 30, 2007) [hereinafter Lebanon Statute]; Annex. Statute of the International Criminal Tribunal for the former Yugoslavia Art. 7(3), S.C. Res. 827 ¶ 2 (May 25, 1993) [hereinafter ICTY Statute]. Article 7(3) of the ICTY Statute states that the fact that a subordinate had committed a war crime, crime against humanity or genocide "does not relieve his [or her] superior of criminal responsibility if he [or she] *knew* or *had reason to know* that the subordinate was about to commit such acts or had done so and the superior *failed* to take the *necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof."; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea 2001 Art. 29 (Oct. 27, 2004) [hereinafter Kampuchea Law]; Statute of the Special Court of Sierra Leone 2002 Art. 6(3), 2178 U.N.T.S. 138, 145 (Jan. 16, 2002) [hereinafter Sierra Leone Statute]; Statute of the International Criminal Tribunal for Rwanda Art. 6(3), S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute].

[154] ICTY Statute, *supra* note 153, at art. 7(3).

a crime.[155] The superiors are held accountable for failure to discharge their duties through taking necessary and reasonable measures to prevent the commission of crimes or to punish the perpetrators.[156] The subordinate's commission of a crime with the requisite mental element is a condition for the applicability of this doctrine.[157] The doctrine of command responsibility has customary international law status in international and non-international armed conflicts.[158]

The Rome Statute 1998, which has 124 states parties, contains a definition of the doctrine of command responsibility that differs from the customary international law definition in a number of respects.[159] For instance, the standard for the mental element is lower for military superiors than for civilian superiors.[160] A detailed analysis of the similarities and differences between the definitions in the Rome Statute 1998 and the ICTY Statute 1993 is beyond the scope of this paper. What is significant is that the International Criminal Court has interpreted the test for the existence of a superior-subordinate relationship in the Rome Statute 1998 in an identical manner to the customary international law definition.[161]

The present inquiry is confined to examining whether the existing standard of a superior-subordinate relationship may be employed to link the performance of LAWS to a failure by a particular individual to appropriately exercise authority over it.[162] This issue goes to the heart of the applicability of the doctrine of command responsibility. If there is no superior-subordinate relationship, then it becomes redundant to ask whether a particular individual could fulfil other criteria for accountability, such as having the requisite intent. The doctrine of command responsibility does not require that the superior exercised features of authority that one finds when the authorities employ the law to confer a mandate on the superior.[163] Nevertheless, the superior must be by virtue of his or her position in "some sort of formal or informal hierarchy to the perpetrator."[164] The ICTY in the *Prosecutor v. Čelebići* case held that a superior-subordinate relationship exists when the superior exercises "effective control" over a subordinate, meaning that he or she has the "material ability to prevent and punish the com-

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[155] Prosecutor v. Kordić & Čerkez, IT-95-14/2-T, Judgment, ¶ 416 (Feb. 26, 2001); Prosecutor v. Čelebići, IT-95-21-A, Judgment, ¶ 226-227, ¶ 234-235, (Feb. 20, 2001).

[156] Prosecutor v. Halilović, IT-01-48-T, Judgment, ¶ 54 (Nov. 16, 2005).

[157] Prosecutor v. Orić, IT-03-68-T, Judgment, ¶ 294 (Jun. 30, 2006).

[158] Prosecutor v. Mucić et al., IT-96-21-T, Judgment, ¶ 333 (Nov. 16, 1998).

[159] International Criminal Court, *The States Parties to the Rome Statute* (last visited Oct. 31, 2017), https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

[160] *Compare* Rome Statute, *supra* note 17, at art. 28(a)(i), *with id.* at art. 28(b)(i).

[161] Prosecutor v. Gombo, ICC-01/05-01/08, Judgment, ¶ 188 (Mar. 21, 2016).

[162] *Id*. Significantly, the International Criminal Court interpreted the test for the existence of a superior-subordinate relationship in the Rome Statute 1998 in an identical manner to the customary international law definition

[163] Prosecutor v. Kajelijeli, ICTR-98-44A-A A.Ch., Judgment, ¶ 87 (May 23, 2005).

[164] Čelebići, *supra* note 155, at ¶ 234-235.

mission of these offences."[165] According to the ICTY Appeals Chamber in the *Prosecutor v. Blaškić* case:

> "[T]he indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish or initiate measures leading to proceedings against the alleged perpetrators where appropriate."[166]

The superior has "effective control" where he or she can issue binding orders to a subordinate who must obey said orders.[167] The possession of similar powers and degree of control over subordinates as a military commander is another indicator.[168] However, the superior does not need to exercise authority in the same manner as a commander.[169] In a recent decision, the International Criminal Court in the *Prosecutor v. Bemba* case held that indicia of "effective control" are where the entity has the capacity to change the command structure, the authority to deploy soldiers to the location where hostilities are taking place, control over the means of waging war, such as weapons, capacity to communicate on behalf of the group, and representation of group ideology.[170] It is unnecessary to determine whether the superior exercised features of authority when the law mandates otherwise.[171]

B. Applying the "effective control" test to the robotic context

The issue transitions into whether a particular individual exercises "effective control" over LAWS. This question is examined in relation to the operator, commander, individuals involved in designing and manufacturing LAWS as well as government procurement officials.

1. The operator

Under the doctrine of command responsibility, the relationship between an operator and LAWS has features of a superior-subordinate relationship. The giving of instructions and an expectation of obedience are indicators that a superior has "effective control."[172] A soldier receives lawful orders and has a legal duty to obey them.[173] Similarly, a LAWS is designed to carry out the operator's orders. The operator has "effective control" over LAWS as long as its software

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165 *Id.*

166 Prosecutor v. Blaškić, IT-95-14-A, Judgment, ¶ 69 (July 29, 2004).

167 Kordić & Čerkez, *supra* note 206; Prosecutor v. Ferreira, Case No 04/2001, Judgment, ¶ 516 (The Special Panels for Serious Crimes in Dili, Republic of the East Timor Apr. 5, 2003).

168 *Čelebići*, *supra* note 155, at ¶ 197.

169 Prosecutor v. Kajelijeli, ICTR-98-44A-A A.Ch., Judgment, ¶ 87 (May 23, 2005).

170 Gombo, *supra* note 161.

171 Kajelijeli, *supra* note 163.

172 Ferreira, *supra* note 167, ¶ 516.

173 *See* U.S. Department of the Army, The Soldier's Guide F.M. 7-21.13 38 ¶ 3-2 (2004); U.K. Army Act, Art. 34 1955.

correctly executes the inputted instruction. The operator possesses the material ability to prevent LAWS from committing a war crime by entering lawful orders. Thus, the International Committee of the Red Cross's argument that when an operator enters an instruction into LAWS to perform an act amounting to an international crime that operator is accountable under the doctrine of command responsibility is undisputed.[174]

The situation is different when a robot performs in an unjustifiable manner, namely for reasons such as the components of the software interacting in an unanticipated manner or the machine being unreliable. When the input of an instruction causes an unexpected interplay between the software components, the machine is not carrying out the operator's instruction. Though an operator expects obedience of an inputted order, the machine treats the order as non-binding. Consequently, in such situations the two core indicia of "effective control" are not met.

The situation when LAWS performs in an unjustified manner may not be analogized to a subordinate disobeying an order. When a subordinate refuses to obey an order, commanders may use disciplining methods in order to enforce their authority.[175] Commanders can detect a risk of a subordinate committing a crime by monitoring the behavior of the soldiers they command or by asking soldiers to report to them when their peers make inflammatory statements, exhibit violent or unstable behavior, or obtain access to narcotic substances.[176] On the other hand, unless LAWS displays a message indicating that the system is functioning in a suboptimal manner or that a malfunction had occurred, operators may be unaware. One of the reasons for this situation is that operators will not necessarily know the software content and how it operates.[177]

To illustrate, in outlining the responsibilities of government agencies, the U.S. Department of Defense Directive 3000.09 makes no reference to operators possessing advanced information technology skills or knowing the principles on which LAWS operates. The Directive states that the onus is on the government to procure reliable LAWS which display to the operators feedback about the system status.[178] The operators are to be trained to understand system capabilities and limitations.[179] Such training is designed to ensure that they can employ LAWS with "appropriate care" and that they can deactivate the system.[180] The Directive's emphasis on the design of the user interface and on the operator's ability to disable the system points to the fact that operators are unlikely to possess ad-

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[174] U.N. Office, The C.C.W. Informal Meeting of Experts on L.A.W.S., The communication of the International Committee of the Red Cross to the Conference on Disarmament convened by United Nations 5 (Apr. 11-15, 2016).

[175] API 1977, *supra* note 17, art. 87(3); Prosecutor v. Had, IT-01-47-A A. Ch., Judgment, ¶T3 (Apr. 22, 2008).

[176] Prosecutor v. Nahimana, ICTR-99-52-A A.Ch., Judgment, ¶ 345 (Nov. 28, 2007); Prosecutor v. Halilović, IT-01-48-T T.Ch. I, Judgment, ¶ 68, ¶ 138 (Nov. 16, 2005).

[177] Beard*, supra* note 99.

[178] U.S. DEP'T OF DEF., Enclosure 3 ¶ 1(b), ¶ 1(b)(5) (2012) [hereinafter Enclosure].

[179] *Id.* at 3 ¶ 1(b)(4).

[180] *Id.* at 4 ¶ 8(a)(4), ¶ 8(a)(5).

vanced programming skills. The Directive arguably does not envision the operators understanding the basis on which LAWS operates and generates solutions. Even programmers find it challenging to find out why the machine produced a particular decision because at this stage limited assessment tools are available.[181] Since programmers have limited foreseeability regarding how LAWS operates so do operators.[182] Operators acquire notice of the software components operating in an unintended manner only when the system alerts them. Consequently, when the machine errs, operators lack "effective control" unless alerted by the system of the malfunction.

2. The commander

The U.S. Department of Defense Directive 3000.09 illustrates the likely role of commanders. Under the Directive, commanders oversee operators, who are trained to use LAWS according to its design and governmental policy.[183] Commanders have a responsibility to monitor the system to ensure no operations are contrary to the applicable policies.[184] The U.S. Military Tribunal acknowledged in the case of United States v. von Weizsaecker et al that superiors are responsible only where the act of the subordinate is within their "official competency."[185] The design and therefore the technical dimension of the operation of the robot is not within the scope of the mandate conferred on the commanders. Accordingly, a commander is not under a duty to prevent or to punish war crimes when LAWS brings about a war crime. On the other hand, because a commander has an official duty to supervise subordinates, he or she will be liable in instances where the subordinates improperly use LAWS or tamper with the machines.[186] Similarly, superiors in non-state armed groups that exercise "effective control" over their subordinates have a duty to prevent their subordinates from inappropriately operating LAWS and tampering with the machines.[187] This duty was created by the doctrine of command responsibility which applies to superiors in non-state armed groups who possess similar powers and degree of control over the subordinates as military commanders.[188]

3. The manufacturer

So far it has been shown that it is difficult to impute "effective control" over LAWS to operators and commanders. The next question to answer is whether the doctrine of command responsibility is applicable to those who design or manu-

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[181] Kester, *supra* note 76; Matthias, *supra* note 32.

[182] Wallach, *supra* note 63.

[183] Enclosure, *supra* note 178, at 4 ¶ 10(a), ¶ 10(c) (2012).

[184] *Id.*

[185] United States v. von Weizaecker et al. (Ministries Case), XIV T.W.C. ¶ 535 (1949) (United States Military Tribunal Sitting in Nuremberg).

[186] Blaškić, *supra* note 166.

[187] *Id.*

[188] Čelebići, *supra* note 155.

facture LAWS.[189] States may purchase LAWS from privately owned or governmental corporations.[190] The U.S. Directive 3000.09 envisions Heads of Defense Agencies and the U.S. Special Operations Command as being responsible for designing LAWS to reduce system failure or loss of control over the system.[191] The Under Secretary of Defense for Acquisition, Technology and Logistics will be responsible for establishing and enforcing standards for testing, safety and reliability.[192] The U.S. Army Research Office outsourced the task of creating software for LAWS to the researcher Ronald Arkin.[193] Similarly, the Russian Chief of General Staff Valery Vasilevich Gerasimov said that, "[i]n the near future, it is possible that a complete 'roboticized' unit will be created capable of independently conducting military operations."[194] Nevertheless, corporations such as Uralvagonzavod will present prototypes to the Russian government and the government will select what product to purchase.[195] Given the possibility that both government agencies and corporations may design LAWS, a separate question remains as to whether the doctrine of command responsibility is applicable to programmers in government and non-state organizations.

a. Government agency employees

The initial impression is that programmers working for a government agency possess "effective control" over LAWS. The programmer is the ultimate source of issuing instructions to the machine. The programmers create software that help LAWS to learn from data sets they encountered.[196] When operators input an order into LAWS, the operation of the software orders the robot to function. Because the software determines what tasks a robot performs and how, the programmer issues orders to LAWS when it is operating on and off the battlefield.

To advance their international obligations, states will deploy only those robots that adhere to IHL.[197] Programmers will program IHL norms into LAWS to enable weapon systems to generate appropriate solutions. The programmers have the material ability to prevent LAWS from performing in an unjustifiable manner by designing suitable software. This aspect renders programmer close to a mili-

189 Grut, *supra* note 147; McFarland, *supra* note 31; Toscano, *supra* note 120.

190 Danielle Muoio, *Russia and China are Building Highly Autonomous Killer Robots*, TECH INSIDER (Dec. 15, 2015), http://www.techinsider.io/russia-and-china-are-building-highly-autonomous-killer-robots-2015-12.

191 *Id.* at Enclosure 4 ¶ 2(a), ¶ 8, ¶ 8(1); The Secretary of Defense for Acquisition, Technology and Logistics will be responsible for establishing and enforcing standards for testing, safety and reliability.

192 *Id.* at Enclosure 4 ¶ 2(a).

193 Ronald C. Arkin & Patrick Ulam, *An Ethical Adaptor: Behavioral Modification Derived from Moral Emotions* 1 Tech. Rep. GIT-GVU-09-04 (2009).

194 Danielle Muoio, *Russia and China are Building Highly Autonomous Killer Robots*, TECH INSIDER (Dec. 15, 2015), http://www.techinsider.io/russia-and-china-are-building-highly-autonomous-killer-robots-2015-12.

195 *Id.*

196 Statement of Italy, *supra* note 10.

197 API 1977, *supra* note 17, at art. 36.

tary superior. In particular, military superiors discharge their duty to prevent the commission of crimes by instituting appropriate procedures.[198] For example, commanders teach subordinates IHL norms and communicate to them that a soldier who transgresses IHL norms will be punished.[199] A programmer selecting and inserting a code to ensure reliable performance of LAWS is akin to a superior acting to maintain order among the subordinates.[200] Superiors use the threat of punishment to deter subordinates from committing international crimes. Programmers create software components with a view to precluding LAWS from performing contrary to IHL. By designing a software which enables LAWS to learn from its interactions with the environment, it is put forward that the programmer's position is similar to a commander who teaches subordinates about IHL.[201] Another parallel between the position of a programmer and superior is that a LAWS and a soldier can act unpredictably. Soldiers may choose to disobey orders.

A closer analysis demonstrates that the design of LAWS does not suggest that a programmer exercises "effective control" over LAWS. According to Gary Marchant and his colleagues:

> "Now, programs with millions of lines of code are written by teams of programmers, none of whom knows the entire program; hence, no individual can predict the effect of a given command with absolute certainty, since portions of large programs may interact in unexpected, untested ways."[202]

Given the complexity of artificial intelligence software, it is unclear whether a programmer will be trained to review the content of the entire program. Cathy O'Neil, a data scientist, explains that programmers do not understand the algorithm they create and cannot interpret it.[203] Although programmers could create programs that map the types of code any given program has and how its components interact, it is suggested that having an overview of how the system functions is not equivalent to knowing how a system will perform in each instance.[204]

Because each programmer contributes to the architecture of the robot in different proportions, the programmer is unaware of how all pieces of code interact.[205] It is difficult to identify any one programmer as the architect of the software. The difficulty of attribution lies in the analysis of the "effective control" test, which was not designed to address situations such as this one, namely where multiple

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198 Halilović, *supra* note 148.

199 Orić, *supra* note 157, at ¶ 330.

200 *Id.*

201 Statement of Italy, *supra* note 10.

202 Borenstein, et al., The Columbia Science and Technology Law Review 284 (2011).

203 CBC Radio, *supra* note 5, at 45:34-45:44.

204 Thomas Keeley, *Auditable policies for autonomous systems (decisional forensics)*, Autonomous Systems: Issues for Defense Policymakers 221, (Paul D. Sharre & Andrew P. Williams eds., 2015).

205 Borenstein, *supra* note 202.

individuals contribute to the instruction issued to the subordinate. The case of Prosecutor v. Nahimana illustrates this point.[206] The International Criminal Tribunal for Rwanda (hereinafter ICTR) held in the Prosecutor v. Nahimana that membership of a collegiate body, such as a board of directors, is insufficient to establish the existence of "effective control."[207] An individual is a superior only if he or she "had the power to take necessary and reasonable measures to prevent the commission of the crime."[208] The ICTY Trial Chamber in Prosecutor v. Orić further elaborated that a critical factor in establishing "effective control" is whether the accused had "the ability to maintain or enforce compliance of others with certain rules and orders."[209] It is doubtful whether an individual programmer satisfies the Nahimana and Orić criteria. The operation of the program is determined by how all of its components interplay.[210] Even when a programmer writes half or a substantial portion of the program, the programmer's ability to prevent a LAWS from bringing about a war crime exists only hypothetically.

Although the performance of LAWS depends on how comprehensive its model is and what datasets are fed into the neural network, the constantly evolving nature of the software renders it difficult for the programmer to intervene and to change the robot's architecture once it is operating on the battlefield.[211] Current tools do not allow the programmer to find out what weight the machine assigns to neural connections when it encounters a particular scenario or how it will arrange symbols of a genetic algorithm when developing a solution to a problem.[212] This compounds the programmer's lack of knowledge about how the software operates.[213] The programmer cannot foresee in advance what the effect of a robot's decision will be.[214] The nature of the artificial intelligence software is a limitation to the programmer acquiring notice of the code executing itself in an unforeseen manner on the battlefield.

Another hurdle for imputing "effective control" to a programmer who writes a portion of the program is the structure of the programming team itself. Generally there is a team leader who supervises a group of programmers and who is responsible for endorsing the program.[215] This means that an individual programmer who creates a component of the software is unlikely to have a supervisory role. The programmer should not be held liable for war crimes a LAWS triggers due to

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[206] Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, (Int'l Crim. Trib. for Rwanda Nov. 28, 2017).

[207] *Id.* at ¶ 788.

[208] *Id.*

[209] Oric, *supra* note 157.

[210] Borenstein, *supra* note 202, at 21.

[211] Cathy O'Neil, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 23-24 (Crown. 2016); Wallach, *supra* note 63; Matthias *supra* note 32, at 178.

[212] Matthias *supra* note 32, at 178; Golubski, *supra* note 67, at 168.

[213] Michael Fisher et al., *Verifying Autonomous Systems: Exploring Autonomous Systems and the Agents That Control Them*, 56 COMMS. OF THE ACM 84, 89 (2013).

[214] *Id.*

[215] Marilyn Mantei, *The effect of programming team structures on programming tasks*, 24 COMMUNICATIONS OF THE A.C.M. 106, 109 (1981).

lacking authority that will enable him or her to oversee the work of other programmers and to take steps to ensure that the running of the software produces only intended outcomes.

The question then is whether an individual in the organization who is responsible for overseeing the work of the team of programmers and for approving the code has "effective control" over the LAWS even when the LAWS is operating on the battlefield. This factual determination depends on whether the nature of control the head programmer has over the code can be compared to the nature of control a superior has over the subordinates. There is a degree of analogy between the lines of code and the subordinates. Subordinates in a unit may communicate and decide to perpetrate a crime. In the context of LAWS the interaction of the lines of code and their execution leads to a machine triggering an international crime. The ICTY Trial Chamber in Prosecutor v. Orić explained that what is crucial for attribution of accountability is whether the superior had the means to prevent the commission of the crimes rather than knowledge of the identity of the perpetrators.[216] The head programmer possesses the material ability to prevent the inclusion of unsuitable components of the program into the software. On the application of Prosecutor v. Orić it is immaterial that the head programmer did not know the final architecture the LAWS's software acquired on the battlefield. Moreover, one the application of Prosecutor v. Orić the head programmer does not need to know all components of the software and how they interacted in order to possess "effective control."[217] The head programmer's authority to remove unsuitable software components, to endorse the blueprint of LAWS and to oversee the work of individual programmers is sufficient to establish "effective control."

Nevertheless, such an analysis is incomplete. It is premature to impute "effective control" to the head programmer on the basis of his or her authority to check the code and to order the team to modify the software. The test of "effective control" arguably presupposes that a superior is able to monitor the intentions, conversations or conduct of subordinates.

This fact may be gleaned from the decision of the ICTY Trial Chamber in Prosecutor v. Blaškić. The Judges held that an individual has a material ability to prevent the commission of crimes where he or she has a duty to submit reports to competent authorities in order to enable them to take appropriate measures.[218] To be in a position to prepare and to submit reports, the superior needs to monitor the conduct of the subordinates. Through monitoring conversations and conduct of subordinates, the superior gains awareness of their intentions. Knowledge of the subordinates' intentions enables a superior to detect that a subordinate may commit a crime. Likewise, the head programmer would need to monitor how the architecture of LAWS evolves as the weapon system is operating on the battlefield to be able to acquire notice of the software executing itself in an unforeseen manner.

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[216] Orić, *supra* note 157.

[217] *Id.*

[218] Blaškić, *supra* note 166.

Some researches contend that it may be possible to monitor the machine's learning process. Peter Margulies, a scholar, maintains that it could be possible to monitor the machine's learning process.[219] The programmers could imbed a function for displaying information, such as a decision tree diagram, and ask the machine to show the factors on which it relied to reach its decision.[220] The branches on a tree diagram represent alternative courses of action while the leaves depict causal factors that influenced the decision.[221] The problem is that such mechanisms do not enable the head programmer to know how the architecture of the software evolves once LAWS is operating on the battlefield. The software will modify itself once LAWS encounters each scenario on the battlefield.[222] The head programmer will lack the capacity to monitor all LAWS the corporation manufactures. Due to lacking knowledge about what architecture the software acquired in the process of being used, the head programmer cannot acquire notice that an unexpected code interaction or glitch was about to occur. Because an ability to become cognizant of the risk of improper conduct is integral to the possession of "effective control," the head programmer may not be said to have a material ability to prevent the robot from triggering an international crime.

However, others believe that the complexity of robots with artificial intelligence makes it impossible for one individual, such as a head programmer, to know how all software components interplay.[223] Since no single individual will know with "absolute certainty" how the software components interact, there is arguably no individual who has full knowledge of how the software operates.[224] Because an ability to become cognizant of the risk of improper conduct is integral to the possession of "effective control," the head programmer may not be said to have a material ability to prevent the robot from triggering an international crime.

A counterargument would be that there is no requirement for the head programmer to know how all components of the code operate when a LAWS carries out a mission on the battlefield. Usually superiors high in the chain of command, such as Heads of State and Generals, are held responsible for the conduct of the subordinates at low hierarchical levels even when they were far away from the location where the subordinates committed war crimes and even though they may not have been aware of the exact manner in which the subordinates interacted.[225] The head programmer is in a different position from a General

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219 Margulies, *supra* note 72, at 16-17.

220 *Id.*

221 *Decision Tree*, INVESTOPEDIA, http://www.investopedia.com/terms/d/decision-tree.asp (last visited Dec. 4, 2017); STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH, 757 (Prentice Hall Inc. 3rd ed., 2010).

222 Wallach, *supra* note 63.

223 Borenstein, *supra* note 202, at 284.

224 *Id.*

225 Prosecutor v. Mengistu et al., S.P.O Investigation File No. 401/85, Reply Submitted in Response to the Objection Filed by Counsels for Defendants, ¶ 1(6) (Ethiopian Special Prosecutor's Office, May 23, 1995).

however. The doctrine of command responsibility imputes accountability to individuals higher in command on the basis that they exercise "effective control" over their subordinates through a chain of command and are expected to enforce compliance with IHL through measures, such as obtaining regular reports.[226] The military chain of command is designed to minimize disobedience and is buttressed by the imposition of criminal sanctions on superiors who fail to exercise appropriate oversight over their subordinates.[227] In contrast, the nature of the artificial intelligence programming tools is conducive to a robot performing in an unanticipated manner. It has been established that an individual programmer lacks "effective control" over LAWS when it is operating on the battlefield. The LAWS cannot be linked to the head programmer using a chain of command. In order for a superior to be held accountable, the superior should have "effective control" over the subordinate, and the subordinate should in turn possess "effective control" over his or her respective subordinate.[228] When the subordinate tasked with monitoring the conduct of LAWS lacks "effective control" over the robot, the head programmer too lacks "effective control" over the machine. It is concluded that the head programmer does not exercise "effective control" over LAWS when it operates on the battlefield.

There is another hurdle for imputing "effective control" to the head programmer. For there to be "effective control" the superior should have the requisite degree of control over a subordinate at the time of the commission of the crime.[229] Chantal Meloni explains the rationale for this requirement.[230] The person who by failing to control the subordinates creates a risk that crimes will be committed cannot be a different individual from the person who fails to take reasonable and necessary measures to prevent this risk from materializing.[231] The fact that the possibility of inflicting sanctions for disobedience is closely-linked to an individual's ability to control the conduct of subordinates substantiates Meloni's reasoning.

Yet, it is unclear whether the head programmer will have an opportunity to regularly monitor the performance of the software after the government agency transfers the robot to the armed forces. The software architecture of LAWS is fluid, due to the robot modifying some of its elements.[232] Accordingly, it is necessary to monitor the robot's architecture. Even if the head programmer possesses "effective control" over subordinates at the armed forces who regularly

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[226] Rep. of the Int'l Commission of Inquiry on Darfur to the U.N. Secretary General, ¶ 558 (Jan. 25, 2005) [hereinafter Inquiry on Darfur]; Blaškić, *supra* note 220.

[227] National Defense and the Canadian Armed Forces, *Chapter 1: The purpose of Military Justice*, Government of Canada (2017), *available at* www.forces.gc.ca/en/about-reports-pubs-military-law-summary-trial-level/ch-1-purpose-of-mil-justice.page.

[228] Inquiry on Darfur, *supra* note 226.

[229] Prosecutor v. Čelebići, IT-95-21-A A.Ch., Judgment, ¶ 306 (Feb. 20, 2001); Prosecutor v. Gombo, ICC-01/05-01/08-424 Pre Trial Chamber II, Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute, ¶ 418 (June 15, 2009).

[230] Meloni, *supra* note 151.

[231] *Id.*

[232] Wallach, *supra* note 63.

check how the robot operates on the battlefield and report back to him or her, the nature of the artificial intelligence software renders it difficult for the subordinates to predict what decision a LAWS will select on any given mission. These subordinates will not always be able to acquire notice of the danger that the robot may perform in an unjustifiable manner. In cases where the recording boxes do not provide a comprehensive snapshot of the neural network and how LAWS reaches each conclusion, the subordinate lacks "effective control" over LAWS. Since the subordinates lack "effective control" over the LAWS so does the head programmer. On the other hand, subordinates who have the tools to monitor operations and to learn how LAWS produces solutions may be held accountable due to possessing "effective control" over LAWS. The head programmer who possesses "effective control" over such subordinates may too be held accountable.

Another question is whether the head programmer has a material ability to prevent LAWS from triggering a war crime on the ground of being able to test its performance in simulated battlefield scenarios. This suggestion is problematic because it assumes that it is possible to test exhaustively how software components interact and how LAWS will perform in each battlefield situation. Robots with artificial intelligence are "complex adaptive systems" which can reorganize themselves in a fundamental way after encountering a "tipping point" event.[233] For this reason, it is very expensive "if not impossible" to fully test them.[234] The assertion that it may be impossible to fully test robots is further supported by the fact that individuals cannot foresee every scenario a soldier or a robot may encounter on the battlefield.[235] Soldiers receive general instructions, such as to open fire if there is an "imminent threat" to their life, rather than detailed guidance on how to act in a prescribed set of situations because the battlefield is unpredictable.[236] Since one cannot foresee every scenario a soldier can encounter neither can LAWS be exposed to all possible battlefield scenarios in a simulated environment. For this reason programmers cannot comprehensively test LAWS.

Although the head programmer will strive to create reliable machines, the nature of the artificial intelligence software is conducive to a LAWS performing in an unforeseen manner. Every time a robot learns a new task its algorithm alters itself in order to ensure that the robot performs differently in the future.[237] The changes to the software accumulate. At some point these alterations could result in a fundamental reorganization of the software's architecture.[238] It is difficult to see how a head programmer who cannot foresee how LAWS will change its algorithm after being exposed to a new scenario on the battlefield retains a material ability to prevent the commission of crimes. Of course, with the development of

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[233] *Id*.

[234] *Id*.

[235] *Id*.; Lin et al., *Autonomous Military Robotics: Risk, Ethics, and Design*, 78 Ethics & Emerging Sciences Group at Cal. Polytechnic St. U. 1.0.9 (2008).

[236] Commander Alan Cole et. al., Sanremo Handbook on Rules of Engagement 31 Annex B (Int'l Inst. of Humanitarian L. 2009); Lin, *supra* note 235, at 32.

[237] Wallach, *supra* note 63.

[238] Wallach, *supra* note 63.

technology this state of affairs may change. When it becomes possible to track the internal workings of the software, a head programmer will fulfil more criteria for "effective control."

Depending on how technology advances, it may or may not be possible to employ the doctrine of command responsibility to hold government employees who create a robot's architecture accountable when LAWS performs in an unforeseen fashion.

When "effective control" over a machine cannot be imputed to a programmer or a head programmer, those higher in command who tasked the programmers with creating a LAWS lack "effective control" over the machine. The result is that the government officials at the Department of Defense responsible for certifying LAWS may be held accountable under the doctrine of command responsibility only where the individual programmer and the head programmer had "effective control" over the LAWS when it was operating on the battlefield. In practice, the fluid nature of the artificial intelligence software and the nascent nature of tools employed to record the workings of the neural network render it challenging to impute "effective control" to any individual in the government agency.[239]

b. Employees of a corporation

A situation where the government outsources to a corporation the task of designing and manufacturing LAWS will now be considered. There is nothing in the doctrine of command responsibility limiting its application to particular institutions or actors. The doctrine of command responsibility focuses on the degree of control a superior has rather than on his or her identity.[240] For instance, in the Prosecutor v. Musema case the ICTR found a tea factory manager liable for failing to prevent his employees from carrying out acts of genocide against the Tutsis.[241] It can be gleaned from this case that the degree of control the programmer, head programmer or the manager has over a robot is more important than whether that individual works for a corporation, the armed forces or a government agency. Likewise, it is immaterial how many subordinates a superior has or what position in the hierarchy he or she occupies.[242] Consequently, it is neither pertinent that a head programmer may be at the low tier in a corporate hierarchy nor that he or she is a creator of many mass-produced LAWS.

The closest analogy to applying the doctrine of command responsibility to corporate employees is that of Private Military and Security Companies (hereinafter PMSCs). Governments hire PMSCs to perform similar tasks to the armed

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[239] Matthias, *supra* note 32.

[240] Prosecutor v. Bagilishema, ICTR-95-1-A-A A.Ch., Judgment, ¶ 52 (Int'l Crim. Trib. for Rwanda July 3, 2002).

[241] Prosecutor v. Musema, ICTR-96-13-T, Judgment and Sentence, ¶ 894-895 (Int'l Crim. Trib. for Rwanda Jan. 27, 2000).

[242] Prosecutor v. Kunarac, IT-98-23/-23/1 T.Ch., Judgment, ¶ 398 (Int'l. Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l. Humanitarian L. Committed in the Territory of the Former Yugoslavia Feb. 22, 2001).

forces, ranging from analyzing intelligence to conducting military operations.[243] For instance, the U.S. hired the services of Six3 Intelligence Solutions in July 2016 to provide intelligence analysis in Syria as part of its fight against the Islamic State militant group.[244] The main challenge for applying the doctrine of command responsibility to the managers of such companies is that they are not in the chain of command to the armed forces and commanders in the armed forces may lack disciplinary authority over the employees of PMSCs.[245]

The similarity between the PMSC and robotic context is that in both cases the corporation's employees operate in a separate chain of subordination to the armed forces. The difference is that LAWS operates under a dual chain of command. A programmer creates the parameters within which LAWS operates while the operator brings into operation the robot's software by issuing instructions to it. This raises the question whether the solutions scholars have developed for extending the application of the doctrine of command responsibility to the PMSC context can be transplanted to the context of a corporation employee's exercise of control over LAWS.

Chia Lehnardt posits that supervisory personnel of PMSCs are in a functionally equivalent position to military commanders where they are: 1) former military officers, 2) exercise authority in a similar way to military commanders, 3) operate in a hierarchically structured organization, and 4) can report crimes to competent government authorities.[246] Micaela Frulli relies on the Prosecutor v. Musema case to argue that the senior managers in PMSCs have "effective control" over the personnel in the field because they hire employees and can dismiss them as a sanction for failing to properly discharge a task.[247] The ICTR held in Prosecutor v. Musema that Musema was in a position to take reasonable measures to prevent his employees from committing genocide while they were engaged in their professional duties because they retained the power to appoint and remove the employees.[248] The scholarship of Lehnardt and Frulli creates a framework whereby the perpetrator's act is imputed to the immediate superior, and the superior's failure to properly supervise the offender is attributed to his or her manager.

The solutions scholars crafted for the PMSC context do not hold for the robotic context. When a robot performs unlawfully, there are hurdles to employing the doctrine of command responsibility to impute the war crime to an act or

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243 Teresa Welsh, *Who is Fighting America's Battles?* U.S. News & World Report (Sept. 11, 2014), http://www.usnews.com/opinion/articles/2014/09/11/private-military-contractors-are-helping-fight-americas-wars.

244 Kate Brannen, *Spies-for-Hire Now at War in Syria,* The Daily Beast (Aug. 18, 2016), http://www.thedailybeast.com/articles/2016/08/09/spies-for-hire-now-at-war-in-syria.html.

245 Chia Lehnardt, *Individual Liability of Private Military Personnel under International Criminal Law*, 19 European Journal of Int'l Law, 1016, 1025-26 (2008).

246 *Id.*

247 Micaela Frulli, *Exploring the Applicability of Command Responsibility to Private Military Contractors*, 15 J. of Conflict & Sec. Law 435, 464 (2010).

248 Prosecutor v. Musema, ICTR-96-13-T, Judgement and Sentence ¶ 880 (Int'l Crim. Trib. For Rwanda Jan. 27, 2000).

omission of a particular individual. As has already been shown, the degree of control programmers have over LAWS when it is operating on the battlefield does not amount to "effective control." It is likely that the corporation's employees, such as the head programmer, will not oversee further operations and software updates upon the sale of LAWS. Even if corporate employees do provide oversight, it is difficult to establish "effective control" between them and LAWS. Although the head programmer endorses instructions on which LAWS performs, the machine modifies its software on the battlefield as it is exposed to new scenarios.[249] It is maintained that a superior who cannot predict how the software will modify itself and monitor the performance of the machine lacks a material ability to prevent LAWS from triggering an international crime.[250] Since the head programmer lacks "effective control" over a LAWS, so do superiors higher in the corporate hierarchy, such as corporate managers. The result is that accountability cannot be imputed to the managers although managers meet certain criteria for possessing "effective control" over their subordinates. Managers have the capacity to influence the corporation's structure and to market LAWS; both aspects are indicia that the individual possesses "effective control."[251]

This outcome, however, is paradoxical because it runs counter to the rationale of the doctrine of command responsibility. It is odd that the doctrine of command responsibility is not applicable to individuals who design and implement software into LAWS. The purpose of the doctrine is to ensure compliance with IHL.[252] Arguably, these individuals are in the best position to prevent it from performing unlawfully. This outcome can be explained on the ground that judges formulated the doctrine of command responsibility with traditional military institutions in mind.[253] Such institutions are characterized by a clear hierarchy and chains of command.[254] The elements of command responsibility are based on the concept of responsible command.[255] The concept of responsible command requires that commanders issue instructions to their subordinates which comply with IHL, maintain an organizational structure that facilitates the maintenance of discipline

[249] Wallach, *supra* note 63.

[250] *Id.*

[251] The International Criminal Court held that the capacity to change the command structure, control over the means of waging war, ability to communicate on behalf of the group and representing the group's ideology are indicia of "effective control." Prosecutor v. Gombo, ICC-01/05-01/08-3343 T.Ch. III, Judgment, ¶ 188 (Mar. 21, 2016). Clearly, there is a parallel between the ability to change the command structure and to alter a corporation's organizational structure. Since weapons are indispensable to waging war and since resources are needed to manufacture a LAWS, control over finances can be analogized to control over weapons. Since representation of the group's ideology and communication on behalf of the group relate to representing the group to the public, this aspect can be equated with informing the public about the products the corporation is producing.

[252] Halilović, *supra* note 148.

[253] *In re. Yamashita*, 327 U.S. 1, 14-17 (1946) [hereinafter Yamashita].

[254] Ray Murphy, U.N. Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice 134 (Cambridge University Press. 2007) [hereinafter Ray Murphy].

[255] Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72 A. Ch., Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 22 (Jul. 16, 2003).

and ensure that subordinates observe IHL.[256] By focusing on the issuance of orders and enforcement, the principle of responsible command arguably envisions that commanders retain control over communication with their troops.[257]

The central assumption that commanders have a duty to retain control over their subordinates may be further gleaned from the nature of the Prosecutor's charges in United States v. Yamashita. Yamashita faced charges before the United States Military Commission for having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes."[258] Although on appeal Justice Frank Murphy of the United States Supreme Court in his dissent argued that Yamashita could not control the troops due to losing communication with them, what is relevant here is the content of the doctrine of command responsibility rather than whether the court correctly applied the law to the facts.[259]

The creators of LAWS do not maintain control over and communication with LAWS. The two elements are implicit in how the doctrine of command responsibility envisages a superior-subordinate relationship. The fact that programmers collaborate on designing LAWS is not captured by the doctrine of command responsibility. The doctrine assumes that there is a particular superior who issues instructions and enforces compliance. Programmers cannot foresee all the solutions that LAWS will generate to particular scenarios on the battlefield. This fact makes it difficult for them to monitor and adjust their performance.

c. Procurement officials

Geoffrey Corn believes that a solution lies in modifying the doctrine of command responsibility in order to hold officials who are responsible for weapons procurement liable.[260] The rationale is that procurement officials make the decision that LAWS is an appropriate technology to deploy.[261] These officials are thus in the best position to prevent the commission of crimes.[262] Because the decision whether to employ LAWS that may perform unreliably entails a moral judgment and has grave consequences for individuals enjoying immunity from attack, such officials ought to be held accountable. The doctrine of command responsibility in its present form is unsuitable for this end because it assumes that

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256 The Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land Art. 1, Oct. 18, 1907, 36 Stat. 2227, Treaty Ser. No. 539; Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT T.Ch., Decision on Joint Challenge to Jurisdiction, ¶ 66 (Nov. 12, 2002).

257 *Id.* This argument is derived from the fact that the principle of command responsibility is concerned with duties associated with commanding the troops and with ensuring that the force is organized. Hadžihasanović, *supra* note 255.

258 United States v. Tomoyuki Yamashita, 4 L.R.T.W.C. 3-4 (United States Military Commission in Manila, 1945).

259 In re. Yamashita, *supra* note 253, at ¶ 34-35.

260 Corn, *supra* note 128, at 23.

261 *Id.*

262 *Id.*

a superior has command over a subordinate; yet, procuring officials will "rarely" be in this position.[263] None of these officials will input an order into LAWS or monitor its performance because this is usually the responsibility of the operator.

To determine what individual or individuals should be held accountable when LAWS performs unlawfully on the basis of possessing authority over it, a looser concept than "effective control" needs to be applied. The concept of power is useful to apply to study this question because 1) LAWS falls into a sui generis category between a weapon system and a subordinate, 2) those who decide on the robot's architecture may exercise power over other individuals involved in designing and manufacturing the robot, 3) multiple stakeholders, such as the corporation and the Department of Defense, may have input in different degrees into the design of LAWS, and 4) the relevant stakeholders may interact with each other in complex ways. The next section will survey through what mechanism the exercise of power occurs so as to create an accountability framework for the robotic context.

IV. Using the Lens of Power to Develop an Accountability Framework

This section will analyze how organizations exercise power to show that accountability should be attributed to numerous individuals on the basis of the fact that they exercise power over LAWS. Different individuals and societies attach varied labels to the term power.[264] Mark Haugaard explains that sociologists and political theorists give different definitions to the term power because the aspects they focus on depend on the nature of the problem they are studying.[265] Specifically, in using the term power, social and political scientists refer to related but different phenomena because each theory captures different dimensions of the notion of power.[266] The work of scholar Boaventura de Sousa Santos intimates that definitions which distort reality are useful as long as one knows the mechanism by which the concept alters reality.[267] Michel Foucault's theory of power will be employed as a starting point for understanding 1) how organizations, such as the armed forces and the corporation, exercise power, and 2) who may be described as the architect of LAWS when the corporation and the Department of Defense contribute to the design in different degrees. Given the fact that Foucault wrote extensively on the subject of power, only the most relevant aspects of his

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[263] Corn, *supra* note 128, at 21.

[264] Robert A. Dahl, *The Concept of Power*, 2 BEHAVIORAL SCIENCE 201 (1957).

[265] Mark Haugaard, *Power: A 'family resemblance' concept*, 13 EUR. J. OF CULTURAL STUD. 419, 429 (2010).

[266] *Id.* at 420.

[267] Boaventura De Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. L. AND SOC'Y 282-83 (1987). De Sousa Santos observes that individuals use maps in order to facilitate their ability to orient themselves in their environment. However, in order to enable individuals to orient themselves in their surroundings, maps necessarily cannot replicate reality. For instance, maps condense or magnify distance; the map contains a scale to convey what distance on the map corresponds to actual distance. De Sousa Santos elaborates that as long as the user knows the mechanism by which the map distorts reality, the map can show the truth to that individual notwithstanding the fact that it distorts reality.

theory to the present discussion will be laid out. After showing why Foucault's theory of power is promising for mapping how power is exercised in corporations and the armed forces, his theory will be applied to trace who exercises power over LAWS.

A. The value of Michel Foucault's theory of power

To analyze why Foucault's theory is valuable, it is first necessary to know the main concepts. Foucault is not concerned with defining what power is.[268] Rather, he focuses on showing through what mechanisms the state and institutions exercise power over individuals.[269] The merit of Foucault's approach is that by examining what the exercise of power entails, he allows us to crystallize what elements this mechanism is comprised of. The disadvantage of defining an abstract concept, such as power, is that it encourages making relative assessments on issues, such as whether an individual who has considerable influence over another individual possesses power.

For Foucault power is neither about coercing another person to act in a particular way nor about consent to be governed.[270] Rather, the exercise of power leads to the array of actions open to an individual to be limited; this is achieved by leading an individual to internalize particular behavior and to voluntarily act it out.[271] In effect, the exercise of power influences the likelihood of an individual engaging in a particular behavior.[272] When individuals do not have an array of possible actions open to them, power may not be said to be exercised.[273] Yet, for Foucault power is not vested in a particular person or group of persons.[274] The exercise of power comes about through particular mechanisms being incorporated into the architecture of an institution or society.[275]

Foucault posits that the way in which individuals exercise power over things differs from the manner in which individuals exert power over others.[276] Power over things is about "capacity."[277] Individuals derive power over objects through using the aptitudes of their body to modify, use, consume and destroy things.[278] On the other hand, power over individuals entails "relations" between individuals

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[268] MICHEL FOUCAULT, POWER 326 § III (Paul Rabinow ed., Robert Hurley and Others trans., The New Press. 2000) [hereinafter POWER].

[269] *Id.* at 342.

[270] *Id.* at 341.

[271] *Id.*

[272] *Id.*

[273] *Id.* at 342.

[274] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 202 (Alan Sheridan trans., Vintage Books 2 ed. 1995) [hereinafter DISCIPLINE & PUNISH]; MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 98 (Colin Gordon ed., Colin Gordon, et al. trans., Pantheon Books 5 ed. 1980) [hereinafter POWER/KNOWLEDGE].

[275] DISCIPLINE & PUNISH, *supra* note 274, at 202.

[276] POWER, *supra* note 268, at 337.

[277] *Id.*

[278] *Id.*

and groups; institutions underpin the exercise of power.[279] Although programmers apply their aptitudes in creating software for LAWS, the manner in which they exercise power over the robot is closer to Foucault's conception of how power is exercised over individuals. To illustrate, imagine that there is a single programmer who designs LAWS. When an individual manipulates an object, he or she knows what end state will be attained. The programmer employs his or her capacity to create the robot's architecture. However, once the LAWS becomes operational, the programmer can no longer use his or her capacities to control how it performs. Neither can the programmer modify the robot's architecture. The way in which the programmer continues to exercise power over LAWS once it is on the battlefield resembles how individuals exercise power over other individuals. Because LAWS will work on probabilistic algorithms, a software creator does not know what assessment the machine will produce in a given situation.[280] The programmer can merely predict the range of actions open to the machine because the software creates parameters for the range of possible conduct. Imposing constraints on the range of solutions a machine can generate matches how Foucault conceptualizes the exercise of power over individuals.

When a programmer tests the LAWS in a simulated battlefield environment and adjusts its software, the programmer is in a similar position to a superior who trains troops. Through providing soldiers with feedback on their performance, the commander modifies their conduct. For instance, soldiers learn what degree of certainty they should have before opening fire on a target by being reprimanded for shooting when they encounter suspicious behavior. Analogizing LAWS to human beings for the purpose of describing how individuals exercise power over the robots is not as far-fetched as it might appear at first sight. Although soldiers possess agency, the armed forces apply institutional mechanisms, such as the doctrine of command responsibility, to limit decision making.

Foucault describes individuals over whose bodies the state exercises power as "small machines," "political puppets" and "small-scale models of power."[281] Lethal autonomous weapons systems may be characterized in these terms too because the software predetermines the array of decisions they can generate. Moreover, operators will choose when to employ LAWS, where and for what tasks. The fact that Foucault's theory of power captures how the software creator exercises power over LAWS and how institutions exercise power in general indicates that his theory is fruitful for identifying who exercises power over LAWS.

Foucault argues that the state, armies, factories, schools and other organizations employ the same methods in order to exert power over the population.[282] The value of Foucault's approach is that he developed a single theory to capture how organizations that are of interest to the present enquiry, such as the armed forces, the corporation and the Department of Defense operate. For instance, the

[279] POWER, *supra* note 268, at 337.

[280] Zoubin Ghahramani, *Probabilistic machine learning and artificial intelligence*, 521 NATURE, 452 (2015); Russ Altman, *Distribute A.I. benefits fairly*, 521 NATURE 417, 418 (2015).

[281] DISCIPLINE & PUNISH, *supra* note 274, at 136.

[282] POWER, *supra* note 268, at 218-19.

factory is a precursor to the corporation because both entities employ individuals for the purpose of producing goods (and in the case of a corporation services too). The fact that Foucault's theory accurately describes institutional mechanisms for exercising power is evidenced by the fact that it captures core features of the doctrine of command responsibility.

According to Foucault metaphorically speaking society and its institutions are a machine which, through distributing individuals in particular spaces in relation to each other and in relation to the source of power, achieve the exercise of power.[283] Power is "capillary" in that it permeates legal regulations, institutions and techniques which are used to shape social practices and the overall social "climate."[284] Power circulates between individuals and through institutions.[285] Multiple forces sculpt individuals and their thoughts.[286] An individual can simultaneously exercise power over others and have power being exercised over him or her.[287] For instance, a director can be positioned to spy on his or her employees; an inspector could arrive unexpectedly and assess the director's performance.[288]

Under the doctrine of command responsibility, power is exercised by positioning individuals in a particular relation to each other, namely through the creation of a superior-subordinate relationship. The power to supervise and discipline is concentrated in the commander but also circulates with commanders being disciplined by those higher in the chain of command. The expectation that the commander remains informed of the conduct of the subordinates, including through creating a system for reporting and through identifying risk factors, such as intoxication or violent character of a subordinate, is arguably reminiscent of Foucault's mechanisms of constant surveillance.[289] Foucault's envisioning of the exercise of power flowing from the centre down through the capillaries is well suited for examining the context where multiple stakeholders may be involved in creating specifications for LAWS and where many individuals are involved in designing LAWS but where there is an individual or individuals in whose hands the power is concentrated.[290]

Foucault employs the term "disciplines" to denote modes of organization that the state and organizations employ in order to exert power over the population.[291] The three elements of "technical capacities," "game of communications" and "the relationships of power" together constitute a means through which individu-

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[283] *Id.*

[284] POWER/KNOWLEDGE, *supra* note 274, at 96-97.

[285] *Id.* at 98.

[286] *Id.* at 97.

[287] *Id.* at 98.

[288] DISCIPLINE & PUNISH, *supra* note 274, at 204.

[289] Prosecutor v. Čelebići, Case No. IT-95-21-A A.Ch., Judgment, ¶ 238 (ICTY Feb. 20, 2001); DISCIPLINE & PUNISH, *supra* note 274, at 214.

[290] POWER/KNOWLEDGE, *supra* note 274, at 96.

[291] POWER, *supra* note 268, at 218-19.

als in an institution exercise power.[292] The institutions deploy these three elements using a particular formula and adjust the weight the formula places on a given element depending on the requirements.[293] The element of "technical capacity" refers to activities or tasks aimed at producing a particular outcome.[294] Examples include training individuals to master a skill or to manufacture a product.[295] To illustrate, universities employ activities, such as classes, as well as question and answer sessions to ensure that students acquire certain aptitudes and types of behavior.[296] The element of communication involves individuals communicating to each other; an example would be workers who collaborate on transforming objects.[297] The third element, namely the relations of power, is needed to enable goal directed activities to operate.[298] For instance, there may be an individual who supervises how the workers carry out their duties and assigns tasks to each worker.[299]

Foucault's description of how power is exercised maps well onto how the doctrine of command responsibility conceptualizes of authority. The doctrine of command responsibility envisages that the commander and the troops are engaged in a goal-directed activity of carrying a military operation. As predicted by Foucault, there is a hierarchical division of labor.[300] The commander learns how to exercise command while soldiers learn how to implement the commander's objectives. The commander uses techniques, such as training troops in IHL and disciplining soldiers for violations, in order to constrain the array of actions open to the troops. Foucault refers to these techniques as a "technical capacity."[301] The doctrine of command responsibility presupposes that commanders use orders to communicate with the soldiers. This is congruent with Foucault's proposition that individuals use means, such as orders, to communicate with individuals over whom they exercise power.[302] The assumption in the doctrine of command responsibility that for there to be a superior-subordinate relationship the subordinate should regard himself or herself as bound to follow orders and that there are hierarchical structures to enforce obedience are consistent with Foucault's claim that the relations of power permeate institutions to make it possible to achieve particular goals.[303]

Additionally, the passing down of orders through the chain of command in the armed forces and the forwarding of reports from low level commanders to high

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[292] *Id.* at 339.

[293] *Id.* at 218-19.

[294] *Id.* at 338.

[295] *Id.*

[296] *Id.* at 338-39.

[297] POWER, *supra* note 268, at 338.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] POWER, *supra* note 268, at 338-39.

[303] Ferreira, *supra* note 167; Blaškić, *supra* note 166, at ¶ 333; POWER, *supra* note 268, at 217-18.

level commanders can be likened to power operating through a capillary system. The fact that subordinates may exercise judgment and enjoy discretion in assessing whether the order is lawful is consistent with Foucault's claim that individuals continue to have a range of options open to them notwithstanding the fact that power is exercised over them.[304] Foucault's theory will now be employed to establish whether a programmer, a corporate manager, a Department of Defense official or a combination of these individuals exercise power over LAWS.

B. Applying Michel Foucault's theory to the robotic context

This section will show that under Foucault's theory accountability can be imputed to individuals across the hierarchy employed by the weapon manufacturer and in some cases to the procurement officials. The three components of the mechanism entailed in exercising power to which Foucault refers to as the "disciplines" map onto the interface between the programmer and LAWS. In designing LAWS to accurately identify targets on the battlefield and to engage them, the software creator carries out a task aimed at achieving a particular outcome. This relationship fits into the element of "technical capacities." Foucault defines communication as the use of language, system of signs and other symbolic mediums in order to act upon another person.[305] In creating a neural network or a genetic algorithm as a basis for software, the software creator uses the medium of a software to induce LAWS to exhibit particular responses. Consequently, the software creator fulfils the third element of the "disciplines." It follows that the software creator exercises power over the LAWS by virtue of creating its architecture and determining what tasks it will be able to perform.

Of course, in practice many programmers collaborate on creating the software. Because the software cannot function if one or two program components were to be removed, the programmers collectively act upon a robot. Conversely, no single programmer constrains the range of actions open to LAWS because the software cannot operate if the program is incomplete. Therefore, the programmers collectively exercise power over LAWS. Significantly, the programmers do not exert power over each other. Although programmers can exchange information with each other and debate on the best design for the robot they lack a position in the organizational hierarchy to be able to constrain each other's actions. On the application of Foucault's writings, one must look beyond individuals who exercise power over the LAWS due to creating its architecture. According to Foucault, there can be individuals exercising power over other individuals who hold power.[306] One should trace how power operates at the extremities to the locus where power is concentrated.[307] For this reason, it is necessary to establish who ultimately exercises power over LAWS when it is operating on the battlefield due to exercising power over the programmers.

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[304] POWER, *supra* note 268, at 341.

[305] *Id.* at 337.

[306] DISCIPLINE & PUNISH, *supra* note 274, at 204.

[307] POWER/KNOWLEDGE, *supra* note 274, at 99.

The relationship between the head programmer and individual programmers fulfils Foucault's three elements of a mechanism for the exercise of power. Because the head programmer occupies a higher position in the hierarchy and is able to issue instructions to programmers, the head programmer is in a position of power in relation to them. Through giving instructions and receiving reports on their implementation, the head programmer relies on communication to constrain the array of actions available to the programmers. Furthermore, the creation of LAWS constitutes a "goal-directed activity" because the programmers collaborate on a particular task. It emerges that the head programmer exercises power over the programmers.

Does Foucault's theory solve the puzzle of whether the team of programmers exercises power over LAWS at the time it triggers a war crime on the battlefield? The following examples illustrate the conundrum. On the one hand, the LAWS's architecture predetermines the range of acts it can carry out and the range of possible interactions between software components. On the other hand, unless the software's design is flawed, the robot's unjustifiable performance will be due to the fluid nature of artificial intelligence software and due to programmers necessarily having limited foreseeability regarding how the robot will perform. The LAWS triggers the commission of a crime because the programmers cannot anticipate the entire range of conduct available to the machine. On this reasoning, it is questionable whether the team of programmers and therefore the head programmer exercise power over LAWS if they do not know the exact array of conduct available to the machine.

On the application of Foucault's theory, the programmers exercise power over LAWS at the moment it brings about a war crime while operating on the battlefield. Foucault posits that there can be no exercise of power when the subject lacks freedom.[308] The subject possesses freedom when power is exercised over him or her because the subject can select among an array of possibilities he or she regards as being available.[309] Another dimension of freedom is that the subject can refuse to submit to the exercise of power.[310] There is a similarity between LAWS performing in an unjustifiable manner and a human being acting beyond the range of actions the holder of power wishes to be available to him or her. While an individual exercises agency in reaching decisions, LAWS can perform in an unjustifiable manner due to modifying its software. The fact that LAWS lacks agency is immaterial for the purposes of the present enquiry. What is relevant is through what mechanisms individuals exercise power rather than the process which enables individuals to act contrary to the power holder's wishes. Under Foucault's definition, the programmers exercise power over LAWS even when it does not perform as intended. To argue otherwise would be absurd because LAWS relies on its software even when it performs in an unjustifiable manner. In turn, the head programmer exercises power over the programmers.

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[308] POWER, *supra* note 268, at 342.

[309] *Id.*

[310] *Id.*

A more crucial difference between human subjects and LAWS is that Foucault envisages that the mechanism for exerting power positions individuals so that they feel "permanent, exhaustive, omnipresent surveillance."[311] This aspect neutralizes individuals and groups who resist its power without the need for someone to intervene to prevent them from engaging in a particular behavior.[312] Because LAWS are not self-reflexive and lack agency, they cannot experience themselves as being under constant surveillance. Neither are programmers able to monitor the grounds on which LAWS generates solutions and how it modifies its software. This difference is immaterial for the purpose of the present analysis. The value of Foucault's theory for the purpose of the present enquiry lies in him explaining how power is exercised rather than why individuals obey. LAWS will in many cases perform according to the intentions of the programmers due to the software circumscribing the array of solutions it can generate and the range of acts it can carry out.

In corporations and government agencies there is likely to be a manager who gives the head programmer specifications about what kind of machine to create and what standards the machine should meet. When LAWS performs in an unjustifiable manner, does the exercise of power over the robot extend to individuals higher in the hierarchy? The employment duties of the manager fall within Foucault's element of "technical capacities." Through monitoring the performance of the head programmer and through informing him or her whether the robot's architecture is adequate, the manager constrains the array of possible conduct available to the head programmer. This corresponds to Foucault's element of communication. By virtue of being in a position of authority in relation to the head programmer, the manager fulfils the third element of the mechanism through which power is exercised. This reasoning can be extended to top managers who oversee the work of the managers. On Foucault's approach, as long as the ability of the superiors to act upon their employees relates to the design and testing of the robot's architecture, that superior exercises power over the subordinate. Foucault's conception of the mechanism through which institutions exercise power allows one to trace the chain of accountability for the performance of LAWS to senior members of the corporation or the government agency responsible for designing LAWS.

It will now be scrutinized whether a Department of Defense procurement official or an official of a similar agency exercises power over a robot under Foucault's approach when he or she decides to acquire LAWS from a corporation. Let's initially imagine that the government agency does not communicate the design specifications to the corporation and does not take part in testing the robot. Government documents will state what specifications a product should fulfil in order to be eligible for procurement. Examples of the specifications are the ability of the armed forces to employ the LAWS in compliance with IHL, appropriate safeguards to prevent the machine from performing in an unjustifiable manner and reliability requirements. In practice, the closer the robot's de-

311 DISCIPLINE & PUNISH, *supra* note 274, at 214.

312 *Id.* at 219.

sign to the needs of the armed forces, the more likely the Department of Defense or a similar agency to buy that particular model. Consequently, the corporate managers will be constrained by the criteria which they perceive the government agency officials to be guided by when the agency determines from which company to procure the LAWS. The managers are likely to constantly monitor and adjust the robot's blueprint in light of their understanding regarding what machine the government agency wishes to purchase. A relevant consideration is that many governments, such as the U.S. and India, regard competition as a powerful tool to foster productivity.[313] Because the government agency chooses among numerous companies and because in practice corporations will tailor the product design to the perceived preferences of the government agency, the most senior decision-maker in the government agency responsible for procurement exercises power over individuals in a corporation determining what design LAWS should have.

In some cases the corporation and the government agency work closely together on the design of LAWS. Linda Gooden, the Executive Vice President of Lockheed Martin, explains that the company works with its customers to assess their needs in order to ensure that it is "delivering what they need, when they need it—and at a price they can afford."[314] Foucault's theory does not address a situation where individuals closely collaborate. According to Foucault, the architecture of a mechanism for exercising power positions individuals in a manner so as to prevent them from having contact with their companions.[315] Through minimising opportunity for communication, the operation of the mechanism prevents individuals from mutually influencing each other.[316] Accordingly, alternative theories will be applied in the subsequent section to address this scenario. What can be said at this stage is that the greater the role that the government agency plays in giving specifications for the robot to the corporation or in testing the robot, the greater the possibility of imputing power to the government agency officials over the senior members of the corporation due to narrowing the array of decisions open to the corporate decision-makers.

When LAWS performs in an unjustifiable manner, due to a feature in its design of which the programmers were unaware, the government agency exercises power over the corporation but not over the robot. Let us consider a situation where LAWS inferred that it is permissible to kill civilians based on observing the unlawful conduct of the adversary. Manufacturing LAWS that do not enable the armed forces to fulfil their obligations does not fall within a range of behavior that a government agency would want a corporation to pursue. Accordingly, the war crime LAWS brings about can be attributed to the corporate actors on the basis that they exercise power over it. Additionally, accountability could be at-

313 Memorandum from the U.S. Office of the Under Secretary of Defense to Department of Defense Acquisition Professionals, 9 (Sept. 14, 2010); Competition Commission of India, Public Procurement and Competition Law 3 (2015), http://cci.gov.in/sites/default/files/event%20document/p4.pdf?download=1.

314 Linda Gooden, *Executive Message: Customer Relevancy*, 4 CONNECT: INFO. SYSS. & GLOBAL SOLUTIONS (Lockheed Martin) no. 3, 2010, at 2.

315 DISCIPLINE & PUNISH, *supra* note 274, at 200.

316 *Id.*

tributed to procurement officials in cases where they exercise power over senior leaders in the corporation.

Do members of the armed forces exercise power over the LAWS when they deploy it on the battlefield? By deciding what task to assign to the LAWS, the operator sets the "goal-directed activity." However, the nature of the task the operator can assign to the LAWS is limited by the range of acts that the software architecture enables a robot to undertake. When an operator issues an instruction to the LAWS, it is the execution of the software that enables a robot to implement the order. Consequently, although an operator acts upon LAWS, it is the software creator who constraints the array of possible actions available to the robot. It follows that the power of the operator over the LAWS is embedded in the power the software creator exercises over the robot. On the application of Foucault's theory, the programmer and the operator exercise power jointly over LAWS when an operator orders it to carry out a war crime.

Yet, it is counter to the principle of personal culpability in international criminal law to attribute accountability to both the programmer and the operator in this scenario. The principle of personal culpability is that, "[N]obody may be held criminally responsible for acts or transactions in which he [or she] has not personally engaged or in some other way participated."[317] Activating the LAWS's mechanism by ordering it to shoot a civilian is similar to pressing a trigger of a rifle or driving a bulldozer with the aim of killing a civilian. When a programmer designs a reliable LAWS, he or she does not participate in the act of the operator ordering the robot to bring about a war crime. Neither does international criminal law treat weapon manufacturers who sell lawful products liable on the basis of aiding and abetting when the buyer uses the product to commit a war crime, as long as the manufacturer did not know that the buyer bought the article with the intent to commit an international crime and the nature of the crime being planned.[318] This raises the question whether Foucault's theory needs to be refined in order to make it possible to make more accurate attribution in the robotic context.

The application of Foucault's theory to analyze what actors exercise power over LAWS yielded an interesting insight that the government agency officials responsible for procuring weapons exercise power over corporate decision-makers when the two entities do not collaborate. In contrast to the doctrine of command responsibility, Foucault's theory points to the fact that individuals across the spectrum of the corporate hierarchy exercise power over LAWS even when they operate on the battlefield. The company directors can be the loci of power to the extent they create guidelines for what product should be created and monitor the performance of their employees. On this approach, accountability can be imposed on the procurement officials, company directors and the head programmer on the basis of exercising power over LAWS. Nevertheless, the fact that under Foucault's theory the software creator exercises power over LAWS when an op-

[317] Prosecutor v. Tadić, IT-94-1-A, Judgment, ¶ 186 (ICTY Jul. 15, 1999).

[318] *United States of America v. Carl Krauch et. al*., Case No. 10, ¶ 1168 (Trials of War Criminals before the United States Nuremberg Military Tribunal under Control Council Law Jul. 30, 1948).

erator orders it to commit a crime calls for a more refined analysis of how organizations exercise power. The final limitation of Foucault's theory is that it does not tell us how to impute accountability when a terrorist or a rebel group creates LAWS.

C. Developing an accountability framework

An interdisciplinary perspective will be utilized with a view to understanding how corporations, armed forces, armed groups and terrorist cells exercise power. It will be shown that all these types of organizations exercise power through the same mechanism. Subsequently, the analysis will be employed to create a framework for imputing accountability in the robotic context.

1. Corporations

Because Foucault wrote with factories and state institutions in mind, his theory closely reflects how government agencies tasked with developing LAWS operate. However, his theory needs to be refined because how corporations function has changed since Foucault's writings. Specifically, in the past corporations used to have a hierarchical structure for exercising authority and control over the subordinates.[319] Senior office-holders, such as managers, were the ultimate decision-makers.[320] Increasingly, the leaders in different tiers of the hierarchy hold disparate degrees of power and authority in relation to each other and in relation to their subordinates.[321] Organizations have flat structures and managers derive their authority by fostering commitment and a sense of shared purpose among the team members rather than from their position in the organization.[322] Organizations are increasingly organized in this manner."[323] Involving individuals who are responsible for implementing the decisions of management in the discussions contributes to financial success.[324] The best practices indicate that top managers should set out organizational policies and strategies.[325] Meanwhile, the middle and lower management should have the autonomy to decide how the teams should be run from day to day.[326] Nevertheless, there is evidence that managers

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319 Michael Maccoby, *Why People Follow The Leader: The Power Of Transference*, HARV. BUS. REV. (Sept. 2004), https://hbr.org/2004/09/why-people-follow-the-leader-the-power-of-transference.

320 *Id.*

321 Oginni Babalola, et al., *A Study of Superior-Subordinate Relationship and Employees' Commitment to the Core Beliefs of Organisation in Public Universities of Southwest, Nigeria*, 3 AM. J. BUS. & MGMT. 28, 29 (2014).

322 Robert McKinney, et al., D*anger In The Middle: Why Midlevel Managers Aren't Ready To Lead*, HARV. BUS. PUB., 2013, at 1, 4.

323 Massimo Garbuio, et al., *How Companies Make Good Decisions: McKinsey Global Survey Results*, MCKINSEY & COMPANY (January 2009), http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-companies-make-good-decisions-mckinsey-global-survey-results.

324 *Id.*

325 *Decision Making: How Much Does Hierarchy Matter?*, MGMT. STUDY GUIDE (2016), http://www.managementstudyguide.com/decision-making-and-hierarchy.htm.

326 *Id.*

lack substantial authority to bring about particular outcomes.[327] Managers, team leaders and team members influence the range of decisions their superiors consider as viable options through exchanging information, views and experiences. This mutual influence takes place in a context of asymmetrical power relationships. The reciprocal influence aspect and its implication for understanding how power circulates in corporations needs to be examined in greater detail because Foucault's theory excludes this dimension.

Corporate leaders exert power over the employees through configuring the group identity and interactions between members. According to the Management Study Guide, "[C]orporate decision-making is successful as long as there is a 'glue' to bind the organization together in the form of charismatic leaders or an organizational culture that values coherence and imposes stability."[328] Western companies create a corporate culture by communicating the company mission to the employees and by telling them to be guided by this mission.[329]

Raimo Tuomela's philosophical enquiry into how individuals act as members of a group suggests that corporations exercise power through creating a group with a distinct identity and through fostering a perception among the employees of belonging to the group.[330] Tuomela argues that individuals who regard themselves as belonging to a group with a distinct ethos and who are committed to the group ethos use group norms to decide what array of possible actions is open to them.[331] The group ethos, consisting of "constitutive goals, values, standards, beliefs, practices" serves as "the foundation for the unity and identity of the group."[332] The work of anthropologist Mary Douglas supports the assertion that the group channels how individuals perceive events and how they act.[333] She writes that institutions create categories which individuals apply in their thinking and fix their identities.[334] Institutional norms create expectations and individuals act in conformity with them.[335]

Furthermore, Robert Ellickson's work points to the fact that employees exercise power over each other by evaluating whether a group member's conduct conforms to group norms and through communicating to others when an individual's conduct deviates from the norm. According to Ellickson, close-knit groups create social norms that maximize the welfare of their members.[336] Additionally,

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[327] David Burkus, *Why Managers Are More Likely to Be Depressed*, HARV. BUS. REV. (Sept. 23, 2015), https://hbr.org/2015/09/why-managers-are-more-likely-to-be-depressed.

[328] *The Process of Corporate Decision Making*, MANAGEMENT STUDY GUIDE (2016), http://www.managementstudyguide.com/corporate-decision-making.htm.

[329] Eric Markowitz, *How to Create a Unified Culture in a Company With Multiple Offices*, INC. MAG. (Feb. 24, 2011), http://www.inc.com/guides/201102/how-to-create-a-unified-corporate-culture.html.

[330] RAIMO TUOMELA, THE PHILOSOPHY OF SOCIALITY: THE SHARED POINT OF VIEW 13 (2007).

[331] *Id.* at 124-25.

[332] *Id.* at 3, 5.

[333] MARY DOUGLAS, HOW INSTITUTIONS THINK 92 (1986).

[334] *Id.* at 112.

[335] *Id.* at 48.

[336] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 184 (1991).

social norms define the identity of the group and membership criteria.[337] To exercise social control over each other, group members identify norms as well as rewards and punishments attached to particular conduct.[338] They rely on established lines of communication with each other so as to spread information about departure from a norm.[339] This informal method for social control may be mixed with enforcement through formal rules.[340] Ellickson defines a close-knit group as a group where the members have equal power.[341] He leaves it open whether the theory is applicable to groups where individuals hold disparate degrees of power.[342]

Although superiors and subordinates hold disparate degrees of power, Ellickson's theory arguably equally applies to corporations. Because corporations have a particular identity, culture, norms of conduct and relatively stable membership, they are a close-knit organization. The nature of human interaction is such that employees pass information to each other and to their superiors about the conduct of their peers. The superior relies on this information to punish deviation from the norms and thereby enforces the corporation's norms. Ellickson's work indicates that each employee exercises social control over other employees, that power circulates in the organization and that organizations rely on a mixture of formal and informal rules in order to enforce power. The role of the group and social norms in regulating employee behavior in corporations echoes Foucault's proposition that the conduct of individuals is constrained through being distributed in relation to other individuals in a particular way and that power circulates between individuals.[343] In sum, senior leaders exercise power over subordinates by establishing an asymmetric relationship between group members, by having employees enforce obedience through interacting with each other and by employees reporting conduct deviating from the norm. The group identity and norms define the array of possible exchanges that can take place between group members.[344]

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337 *Id.* at 233.

338 *Id.* at 184.

339 *Id.* at 214-15.

340 *Id.* at 254.

341 ELLICKSON, *supra* note 336, at 177.

342 *Id.*

343 DISCIPLINE & PUNISH, *supra* note 274, at 198; POWER/KNOWLEDGE, *supra* note 274, at 98.

344 Further support for this understanding of how corporations exercise power may be found in the scholarship of the sociologist Stewart Clegg. Clegg studied how organizations lead individuals to obey. Clegg hypothesizes that organizations create three circuits through which power flows in order control the conduct of individuals. He calls these circuits episodic, dispositional and facilitative power. Power may remain in the episodic circuit or flow between the three circuits. Episodic power involves configuring social relations in such a way that A can lead B to act in a way B would not have otherwise acted through communication. The dispositional circuit pertains to 1) rules of meaning, namely the organizational rules and norms shaping how the employees give meaning to concepts through interpretation, and 2) rules of membership prescribing how the group expects its members to act. This circuit of power produces the company's culture, goals to be pursued and organizational structure. The facilitative circuit refers to techniques of production and discipline. These include management practices, organizational structures, machinery to be used and business processes. Power is exercised by fixing relations and identifying "nodal points" through which discourse and exchange must pass. Rules of membership and

Given that non-Western countries will also manufacture LAWS, it is necessary to establish whether companies in other countries rely on group membership as a tool for exercising power. Japan was chosen as a case study because Western managers regard the Japanese business culture as "unique."[345] If similar patterns of exercising power are present in organizations that are perceived as being vastly different, then it can be argued that the identified mechanism for exerting power is not confined to a particular organization or culture. In Japan the relationship between the employer and the employee cannot be explained in contractual terms.[346] Rather, the employer-employee relationship is characterized as a mutual obligation and the employees are loyal to the company.[347] The company members view the corporation as a social group and receive each new member as a "newly born family member."[348] Ruth Wolf comments that the central principle of Japanese culture of integration with the group and of maintaining harmony in group relations results in individuals relinquishing their personal desires in order to uphold the interests of the group.[349] Wolf's observation points to the fact that Japanese corporations constrain the range of courses of actions the subordinates perceive as being available to them through creating a group with a distinct identity, fostering a sense of allegiance to the group and having an expectation that employees will adhere to group norms.

An important characteristic of the Japanese management style that is less present in Western companies is decision-making through consensus-building.[350] Although the Japanese managers employ an egalitarian method for decision-making, the Japanese workers are much less willing to question the assessment of their superiors than Western employees.[351] Accordingly, although the Japanese companies have a different structure and management philosophy in comparison to Western companies, they exercise power over employees in a similar manner. The case study of Japan illustrates that even when an organization has a horizon-

interpretation as well as the institutional structures create rules which a practice or a decision must satisfy in order to pass these "nodal points." As a result, individuals may exercise discretion but only within the parameters the rules of meaning, membership and practice prescribe. STEWART R. CLEGG, FRAMEWORKS OF POWER (SAGE Publications Ltd. 1997); STEWART R CLEGG, et al., POWER AND ORGANIZATIONS (SAGE Publications Ltd. 2006); JOÃO OLIVEIRA & STEWART CLEGG, ORGANIZATIONAL CONTROL AND CIRCUITS OF POWER (2014).

345 Andrew Miller, *Differences in Business Culture Between Japan and West*, JAPAN TODAY (Apr. 2, 2013), http://www.japantoday.com/category/lifestyle/view/differences-in-business-culture-between-japan-and-west.

346 NAKANE CHIE, JAPANESE SOCIETY 15 (Weidenfeld and Nicolson 1970) (quoted in John van Willigen & Richard Stoffle, *The Americanization of Shoyu: American Workers and a Japanese Employment System*, 28 ANTHROPOLOGY AND INT'L BUSINESS. STUDIES IN THIRD WORLD SOCIETIES 131 (Serrie Hendrick ed. 1984).

347 *Id.* at 129; Ruth Wolf, *Management Relations in the Work Culture in Japan as Compared to That of the West*, 2 INNOVATIVE J. OF BUS. AND MGMT. 116, 117 (2013).

348 CHIE, *supra* note 346, at 14.

349 Wolf, *supra* note 347, at 117.

350 Peter F. Drucker, *What We Can Learn from Japanese Management*, HARV. BUS. REV., (March 1971), https://hbr.org/1971/03/what-we-can-learn-from-japanese-management; Reina Hashimoto, *10 Cultural Contrasts between U.S. & Japanese Companies*, BTRAX (2016), http://blog.btrax.com/en/2010/12/15/10-cultural-contrasts-between-us-and-japanese-companies-a-personal-view.

351 Willigen & Stoffle, *supra* note 346, at 149.

tal structure and involves employees in decision-making, the managers continue to exercise power over their subordinates. This has significance for determining what individuals should be treated as having power over the decision how to design a robot.

To cross-check the broad applicability of the findings of how organizations exercise power, Nigeria will be used as a case study. Nigeria has over 250 ethnic groups and superiors manage teams consisting of individuals belonging to multiple tribes.[352] If a similar mechanism for exercising power exists in Nigeria, Japan and Western countries, then it is likely to manifest itself in other regions too. This is because Nigeria, Japan and Western countries are located in different parts of the globe and have divergent cultures. Moreover, it is significant if the same principle is equally applicable to managing a particular ethnic group and a group with mixed membership. According to Olu Ojo, a Nigerian scholar who studied the link between organizational culture and employee performance in Nigerian insurance companies, organizations have a shared system of meaning which creates a basis for communication and mutual understanding.[353] Culture acts as a bond which generates a sense of belonging to the organization.[354] The culture of the organization leads employees to forgo their personal interests and to act for the benefit of the whole; as a result, employees perform better.[355]

Ojo's study suggests that a feeling among the employees of belonging to a group with a particular identity and culture, namely the company, leads to them being more productive. This outcome is consistent with the finding made above that the elements of creating a group with a distinct identity, fostering a sense of belonging to the group, and associating particular conduct with promoting the interests of the group form part of a mechanism for exercising power over the employees. Significantly, many other studies confirm Ojo's observation. According to Ranya Nehmeh, a Western scholar, many studies demonstrate that employees who are committed to their organization exert greater effort, deliver better service quality and exercise control over their own conduct; this removes the need for supervision.[356] Nehmeh uses the following definition for commitment: 1) a wish to belong to an organization, 2) personal identification with the values and goals of the organization and 3) willingness to exert effort to benefit the organization.[357]

The combination of Foucault's theory and the present analysis of the role of group membership dynamics in the management of companies enables the fol-

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352 Peter Kuroshi, et al., *Cultural Diversity Management of Construction Firms in Abuja-Nigeria*, 6 ORG., TECHNOLOGY AND MGMT. IN CONSTRUCTION 1047, 1048-1049 (2014).

353 Olu Ojo, *Organisational Culture and Performance: Empirical Investigation of Nigerian Insurance Companies*, 8 MANAGER 118, 118-119 (2008).

354 *Id.*

355 *Id.* at 123, 127.

356 Ranya Nehmeh, *What is Organizational Commitment, Why Should Managers Want it in Their Workforce and is There Any Cost Effective Way to Secure it?*, SWISS MGMT. CENTER, May, 2009, at 2, 6.

357 The author draws on the definition of commitment Mowday coined. RICHARD M. STEERS, et al., EMPLOYEE—ORGANIZATION LINKAGES: THE PSYCHOLOGY OF COMMITMENT, ABSENTEEISM, AND TURNOVER (Academic Press. 1982); Nehmeh, *supra* note 466, at 3 (full quote found in text).

lowing conclusion to be drawn about how corporations exercise power. Under Foucault's theory, an individual who determines how to distribute other individuals in time and space in relation to one another in an organization so as to limit the array of courses of action available to them has power concentrated in his or her hands. What is more, in determining whether an individual exercised power over others, regard must be had to whether that person defined the task the employees had to perform, used communication to direct the individuals who carried out the task and created an oversight mechanism. On the application of Foucault's theory, accountability for the war crime brought about by LAWS should be attributed to an individual or group of individuals at the highest tier of the hierarchy who determine how to structure the corporation, what decision-making procedures the employees should follow, how superiors should supervise their subordinates and how to organize the production process. The reason is that these individuals exercise power over the programmers, who in turn exercise power over LAWS.

The fact that power is concentrated in a particular group of persons and that these individuals use group membership as one of the basis for controlling the employees further supports attribution to individuals high in the company hierarchy who define the corporation's norms of conduct, organizational culture, the nature of relationships between employees and criteria for being retained as an employee. Therefore, individuals occupying senior leadership roles who make decisions relating to such aspects as the goals and strategy of the corporation should be held accountable for developing and manufacturing LAWS that brings about an international crime. Where multiple individuals vote for a decision, such as members of the board of directors, the decision should be attributed to each individual who voted in favour of the decision on the ground that the individual enabled the group to adopt a joint position. It is immaterial that superiors involve subordinates in decision-making because subordinates rely on the organization's norms to put forward ideas.

Turning to the head programmer, Foucault's theory indicates that he or she should bear accountability on the basis of exercising power over LAWS. The head programmer should be held accountable due to electing to be part of an organization or group which operates on the basis of particular norms. However, the criterion for attribution should reflect the fact that the head programmer's role in the decision-making may vary depending on the domain to which a company decision pertains. For instance, the head programmer may be more knowledgeable than the manager about how neural networks operate and may influence as a result the manager's decision-making when it comes to technical aspects of how to design LAWS. However, the manager has greater power in the domain of deciding what resources to allocate to designing and testing LAWS. A failure to allocate adequate time and resources to the task of designing a robot could result in an unreliable product. In such cases, the design of the robot cannot be attributed to the head programmer because he or she did not play a dominant role in reaching a decision which resulted in LAWS performing in suboptimal manner. Similarly, if the head programmer conveyed to the corporate director that there was a small likelihood that LAWS could learn that it is permissible to target

civilians on the basis of observing enemy behavior and the director proceeded nevertheless to market the robot, then the director should be held accountable.

Cassandra Steer's test should be adopted to determine when the head programmer can be held accountable. Steer argues that when ascribing responsibility, attention should be paid to whether the individual had input into the deliberation and decision-making that produced the collective will.[358] The focus should be on the individual who had "control over the deliberative process of the collective."[359] This would mean that the head programmer should be held responsible if by virtue of his or her technical expertise that individual played a dominant role in the decision regarding what software design should be selected.

The application of Foucault's theory indicates that individual programmers who prepared a portion of the software but who did not necessarily know the architecture of the entire product should not be held accountable. This is because LAWS cannot function when the software is incomplete and because all software components work together to determine how it performs. Holding every programmer accountable is undesirable because most corporations will set out to create lawful products and because artificial intelligence algorithms are not transparent. More broadly, as Frédéric Mégret explains, blame is a finite resource because when everyone is to blame, no one can be blamed.[360] Holding all individuals involved in creating LAWS deflects attention from the fact that particular individuals made decisions relating to the system's design.

2. Rebel groups, terrorist cells and other non-state actors

The present section will demonstrate that the armed forces and rebel groups rely on a similar mechanism to exercise power over their members as the corporation. The findings will then be employed to extend the application of the test for allocating accountability from the corporate context to the rebel groups, terrorist cells and similar actors. The rhetoric the Israel Defense Forces employ illustrates that they perceive the military organizational structure as being similar to a corporation. Soldiers use terms, such as "large firm" and "business," to talk of the armed forces.[361] They speak of a battalion in terms of a machine where the function of each person and how individuals relate to one another are clearly defined.[362] Just like corporations, the armed forces exercise power over soldiers both through the chain of command and through group membership. The armed forces construct the identity of their personnel around organizational values and require them to be guided by these values in their decision-making. Lieutenant Colonel Michael R. Contratto writes that throughout history, the armed forces

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[358] Nehmeh, *supra* note 356 at 12.

[359] *Id*. at 34.

[360] Frédéric Mégret, *What Sort of Global Justice is 'International Criminal Justice'?* 13 J. OF INT'L CRIM. JUST. 77, 84 (2015).

[361] Ben-Ari, *supra* note 106, at 36.

[362] *Id.* at 34-35.

expected soldiers to exhibit the virtues of patriotism, valor, honor and courage.[363] Robert Mandel elaborates that military ethos underpins the "warrior code" of conduct.[364] The code of conduct stipulates "why soldiers fight, how they fight, what brings them honor and what brings them shame."[365] The references in the code of conduct to values, such as honour, to how the soldiers should fight and to shaming conduct that deviates from the norm point to the fact that there is an interconnectedness between values, the identity of what it means to be a soldier and how soldiers ought to conduct themselves.[366]

It can be discerned from the doctrinal publication Leadership in the Canadian Forces that creating a group with a distinct identity and values as well as instilling a feeling of belonging to the group is critical for exercising control over the armed forces. According to the document, the pre-conditions for exercising leadership and achieving mission goals are fostering a feeling among service members that they are a part of a distinct community, that they possess a particular shared professional identity and that they have a feeling of loyalty towards one another.[367] Common values are used to expand the freedom of action available to individuals and teams while constraining their conduct.[368]

Other sources corroborate that the armed forces utilize the group membership to control soldiers. Mégret, who served as a Sergeant at Eurocorps, explains that the armed forces discourage individualism; they instill a sense among the soldiers that their military unit is their family.[369] This leads to soldiers making sacrifices for the benefit of the group.[370] Other sources echo Mégret's experience in Eurocorps. The U.S. Department of Army Doctrine Publication 6-0 Mission Command states that a sense of mutual trust, shared understanding and common purpose among unit members facilitate effective command over the unit.[371] Corn elaborates that the American armed forces inculcate a sense of loyalty to the commander among the soldiers as a way for enhancing discipline.[372] This information points to the fact that the connection and loyalty soldiers feel to each other and to the unit strengthen the commander's exercise of power over them.

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363 Lieutenant Colonel Michael R. Contratto, *The Decline of Military Ethos and Profession of Arms: An Argument Against Autonomous Lethal Engagements* 17 (2011 Air University).

364 ROBERT MANDEL, SECURITY, STRATEGY AND THE QUEST FOR BLOODLESS WAR 164 (Lynne Rienner Publishers Inc. 2004); Contratto, *supra* note 406, at 19.

365 *Id.*

366 ROBERT MANDEL, SECURITY, STRATEGY AND THE QUEST FOR BLOODLESS WAR 164 (Lynne Rienner Publishers Inc. 2004); Contratto, *supra* note 406, at 19.

367 CHIEF OF THE DEFENSE STAFF, LEADERSHIP IN THE CANADIAN FORCES 10, 13, 30 (Canadian Defense Academy 2005) [hereinafter CHIEF OF THE DEFENSE STAFF].

368 *Id.* at 13-14.

369 Interview with Frédéric Mégret, Professor, McGill University (2016) [hereinafter Interview with Mégret].

370 *Id.*

371 DEPARTMENT OF THE ARMY, U.S. ARMY DEPARTMENT OF ARMY DOCTRINE PUBLICATION 6-0 MISSION COMMAND I-12 (Department of the Army 2012).

372 Corn, *supra* note 128, at 26.

Additionally, the Israel Defense Forces fosters strong ties between soldiers and solidarity; there is strong cohesion in the unit.[373] Because every member is an equal and because of "small group dynamics," the governing modes of thinking are reinforced.[374] The soldiers have a homogenous outlook and ethos.[375] It can be gleaned from this description that soldiers constrain their own and each other's actions as a result of viewing themselves as belonging to a particular group. Furthermore, Ellickson's research intimates that soldiers constrain each other's actions through passing on information to each other and the superior about the fact that their peer deviated from the norm.[376]

In some countries, the armed forces exercise power over the subordinates through creating a group with a distinct identity and formulating norms governing the conduct of members but use violence instead of a sense of allegiance to enforce compliance. For instance, prior to the introduction of contract-based military service in Russia, the superiors employed informal rules to instill obedience into the new conscripts.[377] The social norms of the armed forces specified to which sub-group the conscripts belonged based on the length of time they had spent in the army.[378] Those who had served one year or longer, known as "dedy" (grandfathers), had the power to assign tasks to new recruits and to administer violence for failure to comply with the order or for displeasing the senior members.[379] The case study of Russia corroborates that those who exercise power rely on informal rules to establish groups, to define group membership, to produce rules of conduct and to enforce obedience. These unofficial mechanisms are embedded in the hierarchical structures.

The rigidity of the hierarchical structures and the degree of input the subordinates are allowed to make into the decision-making varies across the armed forces of different countries. According to Mégret, the armed forces communicate to the soldiers that they should unquestionably obey their commanders and the soldiers are never involved in the decision-making process related to the planning of the military operation.[380] On the other hand, the Canadian armed forces specify that leadership "is a dynamic interactive process, involving both hierarchical and mutual influence."[381] All service members are part of a "system of interlocking relationships" and should contribute their ideas where this enables the unit to gain a tactical or strategic advantage.[382] Although the Canadian armed

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373 Ben-Ari, *supra* note 106, at 25, 98-99; ANTHONY KELLET, COMBAT MOTIVATION: THE BEHAVIOUR OF SOLDIERS IN BATTLE 46-47 (Kluwer. 1982); *Id*. at 103 (full quote found in text).

374 Ben-Ari, *supra* note 106, at 63.

375 *Id.* at 67.

376 ELLICKSON, *supra* note 336, at 180-81.

377 Viktor Sokirko, *The reform of the armed forces: 'grandfathers' left but dedovshyna remains,* KOMSOMOLSKAYA PRAVDA (July 14, 2010), http://www.kp.ru/daily/24522/669971.

378 *Id.*

379 *Id.*

380 Interview with Mégret, *supra* note 369.

381 CHIEF OF THE DEFENSE STAFF, *supra* note 367, at 18.

382 *Id.* at 11-13.

forces encourage the exchange of ideas and mutual influence, the authority to commence a military operation is vested in the commander.[383] The fact that the Israel Defense Forces emphasize egalitarianism and are open to "smart comments" from soldiers about how the unit should operate points to the fact that they allow greater consultation. Nevertheless, Israeli commanders only accept ideas which fit the "logic-of-action."[384] Consequently, even egalitarian armed forces have an asymmetrical relationship between superiors and subordinates.

There is a parallel between the extent to which subordinates can have an input into the decision-making in corporations and the armed forces. Even when superiors encourage subordinates to share their views, there is an implicit understanding that the superior retains the ultimate power to make a decision and is a better judge of the suitability of a proposal. Crucially, because a subordinate relies on group norms to formulate ideas and proposals, his or her ideas are an organizational product. Each organization may rely on the mechanisms of a hierarchical relationship and group membership as a way to exercise power to a different degree.

The armed groups employ similar mechanisms for exercising power over their members as the armed forces and corporations. William Murphy is an anthropologist who has studied the relationship between rebel armed groups and child soldiers in Liberia and Sierra Leone.[385] He describes commanders of rebel groups as offering physical protection and economic assistance to child soldiers in exchange for child soldiers risking their lives to provide military services.[386] Child soldiers are frequently very loyal to their commanders due to being provided for.[387] Accordingly, there is a structure of domination that co-exists with a relationship of reciprocity.[388] The rebel groups carry out "signifying rituals" in order to create ties between children and the armed group.[389] Arguably, rebel commanders create a group with a distinct identity in order to facilitate exercising power over the children. Murphy's observation that the rebel forces tattoo children to symbolize their separation from the traditional authority supports this argument.[390] Moreover, the tattoos represent allegiance to comrades and the commander as well as solidarity with the rebel group.[391] Commanders in Sierra Leone told child soldiers that they were their new fathers.[392] The use of the word "father" expresses that children should be loyal to commanders and attributes a

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383 *Id.* at 7, 13.

384 Ben-Ari, *supra* note 106 at 29, 40-42.

385 William P. Murphy, *Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars*, 46 AFR. STUD. REV. 61, 61-62 (2003) [hereinafter William P. Murphy].

386 *Id.* at 65.

387 *Id.* at 70.

388 *Id.* at 62, 70.

389 *Id.* at 75.

390 William P. Murphy, *supra* note 385, at 76.

391 *Id.*

392 *Id.* at 70.

moral bond to the relationship.[393] Scholar Austin Sarat envisions the parent-child relationship as having another dimension. He maintains that fathers are a source of law for their children because fathers define the rules of conduct for their children.[394] By judging the actions of their children and imposing punishment, fathers enforce their law.[395] Sarat's scholarship denotes that through using terms such as "father," commanders combine the exercise of power through a hierarchical relationship with creating a bond to the group's leader in order to reinforce their relationship of power.

Armed groups comprised of adult men too rely on group membership and internal cohesion to exercise power over their members. Brian McQuinn, an anthropologist, describes the revolutionary brigades who fought the Qaddafi regime in 2011 in Libya as cohesive and as owing strong allegiance to their military leaders.[396] The fighters voted to elect their commander.[397] Once elected, the commanders relied on consensus decision-making.[398] For this reason, the structure of the rebel groups resembled a decision-making committee rather than the traditional hierarchical command structure of the armed forces.[399] Because unit commanders employed consensus decision-making, the fighters had close ties with the commander.[400] On the application of Ben-Ari's analysis of the Israel Defense Forces[401] it would appear that the emotive experience of having allegiance to the commander and the group played a role in the commander reinforcing his or her authority over the unit.

The Libyan commanders used group norms and criteria associated with being a member of the group for exerting control over the fighters. The code of conduct the Libyan Ministry of Interior and the Misratan Military Council issued on 20 February 2012 when assigning the task of securing polling stations illustrates this point.[402] This document stated, "Respect the military uniform and raise public awareness through good manners and conduct."[403] The code of conduct draws a link between the military uniform, good manners and acceptable modes of conduct. The document's authors invoke military uniform as a symbol for describing norms and values that should guide a fighter's behavior. The references to God and to "acceptable" conduct in the two documents imply that the superiors relied on community values in order to provide an additional constraint on the behavior

393 *Id.*

394 Austin Sarat, *Imagining the Law of the Father: Loss, Dread and Mourning in the Sweet Hereafter*, 34 Law & Soc'y Rev. 3, 11, 13 (2000).

395 *Id.* at 14.

396 Brian McQuinn, *After the Fall: Libya's Evolving Armed Groups* 18 (Small Arms Surv., Working Paper No. 12, 2012).

397 *Id.*

398 *Id.*

399 *Id.* at 19.

400 *Id.* at 20.

401 Ben-Ari, *supra* note 106, at 63.

402 McQuinn, *supra* note 396.

403 *Id.*

of the fighters.[404] This discussion demonstrates that one of the ways in which rebel commanders exercised power over the fighters was through creating a group with a distinct identity. They used symbols and values to give content to that identity.

Because corporations, the armed forces and rebel groups rely on similar mechanisms for exercising power over subordinates, the same test for attribution can be applied to actors such as rebel groups which develop and manufacture LAWS. The same reasoning can be applied to terrorist groups because they exercise power through group membership and have a leader who formulates the group's ideology. Specifically, individuals join terrorist groups because they want to belong to a group which gives them a social identity and to connect with peers sharing the same values.[405] What is more, the members of terrorist cells use the group ideology as a narrative for interpreting events.[406] Even terrorist groups that are organized as networks and act on generalized guidance have leaders who set the goals of the organization and give guidance on how such aims may be attained.[407] Consequently, accountability should be imputed to an individual or individuals who determine how the terrorist or armed group is structured, its identity, norms, membership criteria and how members interact with one another. Additionally, the programmer who is part of the group is responsible when he or she controlled or dominated the deliberative process in the group related to the LAWS's design.[408] A more refined test will be developed in the conclusion.

3. Procurement officials

The principle that two individuals can have a reciprocal relationship in circumstances where one of the actors occupies a dominant position can be employed to understand the interaction between the procurement officials and the weapons manufacturer. The best practice guidelines on procurement state that the government agency should inform the companies what criteria the officials will apply when reaching decisions.[409] For instance, the United States Office of the Under Secretary of Defense issued a Memorandum for Acquisition Professionals stipulating that the government procures the least expensive products featuring the desired capabilities.[410] As was already discussed, the procurement agent exercises power over the corporation leaders when the corporation designs a product with the features the government agency perceives as desirable in mind. Of

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404 *Id.* at 23-24.

405 Emile Bruneau, *Understanding the Terrorist Mind*, The D.A.N.A. Foundation (2016), http://www.dana.org/Cerebrum/2016/Understanding_the_Terrorist_Mind.

406 Bruneau*, supra* note 405.

407 U.S. Army Training and Doctrine Command, U.S. Army T.R.A.D.O.C. G2 Handbook No. 1: A Military Guide to Terrorism in the Twenty-First Century 3-2 and 3-3 (United States Army, 2007).

408 Steer, *supra* note 42, at 34 (this proposal is based on Steer's test).

409 New Zealand Ministry of Business Innovation and Employment, Government Rules of Sourcing (2015); O.E.C.D. Recommendation of the Council on Public Procurement 7 (2015).

410 Memorandum from the Office of the Under Sec'y of Def. to the Dep't of Def. 2 (September 14, 2010) (on file with the author).

course, there are instances when a single company manufactures a product.[411] In such cases the government agency will be unable to select among different offers. When there are no or few other companies that have an equally technologically advanced product, the corporation will enjoy greater bargaining power.[412] In such instances the official is nevertheless in an asymmetrical (dominant) relationship in relation to the corporation's leaders because he or she decides whether to acquire the product or to buy the next best option at a cheaper price. Whilst Western countries have strict anti-bribery laws, the giving of a financial reward to a public official for granting a contract or a permit is a widespread practice in countries, such as Mexico, Egypt and Burkina Faso.[413] In cases where the government official accepts a financial reward from the corporation for concluding a contract, it is suggested that the relationship is closer to an exchange. However, this reciprocal relationship is embedded in an asymmetrical relationship due to the official deciding from which company to take the bribe.

At the time the corporation and the government agency negotiate a contract, they exchange views, convey expectations and mutually influence the terms of the contract through dialogue.[414] The concluded contract represents a reciprocal exchange of obligations.[415] Because the corporation and the government agency interact through dialogue and exchange, they mutually influence one another. This does not mean that the corporation will be in the same bargaining position as the government agency.[416] Because the clients of the corporation mainly consist of states, and because not all states can afford to commission or to buy cutting edge technology, the number of customers a corporation has is limited. Therefore, the corporation is likely to be prepared to make concessions in order to meet the customer's demands. For instance, Turkey requires the winning bidder to invest in local technologies or infrastructure as a condition for the contract while the United States expects foreign arms manufacturers to source labor in the United States.[417] This analysis supports the assertion that even when the corporation and the government agency reciprocally exercise power over one another, the government agency is nevertheless in an asymmetric (dominant) relationship of power in relation to the corporation.

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411 *Id.* at 9.

412 Michael Sanibel, *The Art of Negotiating,* ENTERPRENEUR (Aug. 24, 2009), https://www.entrepreneur.com/article/203168.

413 *Guns and Sugar,* THE ECONOMIST (May 25, 2013), http://www.economist.com/news/business/21578400-more-governments-are-insisting-weapons-sellers-invest-side-deals-help-them-develop [hereinafter The Economist]; Eric Markowitz, *The Truth About Bribery and Doing Foreign Business*, INC. MAGAZINE (Apr. 27, 2012), http://www.inc.com/eric-markowitz/mexico-walmart-truth-about-bribery-and-business.html (usually, such practices are not officially sanctioned by the government).

414 P. D. V. MARSH, CONTRACT NEGOTIATION HANDBOOK 106 (3rd ed. 2001); Sanibel, *supra* note 412.

415 Mariusz Jerzy Golecki, *Synallagma as a Paradigm of Exchange: Reciprocity of Contract in Aristotle and Game Theory*, *in* ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 259, (Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho eds., 2013).

416 MARSH, *supra* note 414 at 106*;* Sanibel, *supra* note 413.

417 The Economist, *supra* note 413.

Let us now consider a scenario where the weapons manufacturer works side by side with its customer.[418] In these cases the government officials will have an ongoing dialogue with the weapons manufacturer. The interaction between the U.S. government and the scientist Ronald Arkin to whom it commissioned to design LAWS illustrates that the two parties reciprocally influence one another.[419] In particular, it appears that the U.S. specified the core requirements for LAWS. Arkin informed the government about technological possibilities and the likelihood of particular avenues of research being successful. The U.S. then reconsidered what type of product it wished to procure and how it used the technology. This is evidenced by the fact that the U.S. official government position is that human operators will retain control over LAWS at present, but that it does not exclude the possibility that one day these machines will operate fully autonomously.[420] Arkin speaks out in favor of robots operating autonomously.[421] He said in an interview in 2011, "I am convinced that we can indeed create these systems that can perform and outperform human beings from an ethical perspective."[422] He additionally expressed his disagreement with the computer scientist Noel Sharkey, who maintains that this state of technology is unachievable.[423] The divergent statements of Sharkey and Arkin illustrate how the government position on the use of LAWS is conditioned by its dialogue with scientists and programmers about what is technologically possible. When this occurs, the government agency and the corporation mutually influence each other. Although there is reciprocal influence, the government is in a dominant position to the weapons manufacturer and the programmer. This is because the government official chooses with which corporation or scientist to enter in a relationship and on what terms. Therefore, procurement officials should be held accountable in addition to corporate leaders and the head programmer on the basis of exercising power over the corporate leaders.

It is immaterial that the procurement officials do not exercise power over LAWS at the time it performs in an unjustifiable manner. By acquiring LAWS, the officials create a situation where the weapons manufacturer can exercise power over the robot when it is being deployed on the battlefield and take a risk that the machine may bring about a war crime. Because the officials know that programmers have limited foreseeability regarding how LAWS will perform in a particular situation, the officials create a situation where the nature of the software does not allow any individual to have adequate oversight over the workings of the software.

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418 Lockheed Martin, CONNECT: INFORMATION SYSTEMS & GLOBAL SOLUTIONS 2 (2010).

419 Arkin & Ulam, *supra* note 193, at 1.

420 Enclosure, *supra* note 178, at ¶ 4(a), ¶ 4(d); Meier, *supra* note 8, at 1.

421 Sofia Karlsson, *Ethical Machines in War: An Interview With Ronald Arkin*, OWNI.eu, http://owni-eu.6x9.fr/2011/04/25/ethical-machines-in-war-an-interview-with-ronald-arkin/index.html.

422 *Id.*

423 *Id.*

V. A Legal Framework for Attribution

The present analysis demonstrates that the doctrine of command responsibility does not accommodate modern organizational structures, such as corporations. It focuses on the presence of a hierarchical relationship. Yet, organizations, such as corporations and terrorist cells, may have horizontal management structures and rely on consensual decision-making. Moreover, numerous organizations may co-operate with each other on a common goal, such as on creating LAWS, through dividing up the task of designing or manufacturing components. Another flaw of the doctrine of command responsibility is that its vision of how individuals exercise authority is incomplete. The doctrine of command responsibility associates authority with the possession of a particular position in an organization in relation to others. It regards a superior as an individual with the material ability to oversee the subordinates' conduct and to discipline them. Consequently, the doctrine of command responsibility fails to capture the fact that state and non-state organizations exercise authority both through creating an asymmetrical relationship of power between individuals, through formulating group norms to guide the conduct of the subordinates and through having subordinates enforce group norms.

The present discussion provides a blueprint for rethinking the doctrine of command responsibility to enable it to fit the realities posed by organizations which have flat structures, informal networks or the workings of which are not transparent. One step towards enabling the doctrine of command responsibility to capture within its net the conduct of members of terrorist cells and corporate actors could be the inclusion of the material ability to choose how the organization should be structured, to formulate the goals or strategy of the organization, to determine formal and informal norms which guide the conduct of group members and to decide on how the relationships between group members are structured as indicia for possessing "effective control."

When it comes to regulating LAWS, it is better to develop a novel test for imputing accountability.[424] This need stems from the fact that the process of designing and manufacturing a complex artificial intelligence system differs from the process of supervising subordinates. Many individuals, teams and even organizations may be involved in the process. The relationship between them is closer to collaboration than to the traditional military hierarchy. Crucially, the test needs to reflect that artificial intelligence systems are opaque and that it impossible to trace how an act of a particular individual resulted in a particular software error. The analysis shows that primary responsibility for the design of LAWS lies with senior corporate officials, leaders of the armed groups and leaders of terrorist cells who decide to create LAWS and who organize the development process. This proposition reflects the fact that how programmers act is shaped by their interactions with other individuals in the organization or group and with the organizational framework. This suggestion addresses Madeleine Elish's observation that even when the errors of particular individuals contribute to accidents, the

[424] Crootof, *supra* note 79, at 25.

underlying cause of such events is often the management's failure to create a responsible culture and to allocate adequate resources to safety.[425]

The knowledge of the mechanisms through which power is exercised can be employed to trace accountability in cases where multiple corporations or terrorist cells collaborate on creating LAWS. By analogy, accountability should focus on individuals in the partner corporations or terrorist cells who decide to cooperate on creating LAWS. These individuals will create structures to enable the development and manufacture of LAWS. Where two or more organizations cooperate, individuals who play a significant role in designing a component of LAWS are accountable on the same basis as a head programmer in a corporation or a terrorist cell. Additionally, the procurement officials should be held accountable even when multiple corporations cooperate on designing LAWS due to being in a dominant position in relation to the developers and due to creating a situation where the developer or developers jointly exercise power over LAWS on the battlefield.

Imposing accountability on multiple stakeholders promotes the goal of international criminal law of deterrence. Programmers, leaders of organizations developing LAWS and procurement officials are in a position to prevent LAWS from bringing about war crimes by virtue of having input into how LAWS is designed or produced. Yet, the proposed approach to attribution does not lapse into holding individuals responsible based on guilt by association. For instance, the procurement officials are held liable on the basis of exercising power over the corporate leaders rather than because they have a business relationship with the corporation. The proposed approach to imputing accountability echoes the doctrine of command responsibility which imposes obligations and sanctions on individuals throughout the chain of command or supervision on the basis that an individual located at a particular point in the chain exercises authority over other individuals. Here is an example of an attribution test derived from the findings made in this paper:

In cases where LAWS brings about an international crime as a result of operating in an unreliable fashion or in a manner its developers did not intend, the relevant crime shall be attributed to individuals who:

1) Played a "substantial" role in the decision-making relating to 1) the determination to develop and manufacture LAWS either in their own organization or in partnership with other organizations and 2) the design of the governance and operational structures of the organization. The development of governance and operational structures includes: the articulation of the organization's strategy, the decision what resources to allocate to enable the organization to achieve its strategic goals, the setting up of infrastructure, the delineation of the roles of employees, the prescription of the nature of the relationships between employees and what channels of communication they should use, the formulation of decision-making criteria the employees should apply, the setting out of formal or

[425] Madeleine Elish, *Moral Crumple Zones: Cautionary Tales in Human-Robot Interaction* 8-9 (We Robot, Working Paper, 2016).

informal norms guiding the conduct of the employees, and the creation of mechanisms to discipline employees for failing to adhere to the organization's norms.

OR

2) Had "substantial" input, either through direct or indirect communication, into the decision of what architecture or design LAWS should have, or who had "control over the deliberative process of the collective" relating to the said decision.

OR

3) Had a "material" ability to 1) acquire notice that LAWS was about to bring about an international crime as a result of supervising the system's performance and 2) to terminate the mission. Such ability could stem from the design of the user interface, from the possession of technical training or from other factors.

Naturally, it will be necessary to formulate an appropriate test for the mental element to ensure that only sufficiently blameworthy conduct attracts criminal accountability. The mental element test would need to reflect existing standards for locating blameworthiness. It is uncontroversial that individuals who satisfy the proposed attribution test and who act with intent or recklessness should be criminally prosecuted. Given that senior leaders in a corporation or a terrorist cell create structures to enable the development process to take place one could apply an identical or similar mental element test to these individuals as that applied under the doctrine of command responsibility. This is due to the fact that these individuals, just like commanders, embed disciplinary mechanisms to ensure that the organization's members act in conformity with the organization's agenda. Equally, because head programmers have oversight over the work of other workers, one could apply an identical or similar mental element test to them as that applied under the doctrine of command responsibility. For instance, a head programmer who had substantial input into the architecture of LAWS could be held accountable if he or she either knew or had reason to know that there was a real risk that LAWS with that design may trigger a war crime. Given that procurement officials have a supervisory function to ensure that the LAWS they acquire can be used in compliance with IHL, the same mental element test is suitable for this group.

VI. Conclusion

LAWS is a new technology with some experts believing that it will revolutionize warfare.[426] LAWS require that lawyers and states rethink existing legal doctrines and approaches to attribution. It is questionable whether the current position of states of viewing LAWS as weapon systems captures their nature. The better approach is to view LAWS as having a unique nature and status. Countries are moving in the direction of recognizing artificial intelligence systems as hav-

[426] Samuel Gibbs, *Elon Musk leads 166 experts calling for outright ban of killer robots*, THE GUARDIAN, 20 August. 2017.

ing a legal personality. Saudi Arabia granted Sophia, an artificial intelligence system, citizenship in 2017.[427] The Rapporteurs made a recommendation to the European Parliament that it should vote to recognize autonomous robots as having a legal status of "electronic persons."[428] However, individuals should be accountable for the conduct of LAWS because they determine the parameters within which these systems perform. Because numerous individuals and groups of organizations may collaborate on developing LAWS, it is difficult if not impossible to hold a particular individual liable using existing legal categories.[429] Through changing the way in which we think about the exercise of control in organizations it becomes possible to develop suitable accountability frameworks. The operator, commander, programmer, corporate leaders and senior Department of Defense officials should be held accountable when LAWS trigger war crimes on the ground of exercising power over LAWS or over individuals who wield power over LAWS.

[427] Zara Stone, *Everything you need to know about Sophia, the world's first robot citizen*, FORBES (Nov. 7, 2017).

[428] Report with recommendations to the Commission on Civil Law Rules on Robotics A8-0005/2017. 18 (2017).

[429] McFarland, *supra* note 31.

The Protection of Cultural Heritage by International Law in Armed Conflict

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I. Introduction

International cultural heritage is divided into two main categories: 1) tangible cultural heritage and 2) intangible cultural heritage.[1] The former represents physical artistic expressions such as historic buildings, monuments, artistic objects, paintings, sculptures, historic sites, etc.,[2] whereas the latter represents nonphysical artistic expressions such as songs, narrations, tales, traditional expressions such as dance, religious practices, beliefs, etc.[3] Tangible cultural heritage is also regarded as "cultural property" because it is essentially the natural property of the nation that owns it.[4] However, according to some experts, intellectual property, which is also a form of intangible cultural heritage, is also considered cultural property.[5] This paper is focused on the discussion related to the protection of tangible and intangible cultural heritage in times of armed conflict.

Unfortunately, armed conflict, particularly in recent times, has caused massive damage to cultural heritage in conflict-hit areas.[6] For instance, in the war-torn state of Syria, the damage recorded to cultural property sites and objects is colossal.[7] The Islamic State of Iraq and Syria (ISIS) has destroyed a number of temples, historic Christian monasteries, artistic cultural objects, and monuments that

[1] Ben Boer, Donald Rothwell & Ross Ramsay, International Environmental Law in the Asia Pacific 71 (1998) (hereinafter, Boer, et al.); *see also* Jadranka Petrovic, The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict 16–17 (2012).

[2] *See* Boer et al., *supra* note 1, at 71.

[3] *Id.*

[4] Irini A. Stamatoudi, Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law 8 (2011).

[5] Charlie T. McCormick & Kim Kennedy White, Folklore: An Encyclopedia of Beliefs, Customs, Tales, Music, and Art 329 (2d ed. 2011).

[6] Peter G. Stone, *The Challenge of Protecting Heritage in Times of Armed Conflict*, 1 Museum Int'l 40–54 (2015). *See also* Stuart Casey-Maslen, The War Report: Armed Conflict in 2013 386 (2014).

[7] *See* Jadranka Petrovic, Accountability for Violations of International Humanitarian Law 144 (2015).

were several thousand years old and were regarded as precious cultural property and an essential part of international cultural heritage.[8]

Similarly, in Iraq, the 2003 war caused massive plunder of tangible as well as intangible cultural heritage in the form of destruction of historic museums, libraries, collections of old books, and numerous historic cultural objects.[9] Afterwards, ISIS plundered cultural property in Mosul, Nimrud, and Hatra in Iraq by capturing portions of these regions and has also destroyed Christian as well as Muslim historic sites.[10]

Libya is another region that has faced great amount of damage to its cultural property after the demise and overthrow of Moammar Qaddafi's regime there.[11] The rebellious civil war against the Qaddafi regime in Libya resulted in massive plunder to cultural property[12] and now ISIS is also trying to take hold of the region to capture the precious cultural property and oil reserves in this region.[13] Owing to their recurrent threats, the United Nations Educational, Scientific and Cultural Organization (UNESCO) regards five ancient cultural heritage sites—Cyrene, Leptis Magna, Sabratha, Tadrart Acacus, and Ghadames in Libya—as at high risk of attack from ISIS.[14] These sites are considered among the most precious historic cultural heritage sites in the world.[15]

With all the existing threats to tangible cultural heritage, international law also comes into play and provides certain regulations and rules for the conduct of armed conflicts to warring parties in order to ensure full protection of cultural property and heritage sites during fighting.[16] Cultural heritage law and cultural property law have been drawn from the provisions of the 1954 Hague Convention for the Protection of the Cultural Property in the Event of Armed Conflicts, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 World Heritage Convention concerning the Protection of the World Cultural and Natural Heritage, and the two 1977 Additional Protocols of the Geneva Conven-

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[8] *See* Robert Spencer, The Complete Infidel's Guide to ISIS 103-27 (2015) (discussing the ancient cultural artifacts and sites destroyed by ISIS in Syria) (hereinafter Spencer).

[9] Ali A. Allawi, The Occupation of Iraq: Winning the War, Losing the Peace 94–95 (Yale University 2008).

[10] *See* Spencer, *supra* note 8, at 103-27. .

[11] Brigit Toebes, et al, Armed Conflict and International Law: In Search of the Human Face 203 (Springer 2013).

[12] Francesco Francioni & James Gordley, Enforcing International Cultural Heritage Law 73 (Oxford University Press 2013).

[13] Michael Weiss & Hassan Hassan, ISIS: Inside the Army of Terror (Updated Edition) 320 (Simon and Schuster 2016). *See also* Erick Stakelbeck, ISIS Exposed: Beheadings, Slavery, and the Hellish Reality of Radical Islam 50 (Regnery Publishing 2015).

[14] Thomas Page, *The Battle to Save Libya's World Heritage Sites*, CNN (Aug. 2, 2016), http://www.cnn.com/style/article/unesco-libya-sites-danger/index.html.

[15] *Id.*

[16] Jadranka Petrovic, The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict 16–118 (Martinus Nijhoff Publishers 2012).

tions of 1949.[17] This paper explains the applicable provisions of these conventions in the event of armed conflicts.

Furthermore, the essential role played by certain organizations for the protection of tangible cultural heritage during armed conflicts is also set out in the latter part of this paper. UNESCO has the leading role in putting efforts for protection of cultural property during armed conflicts.[18] It has set up several other committees and advisory bodies that work independently or semi-independently within their respective domains for the protection of cultural property in armed conflict-stricken zones.[19] For instance, the World Heritage Committee set up by UNESCO provides technical, scientific, educational, and advisory assistance to states for protecting their cultural property during armed conflict.[20]

The question arises here is whether, with all of the relevant legal provisions of the aforementioned conventions and with the efforts of international organizations for the protection of cultural property, international tangible cultural heritage is under complete protection in conflict-stricken areas. Unfortunately, the answer is no, because there are numerous challenges and gaps in the implementation of these international conventions.[21] In particular, there is a lack of legislation and implementation.[22]

The paper adopts a narrative approach in discussing and evaluating the impacts of armed conflicts on tangible and intangible cultural heritage in light of historic and recent armed conflicts. It then sets out the legal provisions related to offering protection to cultural heritage. In this regard, the first section of this paper elaborates the impacts of armed conflicts on tangible cultural heritage. It particularly addresses the plundering and looting caused by ISIS and the ongoing conflict in Syria, Iraq, and Libya. The second section of this paper evaluates the prominent legal provisions presented by international conventions such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, the UNESCO Convention 1970, the World Heritage Convention, the 1949 Geneva Conventions Additional Protocols of 1977 and the prominent resolutions by the UN Security Council for the protection of cultural property in Iraq and Syria. The third section then elaborates the role of the prominent international organizations in protecting tangible cultural heritage worldwide. The fourth and last section demonstrates the existing gaps and challenges

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[17] Hildegard E.G.S. Schneider & Valentina Vadi, Art, Cultural Heritage and the Market: Ethical and Legal Issues 5 (Springer 2014). *See also* Francesco Francioni & James Gordley, Enforcing International Cultural Heritage Law 42 (Oxford University Press 2013).

[18] Caroline Ehlert, Prosecuting the Destruction of Cultural Property in International Criminal Law 229 (Martinus Nijhoff Publishers 2013).

[19] *See* Andrzej Jakubowski, State Succession in Cultural Property 156 (Oxford University Press 2015).

[20] Abdulqawi A. Yusuf, Standard-Setting at UNESCO: Normative Action in Education, Science, and Culture 230 (Brill 2007).

[21] Jiri Toman, Cultural Property in War: Improvement in Protection: Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 678 (UNESCO Publishing 2009).

[22] Christoph Beat Graber, Karolina Kuprecht, & Jessica C. Lai, International Trade in Indigenous Cultural Heritage: Legal and Policy Issues 233 (Edward Elgar Publishing 2012).

in the successful implementation of the aforementioned legal provisions in protecting cultural property during armed conflict. Inferences are drawn at the end of the paper.

II. Armed Conflict and Its Impacts on International Cultural Heritage

Armed conflict has resulted in grave damage to cultural heritage in conflict-stricken lands.[23] This section of the paper will include an elaboration of the harmful effects of armed conflicts on cultural heritage, with an overview of some of the contemporary conflicts that are threatening international cultural heritage.

A. Impacts on Tangible Cultural Heritage[24]

As we have seen in the historical incidents since the Second World War, victors plunder the conquered society in the name of collecting the spoils of war.[25] Such plunder results particularly in damage to tangible cultural heritage in the conquered region.[26] Numerous cultural and historical sites such as museums, monuments, and libraries have been destroyed or burned down by warring parties, particularly by the victorious party, during as well as at the end of the war.[27] Such pillage causes significant and irreplaceable loss of cultural property in the war-affected regions.[28] In particular, in the modern era of advanced weaponry systems, the likelihood of colossal loss of cultural property and heritage during armed conflict has become even higher owing to the use of harmful, long-range missiles, bombs, and weapons of mass destruction.[29]

In the contemporary arena, armed conflicts are no longer limited to taking place between states;[30] rather, intra-state conflicts have grown in many regions.[31] Most intra-state conflicts are of an ethnic and religious nature.[32] Such conflicts are threatening local cultural heritage because their parties often harm or attack

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[23] Stone, *supra* note 6, at 40; *see also* Casey-Maslen, *supra* note 6, at 386.

[24] *See* Stamatoudi, *supra* note 4, at 8 (noting that the Tangible Cultural Heritage is also called 'cultural property' and is defined as cultural objects and sites that have historic, artistic, religious, monumental, and any other cultural significance).

[25] Larry May, After War Ends: A Philosophical Perspective 14 (Cambridge University Press 2012).

[26] Andrea Benzo & Silvio Ferrari, Between Cultural Diversity and Common Heritage: Legal and Religious Perspectives on the Sacred Places of the Mediterranean 303 (Routledge 2016); *see also* Howard M. Hensel, The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force 43 (Ashgate Publishing 2007).

[27] *Id.*

[28] *Id.*

[29] *See* Karl Mathiesen, *What's the Environmental Impact of Modern War?*, The Guardian (Nov. 6, 2014), https://www.theguardian.com/environment/2014/nov/06/whats-the-environmental-impact-of-modern-war.

[30] Bruce Currie-Alder, et. al., International Development: Ideas, Experience, and Prospects 357 (Oxford University Press 2014).

[31] Mary Hawkesworth & Maurice Kogan, Encyclopedia of Government and Politics 981 (Routledge 2013).

[32] *Id.*

each other's ethnic-oriented cultural sites.[33] This causes damage to the cultural heritage as a whole.[34]

If the parties to an intra-state conflict are a nonstate actor and a state, then the nonstate actor is usually seen as acting as a threatening, rebellious party that causes harm not only to civilians via waging terrorist attacks but also to the cultural heritage sites in such attacks. A prominent example of such damage to cultural property can be witnessed in the ongoing conflict in Syria and the Levant region, where ISIS[35] nonstate actors have caused huge damage to cultural property and have killed many civilians.[36]

ISIS, also called the Islamic State of Iraq and Levant (ISIL), has caused much plundering of cultural heritage sites in Iraq and Syria.[37] It has waged war on cultural sites, prominently museums containing ancient artifacts and old historic temples, by declaring such sites to be idolatrous and un-Islamic.[38] However, its plundering is not limited to museums and temples; it has also destroyed ancient mosques, including Al Sultaniya Mosque, and several other religious and historic sites in the Syria, Iraq and Levant region.[39] ISIS is also taking hold in Libya in order to take hold of the cultural heritage sites and oil reserves there.[40] It has been reported by archaeological researchers that historical artifacts and objects looted by ISIS in Libya, Syria, and Iraq are being sold on the black market.[41] Hence, ISIS is also making illegitimate earnings by selling precious cultural objects from Syria, Iraq, and Libya.[42]

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[33] CHADWICK F. ALGER, PEACE RESEARCH AND PEACEBUILDING 83 (Springer 2013).

[34] *Id.*

[35] The Islamic State of Iraq and Syria (ISIS), also called the Islamic State of Iraq and Levant (ISIL), is a violent organization spreading terror by occupying the regions in Iraq and Levant. *See* Martha Crenshaw & Gary LaFree, COUNTERING TERRORISM: NO SIMPLE SOLUTIONS 12 (Brookings Institution Press 2017); *see also* SCOTT N. ROMANIUK, THE FUTURE OF US WARFARE 37 (Taylor & Francis 2017).

[36] *See* Spencer, *supra* note 8, at 103-27 (discussing the damage done by ISIS to the tangible cultural heritage in Iraq and Syria).

[37] *Id.*

[38] *Id.*

[39] *See* Alyssa Buffenstein, *A Monumental Loss: Here Are the Most Significant Cultural Heritage Sites that ISIS Has Destroyed to Date*, ARTNET NEWS (May 30, 2017), https://news.artnet.com/art-world/isis-cultural-heritage-sites-destroyed-950060 (discussing recent destruction of Islamic and other cultural heritage sites by ISIS).

[40] MARK HITCHCOCK, ISIS, IRAN, ISRAEL: AND THE END OF DAYS 60 (Harvest House Publishers 2016).

[41] Nicholas Kulish & Steven Lee Myers, *"Broken System" Allows ISIS to Profit From Looted Antiquities*, THE NEW YORK TIMES (Jan. 9, 2016), https://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html.

[42] *Id.*

B. Impacts on the Intangible Cultural Heritage[43]

In addition to causing damage to tangible cultural heritage, armed conflict also results in harm to intangible cultural heritage.[44] It damages cultural and artistic expressions, knowledge, skills, and rituals from society.[45] It is common for armed conflict to often end up in the killing of many people, which ultimately causes a reduction in the skills and expressions of people in society.[46] Moreover, feelings following the loss of loved ones also affect people emotionally and psychologically.[47] Heightened stress, nightmares, horrible flashbacks, and feelings of depression are common among locals,[48] especially among children.[49]

Many homes are destroyed during conflict.[50] Consequently, many children are separated from their parents, particularly if their parents have died during the conflict.[51] For children, the depressed feelings may remain active for a long time even after the conflict has ended.[52] Some children may face post-traumatic stress disorder at such heightened level that they may be prevented from engaging in education and participating in cultural activities.[53]

Post-conflict depression may also terminate the celebrations of cultural events and festivals.[54] Thus, the rituals, traditional events, celebrations, etc. considered an essential part of intangible cultural heritage, also fall out of practice by war-affected citizens.[55]

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[43] *See* JANICE AFFLECK ET AL., NEW HERITAGE: NEW MEDIA AND CULTURAL HERITAGE 186 (Routledge 2007) (defining intangible cultural heritage as "the sets of values, oral traditions, rituals, emotions, artistic visual expressions, songs, tales, etc. that are recognized as culturally significant in a society."). *See also* KEN ALBALA, THE SAGE ENCYCLOPEDIA OF FOOD ISSUES 1402 (Sage 2015).

[44] DAN KUWALI & FRANS VILJOEN, BY ALL MEANS NECESSARY: PROTECTING CVILIANS AND PREVENTING MASS ATROCITIES IN AFRICA 209 (Pulp 2017) [hereinafter Kuwali & Viljoen].

[45] SABINE SCHORLEMER & PETER-TOBIAS STOLL, THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS: EXPLANATORY NOTES 228 (Springer 2012) [hereinafter, Schorlemer & Stoll].

[46] *Id.*

[47] *See* CHARLES I. BROOKS & MICHAEL A. CHURCH, SUBTLE SUICIDE: OUR SILENT EPIDEMIC OF AMBIVALENCE ABOUT LIVING 8 (ABC-CLIO 2009) (illustrating the impact of traumatic experiences such as loss of loved ones).

[48] Janice M. Thompson, ESSENTIAL HEALTH ASSESSMENT 373 (F.A. Davis 2017).

[49] STEVEN DAVID VALDIVIA, FORCES. . .GANGS TO RIOTS. . .WHY AND HOW SOME COMMUNITIES ERUPT. . .AND HOW WE MAY END IT 121 (2005) [hereinafter, Valdivia].

[50] *See, e.g.,* UNITED STATES INSTITUTE OF PEACE AND PEACEKEEPING AND STABILITY OPERATIONS INSTITUTE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION 10–182 (US Institute of Peace Press 2009).

[51] Deborah J. Johnson, et al., *Pathways of Success Experiences Among the "Lost Boys" of Sudan: A Case Study Approach*, *reprinted in* CHANDI FERNANDO & MICHEL FERRARI, HANDBOOK OF RESILIENCE IN CHILDREN OF WAR 179 (Springer 2013).

[52] Valdivia, *supra* note 49, at 121.

[53] *See* ERNEST E. UWAZIE, CONFLICT RESOLUTION AND PEACE EDUCATION IN AFRICA 68 (Lexington Books 2003).

[54] Schorlemer & Stoll, *supra* note 45, at 228.

[55] *Id.*

Armed conflicts also result in sexual violence.[56] Rape and sexual slavery of the victims of war by the aggressing party is often carried out to terrorize and humiliate the locals.[57] For instance, in the conflicts in Bosnia the rape of young girls was carried out, resulting in the women carrying the enemy's child, which itself amounted to destroying the social and cultural fabric of society.[58]

It is essential to evaluate here the fact that any damage caused to tangible cultural heritage such as religious sites, theaters, museums, etc. also results in harming intangible cultural heritage.[59] This is because the tendency for people to participate in a particular cultural ceremonial activity can diminish after the damage of a particular cultural site where they used to practice.[60] For instance, the obliteration of the Timbuktu Mausoleums in Mali in 2012 during armed conflict resulted in a significant decline in the practicing of the particular rituals that the locals used to perform at the mausoleums prior to their destruction.[61]

Hence, it can be asserted that armed conflict destroys traditional festivals and cultural practices and also leaves negative impacts on the emotional, psychological, and cultural aspects of society.[62] Thus, it is essential to regulate armed conflict in order to mitigate its harmful effects on intangible as well as tangible cultural heritage.[63]

III. Provisions of International Law for the Protection of Cultural Heritage during Armed Conflicts

International law has provided support for protection of international cultural heritage during armed conflict.[64] Within the framework of international law, international cultural heritage law and international cultural property law are the main sets of legal provisions that mandate the protection of cultural heritage and cultural property in times of peace and conflict.[65] Both sets of laws are based

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[56] Janie L. Leatherman, Sexual Violence and Armed Conflict 1979 (John Wiley & Sons 2013).

[57] *Id.*

[58] *See* Graça Machel, The Impact of War on Children: A Review of Progress Since the 1996 United Nations Report on the Impact of Armed Conflict on Children 55 (C. Hurst & Co. Publishers 2001).

[59] Elisa Novic, The Concept of Cultural Genocide: An International Law Perspective 193 (Oxford University Press 2016). *See also* Marie Louise Stig Sørensen, & Dacia Viejo-Rose, War and Cultural Heritage 7 (Cambridge University Press 2015).

[60] Christiane Johannot-Gradis, *Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?* International Review Of The Red Cross, 1253–75, 1260 (2015).

[61] *Id.*

[62] *Id.*

[63] A Durfina, *Right of peoples to self-determination within the context of international law of armed conflict*, 1, in Martin Dolinsky & Vlasta Kunova, Current Issues of Science and Research in the Global World, 55 (CRC Press, 2014) [hereinafter: Durfina].

[64] Craig Forrest, International Law and the Protection of Cultural Heritage xxii (Routledge 2012).

[65] *See, e.g.*, Francesco Francioni & James Gordley, Enforcing International Cultural Heritage Law, 42 (Oxford University Press 2013) [hereinafter Francioni & Gordley].

upon the rules defined in the Hague Convention 1954, the 1977 Additional Protocols to the Geneva Conventions 1949, the UNESCO Convention 1970, the World Heritage Convention, etc.[66] These conventions have set rules for warring parties in an armed conflict to protect cultural heritage and cultural property.[67] Detailed aspects of the protection offered by these conventions are elaborated below.

A. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[68]

The convention, which is considered the cornerstone of protection for cultural property in times of armed conflict is the Hague Convention 1954.[69] Two additional protocols of the Hague Convention have also been arranged: the First Protocol was drafted in 1954, while the Second Protocol was settled in 1999.[70] The Hague Convention 1954 and its two protocols include principles for protecting cultural property during all kinds of armed conflicts, wars, and territorial occupations.[71] The text of the Hague Convention applies binding instruments on contracting states.[72] The Hague Convention provisions are applicable in times of peace as well as times of armed conflict.[73]

The Hague Convention offers protection for all kinds of cultural property objects, including artifacts, cultural sites, buildings, ornaments, statues, etc.[74] Article 1 of the Hague Convention mentions archaeological sites, artistic objects, and similar artifacts as cultural property.[75] Later, Articles 2 and 3 recommend that all

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66 Francioni & Gordley, *supra* note 65. *See also* HILDEGARD E.G.S. SCHNEIDER, & VALENTINA VADI, ART, CULTURAL HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES 5 (Springer 2014) [hereinafter Schneider & Vadi].

67 *See* STUART CASEY-MASLEN, THE WAR REPORT: ARMED CONFLICT IN 2013 366 (Oxford University Press 2014) [hereinafter Maslen].

68 The complete name of the convention is the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and it was drafted in 1954 in The Hague. The Regulations for Execution of the Convention were also concluded in 1954.

69 *See* James A.R. Nafziger, PROTECTION OF CULTURAL PROPERTY, reprinted in M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 977 (Brill 2008).

70 Schneider & Vadi, *supra* note 66, at 5.

71 Maslen, *supra* note 67, at 365.

72 R. ALBRO, B. IVEY, CULTURAL AWARENESS IN THE MILITARY 93 (Springer 2014). *See also* Ahmet Hoteit & Issam Ali Khalifeh, *The Protection of Cultural Property during Peacetime and in the Event of Armed Conflict: A Historical Overview and a Case Study, The Plundering of Lebanon's Cultural Heritage*, 3 J. Def. Manag. 1, 1–6 (2013).

73 *See* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 18, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

74 *Id.,* art.1. *See also* FRAUKE LACHENMANN & RÜDIGER WOLFRUM, THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 310 (Oxford University Press 2017).

75 *Id*. Article 1 of the Hague Convention 1954 defines that the term "cultural property" shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

contracting parties apply full protection to cultural property within their territorial limits during times of peace and conflict.[76]

It is admitted in the text of the Hague Convention that cultural property has suffered damage in armed conflict.[77] It is further elaborated that cultural property belongs to the whole of mankind as the cultural heritage of humanity and therefore it becomes everyone's responsibility to exert efforts to protect humanity's cultural heritage.[78] This implies an international protection of cultural heritage.[79] Such protection will only become effective if all states also apply the recommended protections of cultural property and heritage at the national level in accordance with the provisions of the Hague Convention as well as also collaborating at the international level for the collective protection of cultural property in times of peace and conflict.[80] All necessary measures at the national and international levels should be recommended, followed, and implemented by all states to protect the cultural property and heritage of all of mankind.

Article 4 of the Hague Convention 1954 takes a further step by recommending that the contracting state parties not only protect cultural property in their own territorial limits but also respect the cultural property and heritage within the territorial limits of other states that are contracting parties to the convention.[81] By respecting, it implies that the contracting state must not take any measure that could harm the cultural property of the other state.[82] In particular, in times of armed conflicts, the state must not attack or damage cultural property sites.[83]

Furthermore, it is also recommended that states ensure that cultural property is protected from any kind of theft, loot, or embezzlement.[84] Moreover, they must also avoid seizing it from any other state.[85] However, if the latter has not imple-

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments". *See* 1954 Hague Convention, art. 1. *See also* JADRANKA PETROVIC, THE OLD BRIDGE OF MOSTAR AND INCREASING RESPECT FOR CULTURAL PROPERTY IN ARMED CONFLICT 129 (Martinus Nijhoff Publishers 2012).

[76] *See* 1954 Hague Convention, *supra* note 73, arts 2-3.

[77] *See* 1954 Hague Convention, *supra* note 73 (recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction). *See also* ALBERT EDWARD ELSEN, JOHN HENRY MERRYMAN, & STEPHEN K. URICE, LAW, ETHICS, AND THE VISUAL ARTS 65 (Kluwer Law International 2007) [hereinafter Elsen et al].

[78] *Id. See also* DUNCAN CHAPPELL & STEFANO MANACORDA, CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 193 (Springer 2011).

[79] CARLO PANARA & GARY WILSON, THE ARAB SPRING: NEW PATTERNS FOR DEMOCRACY AND INTERNATIONAL LAW 233 (Martinus Nijhoff Publishers 2013).

[80] *Id. See also* DIETRICH SCHINDLER & JIØÍ TOMAN, THE LAWS OF ARMED CONFLICTS 747 (Brill 1988). *See also* Elsen et al., *supra* note 77, at 65.

[81] *See* 1954 Hague Convention, *supra* note 73, art. 4.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

mented safety measures for the protection of cultural property, then the former can consider taking the cultural property of the latter in order to fully protect it within its territory.[86]

The Hague Convention also recommends applying "special protection" to cultural property during armed conflicts,[87] particularly if the cultural property is situated at location that is in danger of being damaged by armed attacks.[88] For instance, if a cultural property site is located in an area that is the target of airstrikes or other attacks by any party, then special protection should be applied. For this purpose, a "refuge" can be placed on such a site, which should ensure that the property cannot be harmed by bombs.[89] If the property is movable, then steps should be taken as soon as possible to move or transfer it to a safer location.[90] Such transportation must take place under international supervision and under special protection in a manner that may cause no harm or danger to the transported cultural property.[91] In this regard, no force must be used against the transported property and the opposing warring party must respect it.[92] For this purpose, a proper notification should be sent to the opposing warring party about the transfer of the cultural property.[93] Moreover, a distinctive emblem should be marked on the transporting source to identify the transported material as cultural property.[94] Article 16 of the convention elaborates the shape of the emblem to be a royal blue and white colored shield.[95] The use of this emblem for any other purpose is strictly prohibited by the convention.[96]

On the other hand, if the cultural property site is immovable, then special military or police personnel should be charged with protecting the site, and these personnel must not take part in the fighting of the ongoing armed conflict in the region.[97] These personnel should wear an armlet with the aforementioned emblem signed by the authorities and must carry with them an identity card with the signed emblem for the purpose of identification.[98] Moreover, such personnel should not be denied by each warring party to continue their duty to protect the cultural property, even if the property site or personnel fall into the occupation of either party.[99] In such an event, each party must give respect to both the cultural

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[86] *See* 1954 Hague Convention, *supra* note 73, art. 4(5).

[87] *Id.*, art. 8(1).

[88] *Id.*, art. 8(1)(a).

[89] *Id.*, art. 8(2).

[90] *Id.*, art. 12.

[91] *Id.*, art. 12(2).

[92] *See* 1954 Hague Convention, *supra* note 73, arts. 12(3), 13(2).

[93] *Id.*, art. 13(1).

[94] *Id.*, art. 17(1).

[95] *Id.*, art. 16.

[96] *Id.*, art. 17(3).

[97] *Id.*, art. 8(4).

[98] Regulations for the Execution of the Convention for the Protection of Cultural Property in Event of Armed Conflict, art. 21, May 14, 1954, 249 U.N.T.S. 270 [hereinafter 1954 Hague Regulations].

[99] *See* 1954 Hague Convention, *supra* note 73, art. 15.

property and the personnel protecting that property.[100] The cultural property that is granted special protection must be listed in the International Register of Cultural Property under Special Protection in order to ratify it as a specially protected site at the international level.[101] This should be done to notify all warring parties to avoid harming such a site during armed conflict.[102] The director-general of UNESCO, in coordination with the International Committee on Monuments, Artistic and Historical Sites and Archaeological Excavations, will decide whether a certain property or site can be listed in the register as a cultural heritage property.[103] An emblem can also be marked at the site; however, this emblem should only be marked after acquiring the signed consent of a competent authority of the state for the protection of cultural property.[104]

It is also mentioned in the text of the Hague Convention that anyone who violates the provisions of this convention in the jurisdiction of a contracting state should be penalized by the relevant laws of that state.[105] In this regard, each contracting state has the duty to take all measures to apply the provisions of this convention within its jurisdiction.[106] In order to discuss the problems related to applying protection to cultural property, the Hague Convention 1954 provided authority to UNESCO to call upon a meeting of the contracting states if at least one-fifth of the contracting parties send a request to UNESCO to arrange a meeting.[107]

The Hague Convention also provides a set of regulations for the implementation of its provisions by the contracting state parties.[108] According to these regulations, it is recommended that the contracting state appoint an official representative for its territorial cultural property in the event that that state becomes involved in an armed conflict.[109] It is also essential that the contracting states also appoint official delegates, who will be former or on-duty diplomats, consular officials, etc.[110] The delegates have the responsibility to notify any breaches of the Hague Convention 1954.[111] They can also investigate the protection level applied by each contracting party to its cultural property.[112] Upon finding any breaches, they can attempt to end the violation or inform the

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[100] *See* 1954 Hague Convention, *supra* note 73, art. 15.

[101] *Id.*, art. 8(6).

[102] *Id.*, art. 9.

[103] *See* 1954 Hague Regulations, *supra* note 98, art. 15.

[104] *See* 1954 Hague Convention, *supra* note 73, art. 17(4).

[105] *Id.*, art. 28.

[106] *Id.*, art. 34(1).

[107] *Id.*, art. 27.

[108] Howard M. Hensel, The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force 65 (Ashgate Publishing 2007).

[109] *See* 1954 Hague Convention, *supra* note 73, art. 2.

[110] *Id.,* art. 3.

[111] *Id.,* art. 5.

[112] *Id.*

commissioner-general of the violations if they cannot do so.[113] The commissioner-general is a person of high authority who is chosen by the contracting states and is responsible for dealing with issues related to the application of the Hague Convention.[114]

The commissioner-general can also order the delegates—or can initiate of his/her own motion—an investigation of the breaches of any provision of the convention or any possible pillage of cultural property in times of peace or conflict.[115] Upon completion of the investigation, he prepares reports and shares them with the director-general of UNESCO and the contracting states.[116] The commissioner-general can also play the role of a protecting power if there is no authority applying protection to cultural property in a territory, particularly in the event of armed conflict.[117] He can also appoint special inspectors and experts on special missions such as to inspect a cultural property site to evaluate its protection.[118] If transportation of the cultural property is required from a dangerous site to a safer place, then the commissioner-general consults with the delegates of the contracting parties and the inspectors and then notifies the states and orders the inspectors to transport the property with the emblem to a safer location.[119]

In a nutshell, by offering the aforementioned legal provisions, the Hague Convention 1954 provides protection to cultural property and cultural heritage sites during armed conflicts.[120] The Hague Convention 1954 is the only convention that is solely focused on the issue of protecting cultural property and cultural heritage sites during peace and armed conflicts.[121] All of its provisions are focused on providing protection to cultural property and therefore it is considered an essential contribution to international law that protects international cultural heritage.[122]

B. Two Additional Protocols of 1977 to the Geneva Conventions of 1949

Although the four Geneva Conventions do not have any specific provisions that offer protection for cultural heritage and cultural property, the Additional Protocols I and II added such provisions in 1977.[123] Articles 53 and 85, Para-

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113 *Id*.

114 The president of the International Court of Justice can also appoint the commissioner-general if the consensus among the contracting states is not reached upon finalizing the name of a candidate for this role. *See* 1954 Hague Convention, *supra* note 73, art. 4(1) and 6(1).

115 1954 Hague Regulations, *supra* note 98, art. 6(3).

116 *Id.*, art. 6(5).

117 *Id.*

118 *Id.*

119 *Id.*, art. 17.

120 Alessandro Chechi, The Settlement of International Cultural Heritage Disputes 99 (Oxford University Press, 1st ed., 2014).

121 UNESCO, Gender Equality, Heritage and Creativity 145 (UNESCO, 2014).

122 *Id*.

123 Marshall J. Breger, Yitzhak Reiter, & Leonard Hammer, Sacred Space in Israel and Palestine: Religion and Politics 73 (Routledge, 2013) [hereinafter Breger, et al].

graph 4, of the First Additional Protocol 1977 are focused on cultural property protection.[124] The language of Article 53 prohibits warring parties from harming any historic site, cultural property, monument, religious place, artistic place, or object that is considered cultural heritage.[125] Furthermore, it also prohibits using any cultural property site or object for military purposes.[126]

Paragraph 4 of Article 85 of Additional Protocol I additionally recognizes that causing deliberate damage to historic monuments, cultural heritage sites, places of worship, and any cultural property will be considered a grave breach of Protocol I and a violation of the Geneva Conventions.[127] Paragraph 5 of the same article additionally ratifies the nature of such a breach of Protocol I as a war crime.[128] This ratification affirms that damaging cultural heritage or cultural property during armed conflict is a serious war crime and therefore all warring parties must avoid causing any kind of harm to cultural property objects or sites in a war region.[129]

On a similar note, Article 16 of Additional Protocol II of 1977 prohibits the parties to an armed conflict from causing damage to any cultural property object or heritage site, including historic monuments, artistic objects, statues, religious places, etc.[130] The language of Article 16 further proscribes the warring parties from using such objects or sites for military purposes.[131] It is pertinent to mention here that Additional Protocol I of 1977 is applicable to all international armed conflicts.[132] Therefore, in light of the provisions of Additional Protocol I, a state must avoid causing injury to the cultural heritage or cultural property sites of another state when it is at war with the latter state. On the other hand, Additional Protocol II of 1977 is ratified as applicable solely to all noninternational armed conflicts.[133]

Hence, upon considering the armed conflict relevant provisions of both 1977 Additional Protocols of the Geneva Conventions 1949, it can be asserted that the Additional Protocols become applicable to every armed conflict, whether between states, between a state and nonstate actors, or among nonstate actors. This

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[124] *Id*.

[125] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 53(a), June 8, 1977, 1125 U.N.T.S. 27 [hereinafter Protocol I].

[126] *Id.*, art. 53(b).

[127] *Id.*, art. 85.

[128] *Id*.

[129] Breger, et al., *supra* note 123.

[130] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 16, June 8, 1977, 1125 U.N.T.S. 616. [hereinafter Protocol II]

[131] *Id.*

[132] Breger et al., *supra* note 123, at 73.

[133] *Id*.

applicability reinforces the importance of the relevant provisions of the Additional Protocols of 1977 of the Geneva Conventions 1949.[134]

C. UNESCO Conventions

UNESCO contributed by organizing two conventions, the first in 1970 and the second in 1972.[135] These two conventions are aimed at protecting cultural property and heritage.[136] The conventions were drafted in the sixteenth and seventeenth sessions of the General Conference of UNESCO, in Oct–Nov 1970 and Oct–Nov 1972, respectively.[137]

1. UNESCO Convention 1970

The UNESCO Convention 1970, formally the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, provides legal principles and recommendations for the protection of cultural property and heritage in times of peace and armed conflict.[138] Iraq and Syria, where ISIS has caused severe pillage of cultural property and heritage sites, are also parties to this convention.[139] The main focus of this convention is to prevent the loot, plunder, theft, and illegal trade of cultural property.[140] The convention also prohibits museums and institutions in a state from accepting cultural property objects that have been stolen from another state.[141] It recommends that authorities return any stolen objects found by them to their

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[134] Moreover, the language of both Article 53 of Additional Protocol I and Article 16 of Additional Protocol II of 1977 tends to agree with the provisions of the Hague Convention and even tends to give it pre-eminence. *See* Protocol I, *supra* note 125, at 27. ("Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; b) to use such objects in support of the military effort; c) to make such objects the object of reprisals"); Protocol II, *supra* note 130, at 616 ("Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort").

[135] Christina Cameron & Mechtild Rössler, Many Voices, One Vision: The Early Years of the World Heritage Convention 17 (Routledge, 2016) [hereinafter Cameron and Rössler].

[136] Christina Marie Luke & Morag M. Kersel, U.S. Cultural Diplomacy and Archaeology 63 (Routledge, 2013) [hereinafter Luke].

[137] Sophia Labadi, UNESCO, Cultural Heritage, and Outstanding Universal Value: Value Based Analyses of the World Heritage and Intangible Cultrual Heritage Conventions 27 (AltaMira Press, 2013) [hereinafter Labadi].

[138] Christiane E. Philipp & Jochen Abr Frowein, Max Planck Yearbook of United Nations Law 320 (Martinus Nijhoff Publishers 2001).

[139] Helga Turku, The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq 104 (Palgrave and Macmillan, 2018) [hereinafter Turku].

[140] Barbara T. Hoffman, Art and Cultural Heritage: Law, Policy, and Practice 3-4 (Cambridge University Press, 2006) [hereinafter Hoffman].

[141] *Id.* at 5.

original owners.[142] However, if the property in a state is in danger, then that state can also make a formal request to other states for assistance in protecting its cultural property.[143]

On the other hand, the 1970 Convention also endorses prosecuting any individual, even army personnel, involved in the theft or smuggling of cultural property objects from one region to another.[144] In the event of any illegal transfer of a cultural property object by army personnel during armed conflicts, that object must be seized and returned to its original place.[145] Pertinently, the convention also makes it obligatory on each state to ensure the protection of the cultural property located within its territorial limits.[146] A unique provision of the UNESCO Convention 1970 is that it also lists the fauna and flora of a state as a part of the cultural property of the state.[147] This was not added in the Hague Convention 1954. Furthermore, the UNESCO Convention recognizes that the illegal trade of the cultural property of a state during peace or conflict is the essential reason for the impoverishment of cultural heritage of that state.[148]

In order to ensure the protection of cultural property and heritage from illegal trade in times of peace or conflict, the convention also recommends the formation of special services at a national level in each state, for which very experienced and trained experts should be hired.[149] The experts should have the ability to safeguard or take the property to a safer location during times of conflict. Pertinently, the experts should also be sufficiently qualified to formulate policies, laws, and regulations for the protection of cultural property from illicit trade.[150] Thus, in a nutshell, the UNESCO Convention of 1970 is only focused on preventing cultural property from being smuggled, whether in the times of peace or conflict, from one state to another.

2. World Heritage Convention (UNESCO Convention 1972[151])

The UNESCO Convention of 1972, also called the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, considers that cultural heritage is threatened by various factors of a traditional and modern nature.[152] Armed conflict is one of these factors.[153] The convention considers the damage of any cultural property or heritage in a region to be an impoverishment

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142 *See* Article 18, UNESCO Convention, 1970.

143 Turku, *supra* note 139.

144 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, April 24, 1972, 823 UNTS 242 [hereinafter UNESCO Convention].

145 *Id.* at 240, 244.

146 UNESCO Convention, *supra* note 144.

147 *Id.* at 234-6.

148 UNESCO Convention, *supra* note 144.

149 *Id.*

150 *Id.* at 238.

151 This Convention is also named the World Heritage Convention.

152 Mariana Correia et al., Vernacular Heritage and Earthen Architecture: Contributions for Sustainable Development 827 (CRC Press, 2013).

to international cultural heritage.[154] It therefore ratifies the protection of cultural property and heritage as an essential responsibility of all nations.[155] Article 6 of this convention recommends that states respect the sovereignty of other states, particularly those where the cultural heritage sites are situated.[156] Furthermore, it recommends that states not deliberately cause harm to the cultural property and heritage of other states in times of armed conflicts.[157]

Section III of the UNESCO Convention 1972 approves the formation of an international committee, the World Heritage Committee, which will be responsible for performing several duties mentioned in the convention to protect cultural property and heritage in times of peace and armed conflict.[158] The committee will work under the flag of UNESCO[159] and will keep an up-to-date record of the cultural property and heritage sites of contracting states and publish it under the title of "World Heritage List."[160] It will update this list every two years;[161] it can also add endangered cultural heritage sites or cultural property that is at risk of pillage, damage, etc. owing to armed conflict or any other danger such as natural disasters like earthquake or floods in its vicinities.[162]

Furthermore, the World Heritage Committee can also receive and approve requests from states for assistance in protecting cultural property and heritage in times of peace and armed conflict.[163] For this purpose, it can coordinate with the national agencies of the states, NGOs,[164] the International Union for Conservation of Nature and Natural Resources (IUCN), the International Council of Monuments and Sites (ICOMOS), the International Center for the Study of the Preservation and Restoration of Cultural Property, and any other relevant agencies that may have the capability to protect the endangered cultural property and heritage.[165] Its decisions regarding protecting a particular cultural property or heritage site are based on the approval of a two-thirds majority of its members,

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153 Convention Concerning the Protection of the World Culture and Natural Heritage, 6, December 15, 1975, 1037 UNTS 156 [hereinafter UNESCO 1972].

154 *Id.* at 152-3 (considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world). *See also* MICHAEL A. DIGIOVINE, THE HERITAGE-SCAPE, UNESCO, WORLD HERITAGE, AND TOURISM 76 (Lexington Books 2009); 2 UNESCO, STANDARD-SETTING AT UNESCO CONVENTIONS, RECOMMENDATIONS, DECLARATIONS AND CHARTERS ADOPTED BY UNESCO (1948-2006) 135 (Brill 2007).

155 UNESCO 1972, *supra* note 153 (Article 6 of the UNESCO Convention 1972 endorses cooperation among all states and recommends that it is the duty of the entire international community to protect the world heritage).

156 *Id.*, art. 6(1).

157 *Id.,* art. 6(3).

158 *Id.*, art. 8(1).

159 *Id*.

160 UNESCO 1972, *supra* note 153, art. 11(2).

161 *Id*.

162 *Id.*, art. 11(4).

163 *Id.,* art. 13(1).

164 Nongovernmental Organizations (NGOs).

165 UNESCO 1972, *supra* note 153, art. 13(7).

who are themselves appointed by UNESCO from the contracting states in different regions.[166]

In this regard, if a cultural property or heritage site is adversely affected or damaged owing to an armed conflict in the region, then the World Heritage Committee of UNESCO also provides assistance in the form of training, scientific expertise, and financial assistance for the rehabilitation of the affected cultural property.[167] The financial assistance is managed by the World Heritage Fund, which was formed in accordance with the UNESCO Convention of 1972.[168] This fund is managed by UNESCO and all states that are parties to the UNESCO Convention 1972 provide funding to manage the fund.[169]

Hence, the UNESCO Conventions of both 1970 and 1972 offer protection to cultural property and heritage while staying within their scope of operations.[170] The former prohibits the illegal trade of cultural property,[171] while the latter proscribes states from harming cultural property and heritage in times of peace and conflict.[172] The 1972 Convention also establishes the World Heritage Committee and World Heritage Fund to protect and rehabilitate cultural property and heritage in times of danger, particularly in armed conflict.[173] This aspect related to the rehabilitation of cultural property and heritage sites can be applied in the ongoing conflict situation in Syria, Iraq, and Libya for rehabilitating the cultural property and heritage there. ISIS has already destroyed cultural property and heritage sites of colossal value in these regions.[174] The provisions of the UNESCO Convention 1972 should be applied there for reforming and rehabilitating the cultural property and heritage in these states.

D. UN Resolutions

The United Nations has also passed certain orders and resolutions aimed at protecting cultural property and heritage during armed conflicts.[175] For instance, UN Security Council Resolution 2100 paved the way for the establishment of a separate mission to protect cultural property and heritage in Mali.[176] The mission was named the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).[177] The mission was also given a task to provide support, in

166 UNESCO 1972, *supra* note 153, art. 13(8).

167 *Id.*, art. 22, 23.

168 *Id.*, art. 15.

169 *Id.*, art. 16.

170 Luke, *supra* note 136.

171 ICOM, Museums, Ethics and Cultural Heritage 85 (Routledge 2016).

172 *Id.*

173 UNESCO 1972, *supra* note 153, art. 8, 15.

174 For details about the destruction of cultural heritage in Iraq and Syria, *see* Robert Spencer, The Complete Infidel's Guide to ISIS ch. 4 (2015).

175 *See* Hoffman, *supra* note 140, at 2.

176 *See* S.C. Res. 2100 (Apr, 25, 2013).

177 *Id.*

collaboration with UNESCO, to authorities in Mali for the protection of cultural heritage sites from all kinds of armed or other attacks.[178]

1. Resolutions for Protecting Cultural Property in Iraq and Syria

The United Nations Security Council has also presented resolutions for the protection of cultural property and heritage sites in Iraq and Syria.[179] Resolution 1483 was presented in 2003 while coalition forces were making a joint operation in Iraq.[180] Through this resolution, the UN Security Council recommended that coalition parties not only ensure the protection of Iraqi cultural heritage and cultural property but also return the cultural property that had been illicitly removed from Iraq's National Library and National Museum since 1990.[181] Furthermore, the resolution also ordered coalition forces to prevent the illegal trade and sale of Iraqi cultural property.[182] Thus, this resolution made the belligerent coalition forces responsible for protecting and safely returning Iraqi cultural property to its original place and for causing no damage to it during the fighting.[183]

On a similar note, Resolution 2199 was presented by the UN Security Council in response to the growing threats of ISIS attacks on Syrian and Iraqi cultural property.[184] This resolution recommended all member states of the UN Security Council to take suitable action to prevent the illegal trade of Syrian and Iraqi cultural property.[185] For instance, the Security Council recommended that member states prohibit and report such trade at their own borders.[186] Thus, this resolution also made the forces deployed by UN member states in Iraq and Syria prevent Iraqi and Syrian cultural property from being moved across the borders of Iraq and Syria.[187] In this way, it could be ensured that no illicit trading or smuggling of Iraqi and Syrian cultural property takes place and that no property is removed from its original place.

Upon following this recommendation of UN Security Council Resolution 2199, the military forces became liable to follow the resolutions of the Security Council, and accordingly they are responsible for protecting cultural property and heritage in Iraq and Syria. However, the effectiveness of their efforts is being

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[178] *See* S.C. Res. 2100 (Apr, 25, 2013).

[179] *See* Hoffman, *supra* note 140, at 2.

[180] *Id. See also* Wolff Heintschel von Heinegg, *Iraq, Invasion of (2003) in* The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law 590, 591 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

[181] *See* Hoffman, *supra* note 140, at 2. *See also* S.C. Res. 1483 (May 22, 2003).

[182] S.C. Res. 1483, *supra* note 181.

[183] *Id.*

[184] *See* S.C. Res. 2199, (Feb. 12, 2015).

[185] *Id.*

[186] *Id.*

[187] *Id.*

harmed by the illicit terrorist activities of ISIS in these regions,[188] as set out in the previous section. It is also essential to note that the recommendations given by the UN Security Council through its resolutions are binding upon member states as per Article 25 of the Charter of the United Nations.[189] Therefore, member states have the obligation to ensure protection of their cultural property and heritage sites as well as those of other states with which they are in armed conflict.

In addition to recommending that member states' military forces protect the cultural property of other states during armed conflict, the United Nations has also set a military manual for its own military forces to ensure the protection of cultural property and heritage during its operations in peace or armed conflict.[190] The Bulletin of the United Nations Secretary-General, presented in 1999, forms the basis of the UN forces' military manual related to protecting cultural property and heritage during armed conflict.[191] The bulletin is titled *Observance by United Nations Forces of International Humanitarian Law*.[192] Section 6 of this bulletin strictly prohibits UN forces from attacking cultural property in a territory or using that property as a shield or for other military purposes,[193] including for military advantage.[194] Thus, the United Nations is also making efforts through legal provisions for the protection of cultural property and heritage in situations of armed conflict.[195] UN member states must follow these provisions and ensure the protection of cultural property and heritage, both theirs and those of other states during armed conflicts.[196]

E. Provisions Related to the Protection of Intangible Cultural Heritage during Armed Conflicts

As set out above in the first section of this paper, intangible cultural heritage is being threatened during armed conflict. However, there are only a few provisions found in international law related to providing protection to intangible cultural heritage during armed conflict.[197] The Hague Convention 1954, which is at the

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[188] ISIS has already caused massive damage to cultural heritage in Iraq and Syria. This damage has appeared to be an uncontrollable factor for the military forces stationed in Iraq and Syria. For details of the damage to cultural heritage, *see* Spencer, *supra* note 174.

[189] *See* U.N. Charter art. 25.

[190] *See* Camille Péron, Gianluca Ferrari, Roger O'Keefe, & Tofig Musayev, Protection of Cultural Property: Military Manual 9 (UNESCO, 2016).

[191] *Id.*

[192] *See* U.N. Secretary-General, Bulletin on Observance by United Nations forces of international humanitarian law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

[193] *Id.* at §6(6), (9).

[194] *Id.* at §5.

[195] *See* G.A. Res. 64/83, (Dec. 10, 2009).

[196] U.N. Charter art. 25. *See also* N.D. White, Keeping the Peace 62 (1993).

[197] Rebecca Tsosie, *International Trade in Indingenous Cultural Heritage: an argument for indigenous governance of cultural property, in* International Trade in Indigenous Cultural Heritage: Legal and Policy Issues 221, 233 (Christoph Beat Graber, Karolina Kuprecht, & Jessica C. Lai eds. 2012).

center of providing legal recommendations for the protection of cultural property during armed conflicts, also lacks relevant provisions in this regard.[198] Upon probing further into the field of international law, international humanitarian law, human rights law, certain provisions of the ICCPR[199] and of the Geneva and UNESCO Conventions appear relevant in offering indirect protection for intangible cultural heritage during armed conflicts.[200]

1. Articles 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR)

Article 18 of the ICCPR provides freedom to every person to practice religion, express their thoughts, make choices, and, ultimately, perform any cultural practice or activity as per their beliefs.[201] This freedom stays valid during both peace times and armed conflicts.[202] No party to an armed conflict can infringe these rights.[203] Thus, this article upholds respect for human conscience, religion, culture, freedom, etc. during armed conflicts.[204]

Article 19 of the ICCPR further augments the importance of human freedom of expression, including artistic, religious, cultural expressions, etc., which are essentially included in the category of intangible cultural heritage.[205] Furthermore, no restrictions can be applied on such cultural expressions, particularly if such expressions do not present harm to the cultural expressions of any other person, except in the exceptional cases of national security or for the protection of the rights of other human beings.[206] This indicates that freedom of expression has been assigned a superior position by Article 19 of the ICCPR. Freedom of expression constitutes a freedom of cultural and artistic expression and is in-

198 As per the definition of "cultural property" in the Hague Convention's Article 1, "old manuscripts, books, and scientific collections" are included in the list of cultural property. Providing protection to such items would also imply protecting intellectual property and knowledge, which are considered essentially important intangible cultural heritage. For details, *see* 1954 Hague Convention, *supra* note 73, art. 1. Other than the definition in Article 1, there is nothing mentioned in the text of the Hague Convention 1954 about intangible cultural property protection, which clearly implies that severe gaps exist in the Hague Convention 1954 in addressing the protection on intangible cultural heritage. *See* Toman, *supra* note 21, 678. *See also* Christiane Johannot-Gradis, *Protecting the past for the future: how does law protect tangible and intangible cultural heritage in armed conflict?* 900 Int'l Rev. Red Cross 1253, 1256 (2015).

199 *See* Johannot-Gradis, *supra* note 198, at 1259.

200 *Id*.

201 Cherian George, Hate Spin: The Manufacture of Religious Offense and Its Threat to Democracy 32 (2016). *See also* Karen Murphy, State Security Regimes and the Right to Freedom of Religion and Belief: Changes in Europe Since 2001 21 (2013).

202 This is because the ICCPR applies binding obligations on all states. Therefore, its recommendation to states for respecting individual freedom stays in-tact in all kinds of situations, and remains unaffected whether in the presence of an armed conflict. Thus, states have to follow this principle during armed conflicts as well. *See* Peter W. Edge, Religion and Law: An Introduction 47 (2013).

203 *Id.*

204 *See* Murphy, *supra* note 201.

205 Human Rights Watch, False Freedom: Online Censorship in the Middle East and North Africa 11 (2005).

206 *Id.*

cluded in the category of intangible cultural heritage.[207] Hence, the ICCPR provides importance to the upholding of intangible cultural expressions in times of peace and conflicts.

2. Hague Conventions of 1899 and 1907

The Hague Conventions of 1899, which were revised in 1907, include provisions offering implicit protection to intangible cultural heritage.[208] Article 27 of the Hague Convention (IV) of 1907 prohibits warring parties from causing any damage to a place that has religious, artistic, historic, scientific, or medical importance.[209] This implies a direct protection of tangible cultural property but also an indirect protection of intangible cultural property. This is because the protection of historic, religious, and artistic places implies a continuation of cultural, religious, and ritualistic practices of the people at such places. This will eventually lead to the preservation of such practices that are, in fact, an essential part of the intangible cultural heritage.[210]

Similar implications can be drawn from Article 56 of the Hague Convention (IV) of 1907, which further includes places of education among the places that must be protected by warring parties during armed an conflict, because the protection of such places will result in the preservation of education or knowledge as an intangible cultural heritage.[211] It is pertinent to mention here that the provisions of the Hague Conventions of 1899 and 1907 are legally binding on states.[212] Therefore, states must implement and follow these provisions during armed conflicts.[213] Hence, it can be asserted that the Hague Convention (IV) of 1907 applies implicit protection to intangible cultural heritage along with tangi-

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[207] This is because the freedom of expression preserves an individual's willingness and ability to participate in cultural and artistic activity. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, in* INFORMATION ETHICS: PRIVACY, PROPERTY, AND POWER 297, 299 (Adam D. Moore ed., 2005).

[208] ALISON DUNDES RENTELN, JAMES A.R. NAFZIGER, & ROBERT KIRKWOOD PATERSON, CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS 347 (2010).

[209] *See* 1954 Hague Convention, *supra* note 73, art. 27. *See also* Chantal Meloni & Gianni Tognoni, *Selected Materials from the International Conference 'Is There a Court for Gaza?' 22 May 2009, Lelio Basso International Foundation, Rome, in* IS THERE A COURT FOR GAZA? 13, 68 (Chantal Meloni & Gianni Tognoni eds., 2012).

[210] For instance, the protection of education institutes and artistic places will result in the preservation of education, knowledge, artistic expression, and rituals, which are intangible cultural properties.

[211] *See* YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 245 (2009). *See also* JOHN HENRY MERRYMAN, ALBERT EDWARD ELSEN, & STEPHEN K. URICE, LAW, ETHICS, AND THE VISUAL ARTS 15 (5th ed. 2007).

[212] FADIA DAIBES-MURAD, A NEW LEGAL FRAMEWORK FOR MANAGING THE WORLD'S SHARED GROUNDWATERS 56 (2005).

[213] This is because these conventions were essentially drafted to regulate the conduct of states during armed conflict. Their legally binding attributes make it compulsory on states to follow and implement them. *See* Rüdiger Wolfrum, *Protection of Cultural Property in Armed Conflict, in* THE PROGRESSION OF INTERNATIONAL LAW 297, 299 (Fania Domb & Yoram Dinstein eds., 2011). *See also* BESFORT T. RRECAJ, POLITICS OF LEGAL REGIMES OF NUCLEAR ENERGY IN THE ASPECT OF INTERNATIONAL SECURITY 67 (2014).

ble cultural property. Thus, it considers all aspects of cultural heritage that require mandatory protection during armed conflicts.[214]

3. UNESCO Convention

Article 1 of the UNESCO Convention 1970 includes manuscripts, old books, and literary and artistic collections to be included in the category of cultural property.[215] The convention endorses the full protection of such property during armed conflicts, which indicates an indirect protection of intangible cultural heritage. That is, the knowledge, literature, education, artistic expressions, etc. mentioned in those old books and manuscripts are the intellectual property of the local residents, and, as mentioned earlier, intellectual property is an essential intangible cultural heritage property.[216] Thus, the UNESCO Convention applies protection to intangible cultural property in an indirect manner by recommending provisions for the protection of the objects containing such property, i.e. the old books and manuscripts involving knowledge and intellectual property.

This discussion establishes that international law has provided numerous provisions that affirm the principles, rules, and recommendations for the protection of cultural heritage property during times of armed conflicts. The 1954 Hague Convention and the UNESCO Conventions of 1970 and 1972 have essentially formed the basis for such provisions. However, the majority of these provisions regulate the protection level on tangible cultural property. Nonetheless, intangible cultural property can be protected by applying these provisions indirectly. That is, the preservation of educational institutes and artistic places will likely result in the preservation of intangible cultural property such as education, knowledge, arts, and cultural ritualistic practices. The need is to follow and implement these provisions by all states to ensure national- and international-level protection of international cultural heritage. In this way, the effectiveness of these provisions will become apparent and realistic.

IV. International Organizations Working for the Protection of Cultural Heritage during Armed Conflicts

In addition to the protection offered by international conventions for the protection of cultural heritage, there are several international organizations working globally to protect cultural property and heritage.[217] The most prominent of these organizations are UNESCO, the International Committee of the Red Cross, ICOMOS, the International Council of Museums (ICOM), the World Customs Organization (WCO), the International Alliance for the Protection of Cultural

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214 Wolfrum, *supra* note 213.

215 *See* UNESCO Convention, *supra* note 142, art. 1.

216 Charlie T. McCormick & Kim Kennedy White, Folklore: An Encyclopedia of Beliefs, Customs, Tales, Music, and Art, 329 (ABC-CLIO, 2011).

217 *Editor's Note, in* BUILDING SAFER CITIES: THE FUTURE OF DISASTER RISK xiv, xix (Alcira Kreimer, Margaret Arnold, & Anne Carlin eds., 2003).

Heritage in Zones of Conflict (ALIPH), and the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

A. UNESCO

UNESCO is the leading agency, putting substantial efforts into the protection of international cultural heritage and property in times of peace and armed conflict.[218] It has drafted two major conventions—the UNESCO Convention 1970 and the World Heritage Convention (UNESCO Convention 1972)—and has contributed to provisions of the 1954 Hague Convention.[219] Moreover, it has also contributed to the drafting of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 and the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.[220] UNESCO has a key role in the application of provisions of the 1954 Hague Convention.[221] It also offers technical and scientific support to the 1954 Hague Convention's contracting parties.[222] Furthermore, UNESCO also holds meetings of the contracting parties to the 1954 Hague Convention to discuss and resolve issues related to the application of the Hague Convention and to providing protection to cultural property and heritage in armed conflicts.[223]

The role of the director-general of UNESCO is also essential in relation to the application of the provisions of the 1954 Hague Convention, the 1970 UNESCO Convention, and the 1972 World Heritage Convention.[224] The director-general has the authority to decide on adding new members as contracting state parties to these conventions.[225] Furthermore, the director-general also facilitates the approval of amendments proposed by the contracting state parties to the 1954 Hague Convention.[226] Furthermore, the notification of acceptance of the new amendments by the contracting parties is also issued by the director-general.[227]

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[218] William S. Logan, *Cultural Diversity, Heritage and Human Rights, in* THE ASHGATE RESEARCH COMPANION TO HERITAGE AND IDENTITY 439, 439 (Peter Howard & Brian Graham eds., 2016). *See also* William S. Logan, *Patrimonito leads the way – UNESCO, Cultural Heritage, Children and Youth*, *in* CHILDREN, CHILDHOOD AND CULTURAL HERITAGE 21, 21 (Carla Pascoe & Kate Darian-Smith eds., 2013). *See also* CATHERINE GRANT, MUSIC ENDANGERMENT: HOW LANGUAGE MAINTENANCE CAN HELP 41 (2014).

[219] Elizabeth Lillehoj, *Stolen Buddhas and Sovereignty Claims, in* ART AND SOVEREIGNTY IN GLOBAL POLITICS 141, 143 (Douglas Howland, Elizabeth Lillehoj, & Maximilian Mayer eds., 2016).

[220] *See* Grant, *supra* note 218.

[221] ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 236 (2006).

[222] 1954 Hague Convention, *supra* note 73, art. 23(1). *See* Roger O'Keefe, *Protection of Cultural Property, in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 492, 505 (Andrew Clapham & Paola Gaeta eds., 2014).

[223] S*ee* 1954 Hague Convention, *supra* note 73, art. 27(2). *See also* Toman, *supra* note 21, at 537.

[224] *See* Toman, *supra* note 21, at 23.

[225] *See, e.g., 1954 Convention: New Members Elected to Protect Cultural Property*, UNESCO, https://en.unesco.org/news/1954-convention-new-members-elected-protect-cultural-property.

[226] *See* 1954 Hague Convention, *supra* note 73, art. 39. *See also* SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW 363 (2013).

[227] *See* 1954 Hague Convention, *supra* note 73, art. 39(3).

The director-general also maintains an International Register of Cultural Property under Special Protection and regularly updates it, as well as providing it to the 1954 Hague Convention's contracting state parties and the secretary-general of the United Nations.[228] It is the upon the sole discretion of the director-general of UNESCO to register a particular cultural property or heritage site in the category of having refuge in armed conflict or in other categories, e.g., monuments.[229] While states can also make requests to the director-general to add or remove a particular cultural heritage property in the list of refuges or any other category, the final decision of its registration remains with the director-general.[230]

1. World Heritage Committee and World Heritage Fund

The establishment of the World Heritage Committee and the World Heritage Fund are among the most prominent contributions made by UNESCO for the protection of cultural property and heritage.[231] The World Heritage Committee was established within UNESCO in accordance with the provisions of the World Heritage Convention[232] in 1972.[233] The World Heritage Committee is responsible for providing technical, scientific, and financial assistance for cultural property and heritage protection in the contracting states.[234] Thus, the committee provides tangible support for the protection of cultural heritage in conflict-stricken areas.[235] Furthermore, it also makes a list of such cultural property and heritage sites at risk of harm by certain situations such as natural disasters or armed conflicts.[236]

On the other hand, the World Heritage Fund was established in 1972 following the World Heritage Convention, organized by UNESCO.[237] The fund, as managed by UNESCO, provides financial assistance to states for cultural property protection during armed conflicts.[238] All the contracting states of the UNESCO Convention 1972 provide funding for it.[239]

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228 *See* 1954 Hague Convention, *supra* note 73, art. 12(2).

229 *Id*., art. 12(3).

230 *Id.,* arts. 13(1), 16(1).

231 *See* Lynn Meskell & Christoph Brumann, *UNESCO and New World Orders, in* GLOBAL HERITAGE: A READER 22, 25 (Lynn Meskell ed., 2015).

232 The World Heritage Convention is also called the UNESCO Convention 1972. *See* Patrick J. Boylan, *Geological Site Designation under the 1972 UNESCO World Heritage Convention, in* THE HISTORY OF GEOCONSERVATION 279, 279 (Cynthia V. Burek & Colin D. Prosser eds., 2008).

233 Lillehoj, *supra* note 219.

234 *See* World Heritage Convention, *supra* note 155, arts. 22, 23.

235 This is because the scientific assistance provided by World Heritage Committee of UNESCO in terms of knowledge and training given to the member states for protecting cultural property is considered an intangible support. On the other hand, the materialistic support will be considered tangible support.

236 It keeps this list under the "World Heritage List" title. *See* World Heritage Convention, *supra* note 155, art. 11(4).

237 *See* World Heritage Convention, *supra* note 155, art. 15(1).

238 *See* Toman, *supra* note 21, at 605.

239 *See* World Heritage Convention, *supra* note 155, arts. 16(1), 18.

2. International Council on Monuments and Sites

ICOMOS is an advisory body of the World Heritage Committee and it works at the global level to apply the provisions of the UNESCO Convention 1972 for the protection of cultural heritage sites.[240] The efforts made by UNESCO to protect cultural property and heritage sites in Iraq and Syria are contributed to and augmented by ICOMOS.[241] Furthermore, it also makes contributions to the conferences and debates organized by UNESCO on the topic of cultural property and heritage protection in regions, particularly in Iraq and Syria.[242] ICOMOS also collaborates with the IUCN and the International Centre for the Study of the Preservation and Restoration of Cultural Property to apply the provisions of the UNESCO Convention 1972 in times of peace and conflict.[243] ICOMOS also evaluates the nominations of cultural properties to be considered as having "outstanding universal value" as per the criterion in the UNESCO Convention 1972.[244]

ICOMOS, the World Heritage Committee, and the World Heritage Fund have all played important roles in the protection of cultural property and cultural heritage during armed conflicts.[245] Therefore, it can be asserted that UNESCO has made several valuable efforts for the protection of cultural property and heritage sites during armed conflicts as well as for the application of the provisions of international law specifically aimed at protecting cultural heritage in conflict zones.[246]

3. International Alliance for the Protection of Cultural Heritage in Zones of Conflict (ALIPH)

A new organization, ALIPH, was founded by UNESCO in collaboration with the UAE and France in March 2017.[247] The organization raised around 75 million US Dollars in its first session in March.[248] The fund will be used to protect threatened cultural property, particularly in conflicted-affected regions in Iraq and Syria. In May this year, another six countries including Saudi Arabia, Kuwait, Switzerland, Morocco, and Luxembourg pledged support to this organiza-

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240 *See* Hoffman, *supra* note 140, at xxxvii.

241 *Id.*

242 *See* Hoffman, *supra* note 140, at xxxvii.

243 Gill Chitty, Heritage, Conservation and Communities: Engagement, Participation and Capacity Building, 29 (Taylor & Francis, 2016).

244 *See, e.g.*, Labadi, *supra* note 137, at 38.

245 *See, e.g.,* Patrick J. Boylan, *Cultural Protection in Times of Conflict, in* ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY 43, 85 (Neil Brodie & Kathryn Walker Tubb eds., 2013).

246 Kate Fitz Gibbon, *Chronology of Cultural Property Legislation, in* WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 3, 5 (Kate Fitz Gibbon ed., 2005).

247 See Media Report UNESCO, France and the Emirates Launch an International Alliance for the Protection of Heritage, UNESCO Media Services (Mar. 20, 2017), http://www.unesco.org/new/en/media-services/single-view/news/unesco_france_and_the_emirates_launch_an_international_alli/ [hereinafter UNESCO Media Report].

248 *Id.*

tion for the protection of cultural property in the conflict-affected regions.[249] It is expected that more states, including China, the United Kingdom, Italy, Germany, Mexico, and South Korea will pledge their support to this organization.[250] The fund of this organization is an effort to contribute to cultural heritage and property in conflict-affected zones.[251] As per statistics revealed in a session of this organization, terrorist organizations, including ISIS, have caused damage of around 150 million dollars to international cultural property and heritage.[252]

The establishment of ALIPH is another indication of the essential role being played by UNESCO for the protection of cultural property and cultural heritage in times of armed conflicts since the 1954 Hague Convention. UNESCO has exhibited as well as practically implemented its resolve by performing actions to protect cultural property and heritage in conflict zones as well as by making efforts toward the full application of Hague Convention of 1954 and of its two protocols, the UNESCO Convention of 1970, and the World Heritage Convention 1972.[253]

B. International Council of Museums (ICOM)

ICOM is an international organization that publishes a list of cultural property objects that are in endangered or conflict zones.[254] In this way, its publications facilitate the identification of stolen, damaged, and smuggled cultural property,[255] thus preventing the open sale and export of such objects. ICOM has published the details of Iraqi, Syrian, and Libyan cultural objects in 2003, 2013, and 2015, respectively, when armed conflict was waged in these regions.[256] It highlighted the names and details of the threatened cultural property in these regions.[257]

C. World Customs Organization (WCO)

The WCO has the core objective of preventing the illegal trade of cultural property at the international level.[258] It ratifies the smuggling of cultural property as an organized crime and rates it within the category of money laundering.[259] It

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249 UNESCO Media Report, *supra* note 247.

250 *Id.*

251 *Id.*

252 Buffenstein, *supra* note 39.

253 *See, e.g.* Gibbon, *supra* note 246.

254 Martin R. Scharer, *The work of the ICOM Ethics Committee, in* MUSEUMS, ETHICS AND CULTURAL HERITAGE, 17 (ICOM ed., 2016).

255 *See* Hoffman, *supra* note 140, at 66.

256 STUART CASEY-MASLEN, THE WAR REPORT: ARMED CONFLICT IN 2013 384 (Oxford University Press 2014).

257 *Id.*

258 IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 184 (Edward Elgar Publishing 2011) [hereinafter Stamatoudi].

259 *Id.*

also identifies the cultural property objects that have been stolen or are traded illicitly[260] and coordinates their identification to the relevant authorities through its customs enforcement network databases.[261] For those cultural property objects that are required to be traveled from one region to another for their protection or for any other legitimate reason, the WCO issues special export certificates for such objects after confirming the legitimacy and legality of their trade.[262] It also collaborates with ICOM and UNESCO to exchange information related to the stolen cultural property.[263]

The WCO has also implemented its operations in Syria and Iraq.[264] It has discovered the illegal trading of cultural objects in both regions and has also facilitated the returning of these objects to museums in Syria and Iraq.[265] However, it has also demanded the authorities in these regions increase cross-border vigilance in order to prevent the illegal trade of cultural objects.[266]

D. Committee for the Protection of Cultural Property in the Event of Armed Conflict

This organization was established in 1999 in accordance with the recommendation in the 1999 Second Protocol to the Hague Convention 1954.[267] It has a core objective of protecting cultural property in conflict regions, managing a list of cultural property under enhanced protection in accordance with the Hague Convention, managing the Fund for Protection of Cultural Property in the Event of Armed Conflict, and ensuring the full application of the provisions of the Second Protocol worldwide, especially in armed conflict regions.[268] It has 12 states as its members, which are also contracting parties to the Second Protocol to the Hague Convention 1954.[269] The members of this committee hold annual

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260 *Id*.

261 Lorraine Elliott & William H. Schaedla, Handbook of Transnational Environmental Crime 479 (Edward Elgar Publishing, 2016).

262 The certificate issuing process has been started by WCO in acollaboration with UNESCO. The certificates are also called the UNESCO-WCO Model Export Certificate for Cultural Objects. *See* Stamatoudi, *supra* note 309, at 258.

263 *Id*.

264 Nordic Council of Ministers, Illicit Trade in Cultural Artefacts: Stronger Together: How Can the Nordics Join Forces to Stop the Illegal Import and Export of Cultural Objects? 57 (Nordic Council of Ministers 2017).

265 Press Release, WCO, WCO Calls for Increased Border Vigilance to Protect Syria's Cultural Heritage (Mar. 19, 2012), http://www.wcoomd.org/en/media/newsroom/2012/march/wco-calls-for-increased-border-vigilance-to-protect-syrias-cultural-heritage.aspx.

266 *Id*.

267 Toman, *supra* note 223, at 528.

268 Andrew Clapham & Paola Gaeta, The Oxford Handbook of International Law in Armed Conflict 506 (Oxford University Press 2014) [hereinafter Clapham & Gaeta].

269 *See* Article 24, Second Protocol to the Hague Convention 1954.

meetings to discuss the effectiveness of the operations for the protection of cultural property in conflict-affected regions.[270]

In addition to the annual meeting, the committee can also hold special sessions in the event of any risk to the cultural property of a region.[271] The members of this committee provide recommendations in the special meetings for performing special steps for the protection of the endangered cultural property in a conflict-affected region.[272] In this regard, the member states, the contracting parties to the Second Protocol of Hague Convention, or the director-general of UNESCO can also call special meetings of this committee.[273]

These international organizations are working within their spheres of operations for the protection of cultural heritage in armed conflicts. However, it is also essential that states also collaborate with such organizations and should facilitate the smooth continuation of their operations. This can be done by listening to the recommendations that such organizations may give to states for the protection of cultural heritage in the event of armed conflicts. When it is possible to collaborate with the national authorities of the states, these organizations, including UNESCO, can work more effectively and efficiently to protect cultural heritage property from all kinds of underlying threats in times of peace and conflicts.

V. Gaps and Challenges in Protecting International Cultural Heritage during Armed Conflicts

Despite there being multiple provisions and organizations in operation for the protection of international cultural heritage during armed conflicts, there are several gaps and challenges present in their effective operation.[274]

A. Gaps Related to the Hague Convention 1954

The Hague Convention of 1954 also has certain gaps related to the implementation of its provisions. These are related to setting up an effective universal jurisdiction for the prosecution of the perpetrators of its provisions.

1. Universal Jurisdiction to Prosecute Offenders

Although the Second Protocol of the Hague Convention manages to apply universal jurisdiction in defining the violations related to the protection of cultural heritage property, it does not define the procedures to prosecute the viola-

[270] Committee for the Protection of Cultural Property in the Event of Armed Conflict, *UNESCO,* 2017, http://www.unesco.org/eri/committees/Committees_and_Organs_GC.asp?code=+2+76&language=E.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *See, e.g.,* Brad Jessup & Kim Rubenstein, Environmental Discourses in Public and International Law 381 (Cambridge University Press 2012) [hereinafter Jessup & Rubenstein].

tors of its provisions.[275] For instance, ISIS has thousands of armed men in its group and the group is damaging cultural property in Syria and Iraq.[276] However, there is nothing in the language of either the Hague Convention or its Protocols I and II that could provide a method or guideline to stop or prosecute ISIS.[277] It only provides general recommendations for the protection of cultural property; it does not set out any particular penalties or punishment tools for the violators of its provisions.[278] This is why the convention has not proved successful in protecting international cultural heritage in Iraq and Syria, where there appear to have been stringent violations of its provisions.[279]

2. Lack of Procedural and Quantitative Assessments

A prominent drawback in the 1954 Hague Convention is that it does not set any quantitative measures or procedures to keep track of the effectiveness of the efforts for the protection of cultural property in a particular armed conflict-affected region. That is, the convention largely rests upon the functioning of national institutions for the protection of cultural heritage in armed conflict-affected states and therefore it has not set up its own tribunals to protect cultural heritage or property in conflict-affected regions.[280] This creates a massive gap in the wake of a sudden armed conflict, particularly in the event of national institutions lacking proper infrastructure, expertise, or opportunities to give full protection to cultural property; for example, the Syrian government has become incapable of protecting its cultural heritage sites from ISIS attacks. The question arises here what could be the possible and most suitable action for the protection of cultural property in such conflict-affected regions where national institutions and local bodies fail to deliver protection in accordance with the Hague Convention's provisions related to the cultural heritage sites. What if one or all of the warring parties do not accept the provisions of this convention in causing damage to the

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[275] The Second Protocol to the Hague Convention defined the violations to the provisions of the convention in two categories, i.e., "serious violations" and "other violations." It urged the states to make laws or procedures to prosecute the perpetrators who appear to commit any of the two types of violations. However, it did not mention what could be the punishments or what could be the frameworks or steps that a state can take in order to prosecute such nonstate actors who desecrate the cultural property with the use of force. *See* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS, 987 (Brill 2008) [hereinafter Bassiouni].

[276] *See* ROBERT SPENCER, THE COMPLETE INFIDEL'S GUIDE TO ISIS Chapter 4 (Regnery Publishing 2015) (detailing destruction to cultural heritage by ISIS in Syria and Iraq) [hereinafter R. Spencer]. *See also* Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed,* NATIONAL GEOGRAPHIC (Sept. 1 2015), https://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/.

[277] The Hague Convention and its two Protocols mostly rely on states to conduct litigations and prosecutions for the perpetrators of its provisions. It does not provide its own prosecution framework in this regard. *See* Articles 20 and 21, Second Protocol to the Hague Convention, 1999. *See also* Bassiouni, *supra* note 275, at 987.

[278] *See also* Bassiouni, *supra* note 275, at 987.

[279] *See* R. Spencer, *supra* note 276.

[280] *See* Bassiouni, *supra* note 275 at 987. *See also* Article 21, Second Protocol to the Hague Convention, 1999.

cultural heritage during armed conflict? These questions remain unanswered by the Hague Convention, particularly in armed conflicts.

3. Principle of Military Necessity

Another issue related to the 1954 Hague Convention is that it does not provide any substantial answer related to the question of damage caused to cultural property by invading armies on the basis of the principle of military necessity. That is, the invading army can withdraw special protection from a cultural property site during armed conflict owing to an unavoidable application of the principle of military necessity.[281] This creates confusion or sometimes exceptions that can be exploited by the aggressive party during the armed conflict in causing damage to cultural property and heritage sites.[282] This exception arises from the text of Article 11(2) of the Hague Convention 1954, which withdraws special protection and immunity from cultural property in applying the principle of military necessity.[283] The text of Article 11(2) of the Hague Convention 1954 states that:

> Apart from the case provided for in paragraph I of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger.[284]

Thus, in accordance with the principle of military necessity, special protection is withdrawn from cultural property, which can mean direct damage to such cultural property during armed conflict, particularly when the invading army attacks cultural heritage sites in accordance with the principle of military necessity.

4. Noninternational Armed Conflicts and Nonstate Actors

There is another issue that appears to be present in Article 19 of the Hague Convention 1954. The text of this article is related to offering protection to cultural property in the event of a conflict of a noninternational nature.[285] The text

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[281] This withdrawal is endorsed in Article 11, Paragraph 2, of the Hague Convention, 1954. *See* 1954 Hague Convention, *supra* note 74, art. 11(2).

[282] The confusion is generated when either party commits a violation of the obligations under Article 9 of the 1954 Hague Convention. Consequently, Article 11(2) of the Hague Conventions becomes applicable and withdraws special protection from the cultural property in the events of special cases of unavoidable military necessity. Although after the withdrawal of special protection the principle of proportionality becomes applicable, this again puts cultural property at risk because it can be targeted by the invading army, which can use the rationale of "military necessity" for it. Thus, whether the principle of proportionality is followed or not, the damage to the cultural property will depend upon the extent of the force used in the name of 'military necessity. *See* CAROLINE EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW: WITH A CASE STUDY ON THE KHMER ROUGE'S DESTRUCTION OF CAMBODIA'S HERITAGE 58 (Martinus Nijhoff Publishers 2013).

[283] Toman, *supra* note 223, at 224.

[284] *See* 1954 Hague Convention, *supra* note 74, art. 11.

[285] *See* O'Keefe, *supra* note 221, at 325.

of Article 19, Paragraph 1, expects the parties to the conflict to abide by the rules of the convention; the text of Article 19, Paragraph 2, orders the parties to implement the provisions of the convention by force.[286] However, in real terms, such an application of this article seems awkward. This is because most armed conflicts of a noninternational character are fought either between nonstate actors or between states and nonstate actor groups. In most cases, nonstate actors have turned out to be associated with a terrorist rebellion group who reject the rule of law and are only focused on spreading chaos, terror, and torture in the region. They work as antistate elements and enemies of peace. In such instances, we cannot expect these terrorist nonstate actors to follow the provisions of the Hague Convention. A prime example of such a reality is the terrorist attacks by ISIS, in which it has also caused heavy damage to cultural property in Syria and Iraq.[287] Thus, in such cases, the applicability of the Hague Convention to noninternational armed conflicts becomes vague and elusive.

B. Gaps Related to the UNESCO Conventions

In addition to the Hague Convention 1954, there are also certain gaps and challenges related to the implementation of the UNESCO Conventions.[288]

1. No Universal Jurisdiction

For instance, both the 1970 and 1972 conventions give consideration to the protection of cultural property and heritage that comes under the authority of the states that are party to the conventions.[289] This implies that the cultural property that lies in regions or states that are not party to the conventions is not protected under either convention, though this property is also the part of international cultural heritage.

2. No Enforcement Mechanism for Violators of UNESCO Convention

Moreover, the UNESCO Convention 1970 does not provide any framework for the implementation of its own provisions for the protection of cultural property, particularly in the event of armed conflicts. That is, the enforcement mechanism of its provisions is lacking, as it sets out no prosecution system or penalty

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[286] *See* 1954 Hague Convention, *supra* note 74, art. 19.

[287] ISIS accepts no laws or international conventions. Therefore, it becomes challenging to apply Article 19 of the Hague Convention on such situations where nonstate actors like ISIS are parties to a noninternational armed conflict. To know about the grave damage to cultural heritage committed by ISIS. *See*: R. Spencer, *supra* note 276.

[288] *See* CARLOS ESPÓSITO ET AL., OCEAN LAW AND POLICY: TWENTY YEARS OF DEVELOPMENT UNDER THE UNCLOS REGIME 135 (Brill 2016) [hereinafter: Espósito et al.]

[289] *See* Article 22, UNESCO Convention, 1970 (for application of the UNESCO Convention 1970). *See also* SABINE SCHORLEMER & PETER-TOBIAS STOLL, THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS (Springer 2012). *See* HELGE OLE BERGESEN ET AL., The Yearbook of International Co-Operation on Environment and Development 1999-2000 166 (Earthscan 1999) (for applicability of the UNESCO Convention 1972).

standards to punish those who violate the rules in its provisions.[290] There are no prosecution rules for punishing those who desecrate or damage cultural heritage property in the event of armed conflicts or in times of peace.[291] This creates an enforcement gap in the application of the provisions of this convention.

3. Excessive Reliance on the Legislative Bodies of Contracting Parties

The UNESCO Convention 1970 relies on legislation by its contracting states in order to create laws related to its provisions to protect the cultural heritage within national jurisdiction.[292] This creates gaps in the form of delays in the effective implementation of the provisions of this convention,[293] because not every state has a quick legislative system to enact or approve legislation and not all states that are contracting parties to the convention have the same level of pace in enacting laws based on its provisions.

C. Gaps Related to the Protection of Intangible Cultural Heritage during Armed Conflicts

Stringent gaps exist in international cultural heritage law related to providing protection to intangible cultural heritage during armed conflicts.[294] Although a separate convention, the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, was drafted by UNESCO for intangible heritage protection,[295] this convention has no particular provision focused on the need for the protection of intangible cultural heritage during armed conflicts.[296] The 1954 Hague Convention and the UNESCO Convention also lack provisions for the protection of intangible cultural heritage during armed conflict, as neither directly mentions protection for intangible cultural heritage.[297] Hence, despite the fact that the armed conflicts pose severe threats to intangible cultural heritage when artistic expressions, rituals, etc. are destroyed at the hands of the aggressive party during armed conflict, the gaps in international law related to protecting intangible cultural heritage in armed conflict are daunting.[298]

In order to apply full protection to cultural heritage during armed conflict, these gaps and all relevant challenges must be addressed by the international community. The gaps must be filled to eliminate any inconsistencies and ineffi-

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290 Gary Burns, A Companion to Popular Culture 477 (John Wiley & Sons 2016).

291 *Id.*

292 *See* Christopher C. Joyner & Oscar Schachter, United Nations Legal Order 581 (Cambridge University Press 1995).

293 A slow legislative system in a state will cause a delay in enactment of laws for protection of the cultural heritage property in that state.

294 Christoph Beat Graber et al., International Trade in Indigenous Cultural Heritage: Legal and Policy Issues 233 (Edward Elgar Publishing 2012) [hereinafter Graber et al.].

295 *See* Benedetta Ubertazzi, Exclusive Jurisdiction in Intellectual Property 32 (Mohr Siebeck 2012) [hereinafter Ubertazzi].

296 *See* Johannot-Gradis, *supra* note 198.

297 *Id.* at 1256–59.

298 *See* Graber et al., *supra* note 294, at 233.

ciencies in the global efforts to protect cultural heritage in the event of armed conflict. Special measures should be taken by the international community for this purpose. That is, the community can hold additional sessions or arrange additional protocols to the international conventions to fill the gaps in the provisions of these conventions.

VI. Conclusion

International cultural heritage faces threats in armed conflict.[299] Today, most conflicts are of an intra-state nature.[300] Such conflicts are instigated owing to ethnic, political, or cultural tensions among groups in a state or between a group and state authorities.[301] Owing to their ethnic origin, such conflicts cause further damage to cultural and ethnic expressions in a state.[302] This is because the parties to the conflict tend to cause injury to each other's sites of cultural expression and ethnicity in such conflicts.[303] Consequently, the cultural heritage in the state suffers damage.[304] Likewise, inter-state conflicts also cause severe damage to cultural heritage, particularly to tangible cultural property such as monuments, artistic locations, educational institutes, etc.[305] Damage to the tangible cultural heritage also coincides with damage caused to intangible cultural heritage such as religious rituals, artistic expressions, festivals, oral traditions, knowledge, etc.[306] This is because the destruction of cultural heritage sites during war, e.g., a religious site, can cause decline of certain religious practices that the local people had previously performed there.[307] Hence, cultural expressions also risk dying owing to the damage of war.[308]

It is essential to control the harmful inclinations of war, which has the tendency to cause damage to cultural heritage property and cultural expressions.[309] The international community is fully aware of the grave threats to cultural heritage owing to armed conflicts. Therefore, it has made exceptional efforts to draft

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299 *See* Peter G. Stone, *The challenge of protecting heritage in times of armed conflict*, 67 Museum Int'l 40, 40–54 (2015). *See also* Stuart Casey-Maslen, The War Report: Armed Conflict in 2013 386 (Oxford University Press 2014).

300 Mary Hawkesworth & Maurice Kogan, Encyclopedia of Government and Politics 981 (Routledge 2013).

301 *Id.*

302 Chadwick F. Alger, Peace Research and Peacebuilding 83 (Springer 2013).

303 *Id.*

304 *Id*.

305 *See* Andrea Benzo & Silvio Ferrari, Between Cultural Diversity and Common Heritage: Legal and Religious Perspectives on the Sacred Places of the Mediterranean 303 (Routledge 2016). *See also* Howard M. Hensel, The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force 43 (Ashgate Publishing 2007).

306 *See* Elisa Novic, The Concept of Cultural Genocide: An International Law Perspective, 193 (Oxford University Press, 2016). *See also* Marie Louise Stig Sørensen, & Dacia Viejo-Rose, War and Cultural Heritage 7 (Cambridge University Press 2015).

307 Johannot-Gradis, *supra* note 198, at 1260.

308 *Id*. *See also* Schorlemer & Stoll, *supra* note 45. *See also* Kuwali & Viljoen, *supra* note 44.

309 Durfina, *supra* note 63.

conventions and form international organizations to take substantial steps to protect cultural heritage. The international conventions have provided legal provisions that include rules and recommendations for states to protect cultural heritage during armed conflicts.[310] Among them, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its two Additional Protocols of 1954 and 1999, the Geneva Conventions of 1949 and their two Additional Protocols of 1977, the UNESCO Convention 1970, and the World Heritage Convention 1972 are the most prominent international conventions to have provided important legal provisions for the protection of tangible cultural heritage and property in the event of armed conflicts.[311] On the other hand, the ICCPR, the Hague Conventions of 1899 and 1907, and the UNESCO Convention 1970 provide certain provisions for the protection of intangible cultural heritage during armed conflicts.[312] Several states, including Iraq and Syria, where ISIS has caused severe damage to cultural heritage property, are parties to these conventions.[313]

It is essential to note here that, although the Convention for the Safeguarding of the Intangible Cultural Heritage 2003 focuses solely on the subject of the protection of intangible cultural heritage,[314] this convention does not include any particular provision related to the conduct of war that can guide the protection of intangible cultural heritage during war.[315] Therefore, the provisions regarding the protection of intangible cultural heritage during armed conflicts are found to be lacking.[316] The UNESCO Convention 1970 and some provisions of the Hague Conventions of 1899 and 1907 provide protection to intangible cultural heritage during armed conflicts,[317] but these conventions do not directly mention intangible cultural expressions.[318] Rather, these conventions offer protection to such cultural heritage sites such as educational, religious, and artistic places, which are directly connected with the expression of intangible cultural heritage such as knowledge, religious practices, intellectual property, artistic expressions, etc. This indicates a clear gap in international law for the protection of intangible cultural heritage in the event of armed conflict.

On the other hand, international organizations have made valuable contributions by forming special committees and making operations in the conflict zones to protect cultural heritage during armed conflicts there.[319] UNESCO, ICOM, the WCO, The Committee for the Protection of Cultural Property in the Event of Armed Conflict, the World Heritage Committee, and ICOMOS are the most

310 Maslen, *supra* note 67.

311 *Id.*

312 Johannot-Gradis, *supra* note 198, at 1259.

313 Turku, *supra* note 139.

314 Ubertazzi, *supra* note 295.

315 Johannot-Gradis, *supra* note 198.

316 Graber et al., *supra* note 294.

317 Renteln et al., *supra* note 208.

318 Johannot-Gradis, *supra* note 198, at 1256–59.

319 Kreimer et al., *supra* note 217.

prominent international organizations working for the protection of cultural heritage in armed conflict. Recently, a new organization, ALIPH, has also been established with the same goal of protecting cultural property in armed conflict.[320]

Among the international organizations, UNESCO has the leading role in providing protection to cultural heritage in times of peace as well as in the event of armed conflicts.[321] UNESCO has made exceptional efforts to protect cultural heritage by organizing special committees and funds for the protection of cultural heritage in armed conflicts.[322] For instance, the World Heritage Committee works under the flag of UNESCO and provides technical and scientific assistance to states in armed conflicts.[323] It also maintains a list of endangered cultural properties and formulates policies for their protection.[324] Furthermore, UNESCO has also established a World Heritage Fund, used to sponsor the protective measures required for the urgent protection of cultural property objects and sites in conflict zones during armed conflicts.[325] In addition, UNESCO has also collaborated with the governments of some states such as France and the UAE to formulate ALIPH, as well as raising more than 100 million dollars for a new fund to protect and rehabilitate the cultural heritage property adversely affected during armed conflicts.[326]

In addition, UNESCO has also drafted two of the most important international conventions—the UNESCO Convention 1970 and the World Heritage Convention 1972[327]—which form the basis of international cultural heritage law.[328] UNESCO organized these conventions to lay out policies and rules for the protection of cultural heritage property during wars.[329] Moreover, UNESCO also gained an important role within the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[330]

More importantly, it is the authority of the director-general of UNESCO to decide on adding amendments to the provisions of the Hague Convention, as well as adding new members to the convention.[331] Moreover, the director-general can also convene special meetings of the contracting parties after receiving requests from one-fifth of the contracting parties in the event of an armed attack and

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320 *See* UNESCO Media Services, *supra* note 247.

321 Logan, *supra* note 218. *See also* Grant, *supra* note 220.

322 *See, e.g.,* Meskell, *supra* note 231.

323 *See* Articles 22 and 23, The World Heritage Convention, UNESCO, 1972.

324 *See also* Article 11(2), World Heritage Convention, UNESCO, 1972.

325 *See* Article 15(1), The World Heritage Convention, UNESCO, 1972. *See also* Toman, *supra* note 223, at 605.

326 UNESCO Media Services, *supra* note 247.

327 Cameron & Rössler, *supra* note 135.

328 Francioni & Gordley, *supra* note 65. *See also* Schneider & Vadi, *supra* note 66.

329 Cameron & Rössler, *supra* note 135. *See also* Labadi, *supra* note 137.

330 O'Keefe, *supra* note 221.

331 For the detailed procedure of adding amendments, *see* 1954 Hague Convention, *supra* note 74, art. 39.

consequent threat to particular cultural heritage sites.[332] UNESCO also decides on adding particular cultural heritage sites into the category of "special protection" and also has authority to decide on providing technical or other material assistance for the relocation of cultural property there or for applying an international refuge at that site for its protection from armed conflict.[333] In addition to the Hague Convention, UNESCO also plays an essential role in the application of provisions of the UNESCO Convention 1970 and the World Heritage Convention 1972 in the event of armed conflicts.[334]

Despite the efforts of UNESCO and of other aforementioned organizations, there are several considerable challenges and gaps in applying full protection to cultural heritage property in the event of armed conflicts.[335] The gaps are also present in the provisions of the aforementioned conventions, including the 1954 Hague Convention and UNESCO Convention 1970.[336] For instance, there are no frameworks or quantitative assessment tools for the implementation of the provisions of these conventions and for the prosecution of violators of their provisions.[337] In addition, the provisions also do not provide any substantial rule for situations when the warring party is a group of terrorist nonstate actors, such as ISIS, that causes damage to cultural heritage property during an intra-state armed conflict.[338] That is, the provisions do not provide any suitable recommendation to prevent such nonstate actors from causing injury to cultural heritage property. ISIS has caused significant damage to cultural property in Syria and Iraq, but the provisions have been ineffective in providing a practical ad hoc framework to protect cultural property in the Syrian and Iraqi region from ISIS armed terrorists.[339] This limitation and all other gaps related to the provisions of the conventions should be addressed by the international community in defining and setting up an effective mechanism to apply full protection to cultural heritage property in the event of armed conflicts.

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[332] *See* 1954 Hague Convention, *supra* note 74, art. 27(1).

[333] *See* Article 11(3), Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954.

[334] Gibbon, *supra* note 246, at 5.

[335] Jessup & Rubenstein, *supra* note 274.

[336] Bassiouni, *supra* note 275. *See also* Espósito et al., *supra* note 288.

[337] Bassiouni, *supra* note 275.

[338] *Id.*

[339] *See, e.g.,* R. Spencer, *supra* note 276 (detailing the damage done by ISIS to the cultural property in Syria and Iraq).

United Nations Peacekeepers: Unchecked and Unaccountable

Benjamin Horwitz*

I. Introduction

Abraham Lincoln said, "It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."[1] President Lincoln spoke with regard to a nascent nation whose continued existence and eventual success were – at least in part – dependent on the perceived legitimacy of its governing bodies.

Lincoln's words hold true today, with regard to government as well as international organizations. Although the United States of America and the United Nations are fundamentally distinct in character, size, influence and other features, their legitimacy remains integral to both.

This comment examines the immunity of United Nations peacekeepers through a comparison of the legal recourse available to those affected by two recent significant water crises: the cholera outbreak in Haiti and the contamination of public drinking water in Flint, Michigan. The legal recourse available to victims of conduct of government and international organizations is fraught with historical ramifications and hurdles for individuals. For example, in the United States, there is a long history of sovereign immunity to protect the function of government. Similarly, member nations have long afforded the United Nations vast legal protections.

This comment explores the apparent justifications for such immunities, and assesses the real, limited value in continuing those policies. Immunity is theoretically necessary for the routine function of the United Nations and American government; however, in practice, blanket immunities propagate the unequal,

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[1] Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1223-24 (2001).

unethical and inhumane application of law. The following comparison and analysis revolve around the concepts of the absolute and functional immunity of the United Nations in Haiti and sovereign immunity with regard to government actors and entities in Flint, Michigan.

The United Nations is predicated upon helping states, regions and people in need, and "promoting and encouraging respect for human rights and for fundamental freedoms for all."[2] Among the mechanisms available to the United Nations in affecting such ideals, peacekeeping operations are an essential instrument in pursuing the goals of the organization on missions around the world. Such operations, and the peacekeepers involved, are considered to be "subsidiary organs of the General Assembly or the Security Council."[3][4][5] Moreover, United Nations peacekeepers are referred to either by explicit designation or by function.[6]

While the fundamental goals of the United Nations peacekeeping missions are benevolent and altruistic, there have been multiple allegations of human rights violations by United Nations peacekeepers. Although the possibility of human rights violations by an organization centered on the pursuit of human rights seems self-defeating and wrong, it also raises questions concerning the accountability of the United Nations. The International Court of Justice ("ICJ") is the highest judicial body within the United Nations.[7] The ICJ only hears disputes between members states, and may issue advisory opinions regarding issues that internal UN organs and agencies raise.[8] Even with regard to member states, ICJ jurisdiction relies upon the agreement by each party to "abide by the [ICJ's] jurisdiction." *Id.* Accountability of the UN itself, however, is a different matter. Courts around the world have resisted finding the United Nations or its agents responsible.[9]

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[2] U.N. Charter art. 1, para. 3.

[3] Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 77 (1997).

[4] *See generally* UNITED NATIONS, GENERAL ASSEMBLY OF THE UNITED NATIONS, www.un.org/en/ga (last visited Nov. 3, 2017) (The United Nations General Assembly is "one of the six main organs of the United Nations, the only one in which all Member States (193) have equal representation." The United Nations General Assembly addresses a variety of issues, including "development, peace and security, [and] international law").

[5] *See generally* UNITED NATIONS, THE SECURITY COUNCIL, www.un.org/en/sc (last visited Nov. 3, 2017) (The Security Council is a 15-member body whose task is to determine "the existence of a threat to the peace or an act of aggression" in carrying out its duty of maintaining "international peace and security").

[6] *See* Brzak v. United Nations, 597 F.3d 107, 113 (2010).

[7] GLOBAL POLICY FORUM, https://www.globalpolicy.org/international-justice/the-international-court-of-justice.html (last visited Nov. 3, 2017).

[8] INTERNATIONAL COURT OF JUSTICE: HOW THE COURT WORKS, http://www.icj-cij.org/en/how-the-court-works (last visited Nov. 3, 2017).

[9] *See, e.g.*, HR [Supreme Court of the Neth.] 13-04-2012, NJ 2014, 262 m.nt. (Mothers of Srebrenica Assoc./Netherlands); *see also* Nicole Winfield, *UN Failed Rwanda*, Associated Press (Dec. 16, 1999), *reprinted* in GLOBAL POL'Y F., https://www.globalpolicy.org/component/content/article/201-rwanda/39240.html.

Sovereign immunity is also well-entrenched with regard to the liability of the United States, and, since the mid-nineteenth century, well-settled law indicates that "the United States may not be sued without its consent."[10] While "there is no consensus that absolute jurisdictional immunity is necessary,"[11] sovereign immunity is not a constitutional violation within the United States.[12] Various legal immunities have long been a part of the American system of government and "are firmly embedded in American law."[13] However, in the words of Justice Oliver Wendell Holmes, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[14]

II. Background

A. United Nations: A History of Immunity

The United Nations' functional and absolute immunity are fundamental to understanding the consequences of the United Nations' actions around the world. During its existence, the United Nations has adopted several agreements impacting its own immunity. Such documents include the Convention on the Privileges and Immunities of the United Nations ("CPIUN"), International Organizations Immunities Act and the United Nations' Model Status of Force Agreement.

The United Nations General Assembly adopted the CPIUN in 1946, shortly after the establishment of the United Nations.[15] As a result, the United Nations – a new, groundbreaking international alliance at the time – received broad immunity.[16] According to the Convention, the United Nations "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."[17] Almost from inception, the United Nations possessed "de facto 'absolute' immunity."[1819] However, this immunity was somewhat mitigated by a provision appearing later in the document.[20] The provi-

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[10] Charles Alan Wright, Arthur R. Miller, et al., *Jurisdiction Over Actions Against the United States—The Sovereign Immunity Problem*, 14 FED. PRAC. & PROC. JURIS. § 3654 (4th ed.) (last updated April 2017).

[11] Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 YALE L.J. 1167, 1183 (1982).

[12] Brzak v. United Nations, 597 F.3d 107, 114 (2010).

[13] *Id.*

[14] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[15] August Reinisch, *Convention on the Privileges and Immunities of the United Nations: Convention on the Privileges and Immunities of the Specialized Agencies*, *the Specialized Agencies*, http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf, 2 (2009).

[16] *Id.*

[17] *Id.* at 1-2 *(acknowledging that the CPIUN occurred at a time when "the privileges and immunities of international organizations was largely uncharted territory").*

[18] *Id.*

[19] Absolute immunity is "a complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit." *Absolute Immunity*, Black's Law Dictionary (10th ed. 2014).

[20] *Reinisch*, *supra* note 15, at 2.

sion required the United Nations to "make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. . .".[21]

The United Nations' alleged effort to provide an avenue to settlement notably appears in a document that sets forth potential legal consequences when the United Nations enters a nation in its peacekeeping capacity.[22] That document is called a Status of Force Agreement, or "SOFA."[23] It is a permutation of the United Nations' Model Status of Force Agreement that: "provides for the establishment of a standing claims commission in order to settle disputes of a private law character over which the local courts have no jurisdiction due to the immunity of the United Nations.[24]

Furthermore, the United Nations has acknowledged its dual role of allowing private citizens' claims in civil cases while recognizing the United Nations' immunity.[25] In practice, however, no such claims commission has been created in the history of the United Nations.[26] The burden of this reality falls squarely on vulnerable individuals in unstable regions of the world. Those regions are the most likely to warrant United Nations presence in the first place. The likelihood of achieving legal recourse in the nation's legal system is even lower, so when there is no recourse against the United Nations, there is no recourse at all.

Within the United States, Congress has passed legislation that is significant with regard to the immunity of international organizations. Such legislation includes the IOIA of 1945 and the Foreign Sovereign Immunities Act ("FSIA") of 1976.[27] The main purpose of the IOIA was to grant international organizations – like the United Nations – "privileges and immunities of a governmental nature."[28] The FSIA enabled the judicial branch to make determinations of immunity for international organizations, rather than the executive branch.[29] According to the FSIA, foreign nations and international organizations were subject to limited liability – depending on the applicability of certain carve-outs – where they

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[21] *Id.*

[22] Jan Wouters & Pierre Schmitt, *Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials* 31 (Leuven Center for Global Governance Studies, Working Paper No. 49, 2010), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp41-50/wp49.pdf.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 30 (asserting that "in civil cases, the uniform practice is to maintain immunity, while offering in accord with Section 29 of the General Convention, alternative means of dispute settlement").

[26] *Id.*

[27] *See* Kevin M. Whiteley, *Holding International Organizations Accountable Under the Foreign Sovereign Immunities Act: Civil Actions Against the United Nations for Non-Commercial Torts*, 7 WASH. U. GLOBAL STUD. L. REV. 619 (citing H.R. Rep. No. 79-1203, at 946 (1945), reprinted in 1945 U.S. Code Cong. Serv. 946) (2008).

[28] *Id.* at 626.

[29] *Id.* at 625.

previously had not been so vulnerable.[30] However, the FSIA did not narrow the immunity that the United Nations maintains under the IOIA.[31]

Additionally, in the United States, necessity further justifies the immunity of international organizations.[32] This theory is called the " 'functional necessity' test of international immunities."[33] Accordingly, immunity for international organizations is essential for a body to strive toward its mission. Thus, the United Nations retains its "independence from national control."[34]

B. Expansion of United Nations' Immunity

In addition to organizational protection from legal recourse, there is further insulation from liability for actors and agents of the United Nations.[35] This iteration of defense appears in the form of "functional immunity," meaning that "all members of a peacekeeping operation are immune from legal process for acts performed by them in their official capacities."[36]

Consequently, the United Nations and those who act on its behalf exist behind a shield of multiple layers of legal immunity. In reality, the immunity exists unless and until it is waived.[37] As illustrated by various inquiries into the ethics of United Nations actions, it appears unlikely that the organization would voluntarily expose itself to liability by taking responsibility for its conduct.

Alarmingly, courts have expanded the protection afforded to the United Nations to other actors as well, including to military forces serving as part of a United Nations campaign. In *Mothers of Srebrenica et al. v. State of the Netherlands and the United Nations*, the Dutch Supreme Court held that the Netherlands was not liable for a genocide occurring while an ethnic and religious minority was under the protection of the United Nations security forces and the Netherlands military personnel.[38][39] The court reasoned that the Netherlands escaped liability because it acted as part of the United Nations Protection Force

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[30] Republic of Austria v. Altmann, 541 U.S. 677, 678 (2004); Whiteley, *supra* note 27, at 658 (Kevin M. Whiteley concluded, "Long gone are the days when international organizations were minor participants in global politics in need of protection from member states. Today these organizations, especially the United Nations, have accumulated immense wealth and wield vast amounts of power. Under such conditions, the lack of absolute immunity appears neither to threaten the existence of the organization nor its functionality").

[31] Brzak, *supra* note 12, at 112.

[32] *Jurisdictional Immunities*, *supra* note 11, at 1181.

[33] *Id.*

[34] *Id.*

[35] Code Blue, *Fact Sheet: Privileges and Immunities of the United Nations* (2015), http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/immunity.

[36] *Id.*

[37] Reinisch, *supra* note 15, at 2.

[38] Wouters & Schmitt, *supra* note 22, at 8.

[39] In 1995, a Dutch military unit under the control of the United Nations oversaw an ethnic group – the Srebrenica enclave – in eastern Bosnia. HR 13 April 2012, NJ 2014, 262 m.nt., *Mothers of Srebrenica,* at 3. The unit failed to protect the group, and 8,000 people from the enclave were subsequently killed in a genocide. *Id.* In response, families of those killed in Srebrenica alleged that the victims were killed as a result of the inaction of United Nations peacekeepers. *Id.* In the lawsuit that followed in the Nether-

("UNPROFOR"), which – as an arm of the United Nations – had default absolute immunity.[40] Similarly, in *N.K. v. Austria,* an Austrian court dismissed the plaintiff's claim alleging property damage.[41] The court held that the defendant, an Austrian soldier, was "acting as an organ of the United Nations and not of Austria."[42] Therefore, Austria was protected under the growing umbrella of the United Nations immunity.

C. The Role of the United Nations in Haiti's Cholera Outbreak

Located just six hundred and eighty nine (689) miles from Miami, Florida, Haiti has a per capita gross domestic product that is over seventy-five (75) times smaller than that of the United States.[43] It has a population of nearly eleven (11) million people.[44] According to the World Health Organization ("WHO"), the life expectancy in Haiti is almost sixteen (16) years shorter than in the United States.[45] The United Nations' current mission in Haiti is its seventh in the small island nation, which is the most for any nation on earth.[46]

Peacekeeping missions have been a staple of the United Nations, and there have been seventy-one (71) since the organization was created in 1945.[47] United Nations peacekeeping missions are necessarily aimed at helping regions and populations that are vulnerable, due to poverty, war or natural disaster and in need of support that local government and infrastructure cannot provide.

The current United Nations' mission in Haiti ("MINUSTAH") began in 2004.[48] The mission was active on January 12, 2010, when an earthquake devastated Haiti.[49] In response to the earthquake, the United Nations increased resources to the MINUSTAH mission, including additional peacekeepers.[50] As a part of this augmented effort, a group of peacekeepers traveled to Haiti from

lands, the Supreme Court of the Netherlands ruled that the United Nations retained its immunity, regardless of the gravity of the claims. *Id.* at 12.

[40] *Id.*

[41] *Id.* at 20.

[42] *Id.* at 21.

[43] Statistics Times, *List of Countries by Projected GDP per Capita* (June 7, 2017), http://statisticstimes.com/economy/countries-by-projected-gdp-capita.php.

[44] *The World Factbook*, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html.

[45] World Health Org., *Life Expectancy at Birth (years), 2000-2015*, http://gamapserver.who.int/gho/interactive_charts/mbd/life_expectancy/atlas.html (last visited Jan. 1, 2017).

[46] Thomas G. Bode, *Cholera in Haiti: United Nations Immunity and Accountability*, 47 Geo. J. Int'l. L. 759, 761-62 (2016).

[47] United Nations, *United Nations Peacekeeping*, http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml (last visited Nov. 4, 2017).

[48] The mission is called the United Nations Stabilization Mission in Haiti, or "MINUSTAH." *MINUSTAH: United Nations Stabilization Mission in Haiti*, United Nations, http://www.un.org/en/peacekeeping/missions/minustah/ (last visited Jan. 8, 2017).

[49] Bode, *supra* note 46, at 762 (On January 12, 2010, a 7.0 magnitude earthquake caused devastating damage to Haiti. As a result, 217,000 people perished, and another 300,000 were injured. Two hundred fifty thousand residences and thirty thousand businesses were also destroyed).

[50] Bode, *supra* note 46, at 765.

Nepal.[51] Coincidentally, there had been a cholera epidemic at that time in Nepal.[52] One of the unintended consequences of their presence was the contamination of local water with cholera, which was subsequently transmitted to the local people.

Despite being a developing nation with limited socioeconomic status, Haiti had no history of cholera prior to 2010.[53] Until then, Haiti had managed to avoid a cholera outbreak due partially to the government's awareness of its vulnerability and partially because of Haiti's lagging economy through which Haiti had less international trade than other Caribbean nations.[54] Despite three cholera epidemics in the Caribbean in the 19th century, research by the Center for Disease Control found no evidence of cholera in Haiti during that time.[55]

However, in 2010, the arrival of cholera with United Nations peacekeepers was catastrophic. The United Nations has estimated that the arrival of cholera led to approximately four thousand, five hundred (4,500) deaths and illness in three hundred thousand (300,000) people in Haiti, and it "continues to cause infections and death" there.[56] While economic torpor had once insulated Haiti, when cholera finally did arrive, the outbreak was worse because of "simultaneous water and sanitation and health care system deficiencies."[57]

Determining the culpability for the cholera epidemic in Haiti languished in comparison to the rapid pace at which cholera devastated hundreds of thousands of Haitians.[58] An "independent panel of experts"[59] sought to determine the source of the outbreak. The panel concluded that the cholera was caused by human activity and the cholera in Haiti was the same strain of cholera that was found in the South Asian strain.[60] While the panel developed the possible connection between the United Nations Peacekeepers who arrived from Nepal – in South Asia – and cholera in Haiti, the experts' ultimately found that "the Haiti

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[51] *Id.* at 764-65.

[52] *Id.*

[53] Deborah Jenson et al., *Cholera in Haiti and Other Caribbean Regions, 19th Century*, 17 (11) EMERGING INFECTIOUS DISEASES 2130, 2130 (2011).

[54] *Id.* at 2133-34.

[55] *Id.* at 2133.

[56] Dr. Alejandro Cravioto et al., *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, 3, UNITED NATIONS, http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf (last visited Jan. 8, 2017).

[57] *Id.* at 4.

[58] According to a 2011 United Nations press release, the Secretary-General communicated the need to determine the source of the Haiti cholera outbreak as early as December 17, 2010. United Nations, *Press Release: Deeply Concerned from Outset by Cholera Outbreak in Haiti, Secretary-General Appoints Independent Expert Panel*, http://www.un.org/press/en/2016/sgsm17705.doc.htm (last visited Oct. 29, 2016). According to the release, "determining the source of the cholera outbreak is important for both the United Nations and the people of Haiti." *Id.* The release further explains that the United Nations will cooperate completely in the investigation of an independent group, appearing to recognize the importance of transparency and credibility in the investigation. *Id.* Although it is honorable to support such a fact-finding expedition to stem the scourge of cholera, it also appears that the United Nations sought to maintain – or achieve – reputation of benevolence and credibility with regards to its investigation. *Id.*

[59] *See* Cravioto, *supra* note 56.

[60] Cravioto, *supra* note 56, at 29.

cholera outbreak was caused by the confluence of circumstances. . . and was not the fault or, or the deliberate action of, a group or individual."[61]

D. The Role of Local Government in the Contamination of Flint's Drinking Water

The potential for contamination of drinking water in Flint, Michigan has long existed as the leaching of the municipality's lead water pipes demonstrate.[62] Furthermore, city officials operated the Flint Water Treatment Plant on a mere quarterly basis from 1967 to 2014, likely with little inspection as it served as a backup water treatment plant during that time.[63] However, steps immediately precipitating such contamination began in 2014 in response to the nation's economic crisis which had particularly acute effects in Flint.[64] At that time, Michigan Governor Rick Snyder placed an Emergency Manager in charge of the operations of the city of Flint.[65] As part of cost-cutting measures, the Emergency Manager – a non-elected individual – and other state officials switched the source of Flint's drinking water from Lake Huron to the Flint River.[66] The results have been catastrophic for local residents.

A group of Virginia Tech researchers conducted a study of lead levels in Flint's water in the summer of 2015.[67] The study contained analysis from two hundred and seventy one (271) homes in Flint.[68] The study revealed that the 90th percentile for lead concentration in the city – an important metric for city officials – was over five times higher than the United States Environmental Protection Agency's ("EPA") recommended limit.[69] Additionally, investigators discovered that some homes had lead levels in the water that qualified as "toxic waste" according to the EPA, as well as lead levels in the water of one residence that was almost eight hundred (800) times the recommended limit.[70]

Investigations into the Flint water contamination revealed that in 2011, independent consultants for the city determined that keeping or making the Flint water system safe would require fifty million dollars ($50,000,000) in improve-

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[61] *Id.*

[62] FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 16 (2016).

[63] *Id.* at 15.

[64] Complaint at 2, Concerned Pastors for Social Action v. Khouri, 2016 WL 319206 (E.D. Mich.) (No. 16-10277).

[65] *Id.*

[66] *Id.*

[67] Christopher Ingraham, *This Is How Toxic Flint's Water Really Is*, THE WASH. POST (Jan. 15, 2016) https://www.washingtonpost.com/news/wonk/wp/2016/01/15/this-is-how-toxic-flints-water-really-is/?utm_term=.2a441192d84c.

[68] *Id.*

[69] *Id.*

[70] *Id.*

ments.[71] However, it appears that city and state officials did not pursue such regulatory measures.[72]

In a report analyzing the causation of the contamination of drinking water in Flint, an independent task force reported that "primary responsibility for the crisis in Flint, Mich. lies with a state environmental agency called the Michigan Department of Environmental Quality."[73] The task force also found that the Michigan Department of Health and Human Services had data indicating that the water was contaminated, and failed to adequately act to protect Flint's residents.[74] The Michigan Safe Drinking Water Act (M.C.L.A. § 325.1005 et seq.) and the federal Safe Drinking Water Act (42 U.S.C.A. § 300 et seq.) provide the statutory guidelines to which governmental bodies – at least in theory – are required to adhere. Despite numerous layers of statutory protection regarding the quality of drinking water, safe drinking water is not guaranteed.

The reality of an American city depriving its citizens of potable drinking water has, justifiably, been shocking to many people.[75] While disputes continue with regard to other natural and man-made resources – like oil rights, for example – it seems unconscionable for water, as a basic necessity, to be expendable. According to the federal Safe Drinking Water Act, local governments are required to provide safe drinking water "by testing the water for harmful contaminants and treating the water to control for those pollutants."[76]

III. Discussion

Sovereign immunity has long been an important governmental protection against liability.[77] Among the justifications for sovereign immunity are tradition, the protection of government treasuries and the "existence of adequate alternative remedies."[78] While sovereign immunity has been firmly entrenched in governments around the world – and in the United States, in particular – it seems contradictory based on the American tenet that "government and government officials can do wrong and must be held accountable."[79] Sovereign immunity has even been criticized as an "anachronistic relic"[80] whose continued existence rests

[71] Concerned Pastors for Social Action v. Khouri, 194 F. Supp. 3d 589, 595, 602 (E.D. Mich. 2016).

[72] *Id.*

[73] Merrit Kennedy, *Independent Investigators: State Officials Mostly To Blame For Flint Water Crisis*, NPR (Mar. 23, 2016), https://www.npr.org/sections/thetwo-way/2016/03/23/471585633/independent-investigators-state-officials-mostly-to-blame-for-flint-water-crisis.

[74] *Id.*

[75] Jean Ross, *The Crisis in Flint is About More than Poisoned Water*, Ford Foundation (Feb. 2, 2016), https://www.fordfoundation.org/ideas/equals-change-blog/posts/the-crisis-in-flint-is-about-more-than-poisoned-water/.

[76] Rita Ann Cicero, *In Flint, Lawsuits Over Drinking Water Contamination Start Trickling In*, 33 No. 26 WL J. Toxic Torts 4, Feb. 12, 2016, at 1, 2.

[77] *See* Chemerinsky, *supra* note 1, at 1216.

[78] *Id.*

[79] *Id.* at 1202.

[80] *Id.* at 1201.

on the premise that "protecting the government treasury is more important than the benefits of liability in terms of ensuring compensation and deterrence."[81]

Various constitutional scholars have been unable to find a basis for sovereign immunity in the Constitution of the United States, and have even found it to be "inconsistent with three fundamental constitutional principles: the supremacy of the Constitution and federal laws; the accountability of government; and due process of law."[82] Such shortcomings suggest that governmental entities ought not to be so shielded by a theory that contradicts the very foundation of democracy.

Sovereign immunity is the legal turning point for the calamities in Haiti and Flint, Michigan. This powerful immunity distinguishes the defendants – government entities in Flint and the United Nations in Haiti – from private actors. Private actors whose actions lead to the same results would likely face enormous legal consequences. But sovereign immunity seems to serve as an insurmountable hurdle in the instant cases.

With regard to United Nations' accountability, legal scholars have asserted that the court's decision in *Georges v. United Nations* was correct in terms of its interpretation of the law and consistency with prior holdings.[83] In *Georges*, the court held that the United Nations' failure to enact remedial measures by which injured parties could seek recourse against the United Nations – as mandated by the CPIUN – did not waive the United Nations' immunity.[84] Furthermore, the Second Circuit recognized its holding in *Georges* to be consistent with its previous decisions, maintaining that "purported inadequacies of the United Nations' dispute resolution mechanism did not result in a waiver of absolute immunity from suit."[85]

Such an argument is difficult to dispute given the vast protections that courts around the world have afforded governments and their agents in the past. However, the more worthwhile and necessary discussion revolves around the very policies upon which centuries of sovereign immunity is based. Although the application of a law may be correct in terms of how that law is written or intended, such application does nothing further to justify the law, just as a term cannot be used in its own definition. Therefore, the decision to maintain United Nations and United Nations peacekeeper immunity may be considered "good policy" only insofar as it extends decades of unethical and unjust jurisprudence.[86] Courts and policymakers prioritize the fiscal health of the United Nations over the ethical duties to the individuals that the United Nations was created to serve.

Flint's victims of contaminated water face similarly narrow avenues for recourse, with an important exception being the liability of the municipality of Flint. The Flint Water Advisory Task Force reached damning conclusions about the causes of and responsibility for the lead contamination in the report it

[81] *Id.* at 1217.

[82] *Id.* at 1210.

[83] Bode, *supra* note 46, at 780.

[84] *Georges v. United Nations*, 834 F.3d 88, 97 (2nd Cir. 2016).

[85] *Id.* at n.48.

[86] Bode, *supra* note 46, at 781.

presented an important report to the Governor of Michigan.[87] The Task Force ultimately asserted that "the Flint water crisis is a clear case of environmental injustice."[88] As the United Nations has – in theory – the duty of creating a system of legal and financial recourse for victims, the Task Force also recommended specific steps that various governmental entities should take to fix the problems it created and ameliorate the burden on the citizens of Flint.[89]

In both scenarios, though thousands of miles apart, there seems to be a striking similarity. Rather than holding governments, international organizations and their agents to account for the errors in their conduct, the legal systems merely encourage the such bodies to "do the right thing." State and federal statutes, as well as international treaties and agreements, exist in theory to protect public health and public safety. If the result of such a system were actual government action and relief to those victimized by governmental action or negligence, such a framework would be sufficient. In reality, however, relief is slow and insufficient, if existent at all.

IV. Analysis

Legal action has been limited with respect to both the crises in Haiti and Flint. In *Georges v. United Nations*, a class of plaintiffs and their decedents filed a class action suit against United Nations for the illnesses and death caused by cholera in Haiti.[90] The United States Court of Appeals (Second Circuit) ruled in 2016 for the United Nations.[91] Following the United Nations' argument for absolute immunity based on Section 29 of the CPIUN, the court dismissed the case for lack of subject matter jurisdiction based on immunity.[92] Before the case was decided, the United States executive branch submitted a statement of interest to the court, and "took the position that defendants are 'immune from legal process and suit' pursuant to the United Nations Charter."[93][94]

The United Nations offered a late, meaningless apology in December of 2016.[95] While expressing "moral responsibility" and "deep regret", Secretary-

[87] *See* FLINT WATER ADVISORY TASK FORCE, FINAL REPORT (2016).

[88] *Id.* at 54.

[89] *Id.*

[90] *Georges v. United Nations*, 834 F.3d 88, 98 (2nd Cir. 2016).

[91] *Id*.

[92] *Id.*

[93] *Id.*

[94] Alejandra Salmeron Alfaro, *JASTA: Impact on the Principle of Sovereign Immunity*, 37 MICH. J. INT'L. L. (2016) (amending the Foreign Sovereign Immunities Act (FSIA), Justice Against Sponsors of Terrorism Act (JASTA) amended the Foreign Sovereign Immunities Act (FSIA) opening the door to private parties seeking legal action against foreign governments. Justification for this legislation was formally based on the efforts of American families of victims of the terrorist attacks on September 11, 2001, it appears to introduce the analogue of foreign individuals having standing to bring suit against the United States – or potentially other international organizations in courts in the United States – in the future).

[95] Somini Sengupta, *U.N. Apologizes for Role in Haiti's 2010 Cholera Outbreak*, NY TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/world/americas/united-nations-apology-haiti-cholera.html.

General Ban Ki-moon did not assume legal responsibility on behalf of the United Nations.[96] According to *The New York Times*, "the group that represents the victims, the Institute for Justice and Democracy in Haiti, has said it has not yet decided on whether to take the matter to the United States Supreme Court to seek compensation."[97] However, based on the response of American courts in the past, and their apparent aversion to assigning liability to the United Nations, it is unlikely to amount to legal accountability even if a case is filed with the Supreme Court of the United States.

Although less open-and-shut than legal proceedings for Haiti's victims of U.N.-caused water contamination, legal recourse in Flint, Michigan also appears limited,.[98] The most prominent lawsuit filed with regard to the water crisis in Flint was *Concerned Pastors for Social Action v. Khouri* (2016 WL 319206 (E.D. Mich.)), a civil action filed in the United States District Court in the Eastern District of Michigan. In *Concerned Pastors for Social Action v. Khouri*, three organizations and an individual brought a lawsuit on behalf of the residents of Flint, Michigan with regard to the water contamination.[99] The court ruled that – although the 11th Amendment gives general immunity to officials from suit in federal court – "a plaintiff can avoid this sovereign immunity bar by suing for injunctive or declaratory relief, rather than monetary relief."[100] Moreover, the court ruled that "the state defendants have exerted a level of control to bring them within the scope of the Safe Drinking Water Act's requirements."[101]

In March of 2017, a federal judge in Michigan approved a settlement in the *Khouri* case in which "the state of Michigan has agreed to spend up to $97 million for new water lines in the city of Flint."[102] According to the settlement, Michigan will provide funding for related health programs until March 2021.[103] To date, this is the largest remedial expenditure related to the water crisis in Flint.[104]

While financial recovery appears to remain limited for potential plaintiffs in Flint, developments in other federal jurisdictions may prove fruitful in future litigation. For example, in a North Carolina water contamination case, a federal district court judge denied the government's motion to dismiss the plaintiff's Federal Tort Claims Act case, despite the government's predication of its motion on sovereign immunity.[105] In *Jones*, the government argued that it retained sover-

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[96] *Id.*

[97] *Id.*

[98] *See* Jenson, *supra* note 53; Concerned Pastors, *supra* note 71 at 595, 602.

[99] *Supra* note 71, at 593.

[100] *Id.* at 604.

[101] *Id.* at 606.

[102] Merrit Kennedy, *Judge Approves $97 Million Settlement To Replace Flint's Water Lines*, NPR (Mar. 28, 2017, 2:10PM), http://www.npr.org/sections/thetwo-way/2017/03/28/521786192/judge-approves-97-million-settlement-to-replace-flints-water-lines.

[103] *Id.*

[104] *See* Guertin v. Michigan, 2017 WL 2418007 (E.D. Mich. 2017); Boler v. Earley, 865 F.3d 391 (6th Cir. 2017); Mich. Dept. of Envtl. Quality v. City of Flint, 2017 WL 4641897 (E.D. Mich. 2017).

[105] Jones v. U.S., 691 F. Supp. 2d 639, 643 (E.D. N.C. 2010).

eign immunity under the Federal Tort Claims Act because the water contamination related merely to its discretionary functions.[106] Nevertheless, the court held that the government already had notice of the contamination when the plaintiff lived on the government's property, and that the plaintiff's complaint was timely filed within a standard of reasonable diligence in becoming aware of the injury.[107] Therefore, the court permitted the plaintiff's to proceed under the Federal Tort Claims Act.[108]

The availability of legal remedies available in response to the government's contamination of drinking water in the United States depends on two variables; (i) the type of relief the plaintiffs seek and (ii) the level of government opposing the claim.[109] In *Concerned Pastors v. Khouri*, the Flint plaintiffs did not seek compensatory damages.[110] Rather, the plaintiffs are sought "equitable relief to mitigate the health and medical risks resulting from the defendants' violations."[111]

While it is very difficult to attain monetary relief from state and federal government in the United States, municipal governments are not protected by sovereign immunity.[112] Therefore, municipal governments remain susceptible to legal recourse even when the state government is not.[113] Gil Seinfeld, a law professor at the University of Michigan, has maintained that there is established legal theory for Flint plaintiffs to seek – and win – damages from the city of Flint.[114]

Furthermore, a municipality is subject to ever broader liability when it expands the scope of its activities: "A municipality acting in a private or proprietary capacity, in contrast to a governmental capacity, could be subject to tort liability under the same rules that apply to private persons or corporations.[115] In *S.A.B. Enterprises, Inc. v. Village of Athens*, a New York appellate court found that "supplying water through lines to local customers" was proprietary and thus subjected it to potential tort liability.[116] Even more broadly, the Pennsylvania Supreme Court has held that a municipal water authority is liable when a dangerous water condition "created a foreseeable risk. . . and that the local agency had actual notice or could reasonably be charged with notice. . . of the dangerous

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106 *Marine's Spouse Can Sue U.S. Over Tainted Drinking Water*, 28 No. 3 WL J. Toxic Torts 2, 1 (Mar. 24, 2010).

107 Jones, *supra* note 105, at 642.

108 *Id.* at 643.

109 *See* Chemerinsky, *supra* note 1; *see also* Amber Phillips, *Criminal charges were just filed in Flint. But suing over the water crisis remains very difficult.*, The Wash. Post (Apr. 20, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/why-it-will-be-very-difficult-for-flint-residents-to-sue-the-state-of-michigan-for-money/?utm_term=.611cba76a743.

110 Cicero, *supra* note 76, at 1.

111 Concerned Pastors, *supra* note 71, at 597.

112 Phillips, *supra* note 109.

113 *Id.*

114 *Id.*

115 Anthony J. Bellia, Jr., *Lead Poisoning in Children: A Proposed Legislative Solution to Municipal Liability for Furnishing Lead-Contaminated Water*, 68 Notre Dame L. Rev. 399, 410 (1992).

116 *Id.* at 411.

condition."[117] Therefore, the threshold after which municipal governments may be held liable seems to provide recourse for government-caused local water contamination.

However, based on the severity and breadth of the water contamination in Flint, plaintiffs are also pursuing action against the state, which has the potential to provide more substantial relief.[118] The plaintiffs' theory is that "the state denied citizens their basic constitutional rights by piping them water poisoned by lead for 18 months."[119]

V. Proposal

The United Nations needs to create real remedial mechanisms and delineate specifically how it will be responsible under humanitarian law. The shortcomings in recourse available to individuals under the influence of United Nations missions is twofold. First, it undermines the very goals of human rights and equality upon which the United Nations was founded. Second, it delegitimizes the United Nations as a benevolent force in the world.

The similarities between the populations of Flint, Michigan and Haiti are striking, especially concerning their standing within their respective regions. They are both economically feeble. They are surrounded by regions, cities or countries that hold far more economic and political clout. Their populations are comprised of a majority that is non-white. Both seem restrained to the nadir of their socioeconomic and political existence. Legal recourse for both of these imperiled populations is challenging to attain, at best.

However, a significant distinction between the cases of water contamination in Haiti and Flint is the public perception and public relations campaign with regard to each crisis. Although neither case has adequately remedied the problem in those respective regions, the situation in Flint appears to have garnered a more fervent public response.

In comparison to Flint, the public relations campaign with regard to the cholera crisis in Haiti represents uncharted territory as there is no precedent for the establishment of "international victim relief funds." Such efforts have taken hold in the United States in past decades in certain circumstances. For example, compensation plans were organized for the families of those injured or killed during the terrorist attacks of September 11, 2001 as well as for victims and their families who had been affected by the explosion of the oil rig Deepwater Horizon in the Gulf of Mexico in 2010.

Despite the differences in public perception between the water crises of Haiti and Flint, there is a shocking causal connection between the actions of American government and the United Nations and subsequent severe health problems and deaths of innocent citizens. The totality of the damage is not yet quantifiable. Yet the nature of the discourse that has followed appears to revolve not around the

[117] *Id.*

[118] Phillips, *supra* note 109.

[119] *Id.*

merits of the victims' claims. Rather, it revolves around the legal framework now serving hurdle to achieving hope, equality and justice. In these tragic circumstances, it is the simple, ethical response – as Wayne State law professor Noah Hall posits – that seems to have gotten lost in the debate:

"The state is better off accepting responsibility and moving the focus to how are we going to fix this, compensate the victims and prevent future damage from happening. The worst strategy is for the state to fight – the state shouldn't be spending its resources fighting residents who are seeking compensation for the harm they suffered. It should facilitate them getting compensation."

In the United States, it seems contradictory that an arm of government in a democracy – empowered by the people of that democracy – would be able to do harm without consequence. It is especially incomprehensible that a lack of accountability exists in a litigious society, where private citizens must answer for actions far less damaging than those of public officials in Flint. It is confusing that there can be such a dearth of culpability in a nation that prides itself in many regards as promoting a meritocracy.

VI. Conclusion

Two-thousand five hundred and fifteen days after the 2010 earthquake in Haiti that precipitated support from the United Nations and led to peacekeepers devastating Haiti with cholera, the United Nations apologized.[120] United Nations Secretary-General Ban Ki-moon apologized in three different languages.[121] However, the United Nations carefully sculpted its apology so as not to assume any legal responsibility.[122] During those twenty-five hundred days, the death toll has risen to an estimated ten thousand (10,000) people.[123] The response to the outbreak is long underway, but it is merely an effort to restore Haiti and its people to their status before the United Nations intervention. The United Nations claims it is close to having the amount necessary to fund repairs to Haiti's water and sanitation system and to being able to provide cholera treatment for Haitians. However, as of December 1, 2016, the United Nations had raised only five hundred thousand ($500,000) – or 0.25% – of its pledge to provide Haitians with "material compensation."[124] In August 2017, a New York federal judge dismissed the only remaining class action lawsuit regarding water contamination in Haiti against the United Nations.[125]

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[120] Somini Sengupta, *U.N. Apologizes for Role in Haiti's 2010 Cholera Outbreak*, The New York Times, http://www.nytimes.com/2016/12/01/world/americas/united-nations-apology-haiti-cholera.html (Dec. 1, 2016).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] Rick Gladstone, *Court Dismisses Remaining Lawsuit Against U.N. on Haiti Cholera*, The New York Times, https://www.nytimes.com/2017/08/24/world/americas/haiti-cholera-lawsuit-united-nations.html?_r=0 (last visited Nov. 3, 2017).

The devastation that the United Nations unleashed in Haiti cannot be excused as a coincidental effect of humanitarian aid. To allow such an excuse is to annihilate any semblance of a legal duty that the United Nations holds. Compared to the plight of those affected by water contamination in Flint, the effects in Haiti have been more immediate in terms of the score of deaths of people in Haiti. While residents in Flint are at risk for brain damage and other health problems, thousands of Haitians are already dead. However, both scenarios will likely have longstanding, deleterious impact on local populations. Despite major humanitarian efforts to support Haiti, and a nearly-hundred million dollar settlement for the residents of Flint, the full depth of devastation in both cases has yet to be realized. An equitable or just outcome appears unattainable within the current legal framework. Both crises should cause moral outrage and warrant much more than government resistance and meaningless apologies aimed at reviving a deteriorating public image.

The Hybrid Court of South Sudan: Progress Towards Establishment and Sustainable Peace

Elizabeth Watchowski*

I. Introduction

In December 2013, civil war in South Sudan erupted between the "Sudan People's Liberation Movement" and the "Sudan People's Liberation Movement-In-Opposition".[1] A political struggle between Salva Kiir, South Sudan's President, and Riek Machar, South Sudan's former/current Vice-President contributed greatly to the conflict.[2] Despite political roots, the conflict has ethnic and familial ties through which soldiers from the Dinka ethnic group aligned with President Kiir and soldiers from the Nuer ethnic group aligned with Machar.[3] The resulting violence has led to innumerable human rights abuses including the direct targeting of civilians by armed groups, ethnic cleansing, rape and sexual violence, destruction of property and looting, arbitrary detentions, torture, enforced disappearances, and the use of child soldiers.[4] In August 2015, the Intergovernmental Authority on Development, an eight-country trade bloc in Africa, mediated the "Agreement on the Resolution of the Conflict in the Republic of South Sudan",

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[1] *Global Conflict Tracker: Civil War in South Sudan*, Council on Foreign Rel., http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/civil-war-in-south-sudan (last visited Oct. 19, 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

also known as the "Compromise Peace Agreement".[5] The aforementioned agreement provided for the creation of an independent hybrid judicial court, the Hybrid Court for South Sudan ("HCSS"), to be established by the African Union Commission to facilitate the investigation and prosecution of individuals responsible for violations of international and national law since the beginning of the conflict.[6] Shortly thereafter, Kiir and Macher spoke out against the HCSS, and instead advocated for a "national truth and reconciliation commission".[7] Since the August 2015 ratification, the African Union and South Sudanese government have taken little to no concrete steps to set-up the court and prosecute those accountable for gross violations of international and national law.[8] In June 2016, the conflict resumed resulting in further civilian killings, rapes and sexual violence, property destruction and looting.[9]

The continuation of this conflict underscores the need for the HCSS's establishment to ensure accountability, promote deterrence, and encourage sustainable peace. The establishment of the HCSS is preferable to the "national truth and reconciliation commission" proposed by Kiir and Machar as the sole means of transitional justice in South Sudan because truth is not an alternative to justice.

II. Background

A. Formation of South Sudan and the South Sudanese Civil War

In July 2011, the Republic of South Sudan gained independence from Sudan following a six-year peace process beginning with the "Comprehensive Peace Agreement" and culminating in a national referendum, thereby becoming the newest country in the world.[10] Five years after gaining independence, violence erupted between presidential guard soldiers in the country's capital on December 15, 2013.[11] Soldiers of the Dinka ethnic group aligned with South Sudanese President, Salva Kiir, and those of the Nuer ethnic group aligned with former vice president, Riek Machar.[12] On December 16, 2013, Kiir appeared on state television to declare that he had successfully suppressed a coup led by Machar, certain

[5] *Id.*

[6] *Agreement on the Resolution of Conflict in the Republic of South Sudan*, *NDFSS-SPLM/SPLA-IO-Former Detainees-Political Parties of South Sudan*, INTERGOVERNMENTAL AUTH. ON DEV. (Aug. 17, 2015), https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf [hereinafter Agreement on Resolution].

[7] Salva Kiir & Riek Machar, *South Sudan Needs Truth, Not Trials*, N.Y. TIMES (June 7, 2016), http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?_r=2.

[8] *South Sudan: One Year Since Peace Deal, Justice Still Elusive for Victims*, AMNESTY INT'L (Aug. 17, 2016), https://www.amnesty.org/en/latest/news/2016/08/south-sudan-one-year-since-peace-deal-justice-still-elusive-for-victims/.

[9] *Id.*

[10] *South Sudan Profile – Overview*, BBC NEWS (Apr. 27, 2016), http://www.bbc.com/news/world-africa-14019208; *UNMIS*, U.N. MISSION IN SUDAN, https://unmis.unmissions.org/Default.aspx?tabid=515 (last visited Oct. 18, 2017); *UNMISS Background*, U.N. MISSION IN THE REPUBLIC OF S. SUDAN, http://www.un.org/en/peacekeeping/missions/unmiss/background.shtml (last visited Oct. 18, 2017).

[11] *Global Conflict Tracker*, *supra* note 1; *UNMISS Background*, *supra* note 10.

[12] *Global Conflict Tracker*, *supra* note 1.

ex-cabinet ministers, and officials.[13] Subsequently, the outbreak of violence escalated and civil war erupted throughout South Sudan within the same month.[14] The root of the conflict stems from the political power struggle between Kiir, an ethnic Dinka, and Machar, an ethnic Nuer.[15] Though, it should be noted that the conflict's course and escalation is heavily influenced by a history of violence and ethnic tension in the region.[16] Both Kiir and Machar are backed by their respective political parties, the Sudan People's Liberation Movement ("SPLM") and the Sudan People's Liberation Movement-In-Opposition ("SPLM-IO") each of which are generally divided along the aforementioned ethnic lines.[17]

Since the initial outbreak of violence in December 2013, an estimated 50,000 people have been killed, over 1.6 million individuals have been displaced, and around 200,000 individuals are seeking protection on United Nations Missions bases throughout the country.[18] The violence has resulted in famine, disease and the flight of thousands of South Sudanese citizens to neighboring countries that lack adequate resources to offer aid.[19] Reports have established that armed forces on both sides are deliberately targeting civilians along ethnic lines as part of their military tactics.[20] Since the start of the conflict in December 2013, there have been thousands of civilian deaths and numerous human rights violations, including forced disappearances, arbitrary arrests, torture, and much more. Moreover, there have been serious war crimes, such as attacks on medical workers, aid workers, media personal, and places of worship.[21] As of November 2016, the UN Security Council reports that the violence has not only continued, but human rights violations perpetrated by SPLM and SPLM-IO "are taking on an increas-

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[13] Douglas H. Johnson, *Briefing: The Crisis in South Sudan*, 113 AFR. AFF. 451, 300-309 (Apr. 2014), http://afraf.oxfordjournals.org/content/113/451/300.full.

[14] Interview with Alex de Waal, Executive Director, World Peace Foundation (Sept. 14, 2016), http://www.cfr.org/south-sudan/understanding-roots-conflict-south-sudan/p38298.

[15] Carlo Koos & Thea Gutschke, *South Sudan's Newest War: When Two Old Men Divide a Nation*, GER. INST. ON GLOB. AND AREA STUD. FOCUS INT'L (May 2, 2014), https://www.giga-hamburg.de/en/publication/south-sudan%E2%80%99s-newest-war-when-two-old-men-divide-a-nation.

[16] Skye Wheeler, *South Sudan's New War: Abuses by Government and Opposition Forces*, HUMAN RIGHTS WATCH (Aug. 7, 2014), https://www.hrw.org/report/2014/08/07/south-sudans-new-war/abuses-government-and-opposition-forces.

[17] Lauren Ploch Blanchard, *The Crisis in South Sudan*, CONG. RES. SERV. (Jan. 9, 2014), http://www.markswatson.com/south%20sudan%20-%20CRS.pdf.

[18] *Global Conflict Tracker*, *supra* note 1.

[19] U.N. Secretary-General, *Report of the Secretary-General on South Sudan*, U.N. Doc. S/2014/708, U.N. SEC. COUNCIL (Sept. 30, 2014).

[20] *Global Conflict Tracker*, *supra* note 1; *South Sudan: Events of 2015*, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2016/country-chapters/south-sudan (last visited Sept. 27, 2017); Letter from the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206 Addressed to the President of the Security Council, U.N. SEC. COUNCIL (Aug.21, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=S/2015/656.

[21] U.N. Secretary-General, *Report of the Secretary-General on South Sudan*, U.N. Doc. S/2014/537, U.N. SEC. COUNCIL (July 25, 2014) [hereinafter U.N. S/2014/537]; U.N. Doc. S/2014/708, *supra* note 19; U.N. Secretary-General, *Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan*, U.N. Doc. S/2016/951, U.N. SEC. COUNCIL (Nov. 10, 2016) [hereinafter *Review of the Mandate*]; Human Rights Council Res. 31/20, U.N. Doc. A/HRC/RES/31/20 (Apr. 27, 2016).

ingly ethnic dimension, and hate speech is on the rise throughout the country," this raises concern that ethnic cleansing campaigns may occur similar to that which occurred in Rwanda[22] Additionally, the violence resulting from the conflict prevented the planting or harvesting of crops as early as July 2014.[23] This led the UN Security Council to declare the food crisis in South Sudan as the worst in the world.[24] The UN Security Council estimates that four million people could potentially be affected by the ongoing food crisis and die of hunger.[25]

B. International Response, and Previous Peace Agreements and Ceasefires

There have been numerous international responses to the conflict and it's aforementioned effects.

In late December 2013 following the initial clashes between SPLM and SPLM-IO, the UN Security Council through the United Nations Mission in the Republic of South Sudan ("UNMISS") increased the interim troop level in South Sudan to 12,500 peacekeeping personnel and 1,323 police personnel.[26] As of September 2016, 18,000 peacekeeping troops, police and military observers backed by the UN Security Council are present in South Sudan.[27]

In addition to the United Nations' role in attempting to achieve sustainable peace in South Sudan, the African Union, the Intergovernmental Authority on Development ("IGAD"), and the Intergovernmental Authority on Development Plus ("IGAD+") have participated by mediating numerous peace talks between SPLM and SPLM-IO, resulting in numerous agreements between the parties.[28] The first direct negotiations between South Sudanese parties, mediated by IGAD, occurred in January 2014.[29] These negotiations ultimately resulted in the "Agreement on the Cessation of Hostilities between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/ Army in Opposition (SPLM/A In Opposition)" of January 23, 2014.[30] In the following weeks, both parties violated the aforementioned ceasefire and the con-

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[22] *Review of the Mandate*, *supra* note 21; *U.N.: 'Ethnic Cleansing Under Way' in South Sudan*, AL JAZEERA NEWS (Dec. 1, 2016), http://www.aljazeera.com/news/2016/12/ethnic-cleansing-south-sudan-161201042114805.html.

[23] *Global Conflict Tracker*, *supra* note 1.

[24] U.N. S/2014/537, *supra* note 21.

[25] *Review of the Mandate*, *supra* note 21.

[26] *Global Conflict Tracker, supra* note 1; *UNMISS Mandate*, U.N. MISSION IN THE REPUBLIC OF S. SUDAN, https://peacekeeping.un.org/en/mission/unmiss (last visited Nov. 12, 2017).

[27] Jeffrey Gettleman, *South Sudan to Allow More U.N. Peacekeepers, but Force Will Be No 'Panacea'*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/world/africa/south-sudan-un-peacekeepers.html.

[28] Interview with Dr. Getachew Gebrekidan, Visiting Scholar, Southern Voices Network, and John Prendergast, Founding Director, The Enough Project in Washington, D.C. (July 16, 2015) https://www.wilsoncenter.org/event/the-role-igad-regional-approach-to-the-crisis-south-sudan.

[29] Press Release, Intergovernmental Auth. on Dev., Direct Negotiations Between South Sudanese Parties (Jan. 6, 2014), http://reliefweb.int/sites/reliefweb.int/files/resources/Press%20Release-%20Direct%20negotiations%20between%20South%20Sudanese%20Parties%2C%206%20Jan%2714.pdf.

[30] Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and Sudan People's Liberation Movement/Army (In Opposition) (SPLM/A In Opposition),

flict continued.[31] Despite the failure of this agreement to cease hostilities, IGAD commenced operations in South Sudan to monitor the implementation and enforcement of this agreement through "monitoring and verification teams" in April 2014, in continuance of the mediation process.[32]

Peace talks mediated by IGAD continued through April 2014.[33] On May 9, 2014 both Kiir and Machar through their capacity as leaders of the SPLM and SPLM-IO, respectively, committed to the cessation of hostilities and the creation of a transitional government of national unity through an agreement mediated by IGAD.[34] On June 10, 2014, Kiir and Machar committed to expedite and complete negotiations to create a transitional government of national unity within sixty days.[35]

On June 20, 2014, multi-stakeholder roundtable negotiations, mediated by IGAD, began with the intention of implementing the cessation of hostilities reaffirmed through the May 9, 2014 agreement, and establishing an agenda and arrangements for the transitional government of national unity.[36] However, the SPLM-IO failed to attend the negotiations and the multi-stakeholder IGAD-led peace talks adjourned on June 23, 2014.[37] The violence continued and the parties' failed to create a transitional government of national unity within sixty days as set forth under the June 10, 2014 agreement.[38] On August 25, 2014, IGAD threatened sanctions against SPLM and SPLM-IO if they did not reach an agree-

GRSS-SPLM/A, INTERGOVERNMENTAL AUTH. ON DEV. (Jan. 23, 2014), http://reliefweb.int/sites/reliefweb.int/files/resources/Agreement%20on%20Cessation%20of%20Hostilities_0.pdf.

[31] *South Sudan Profile – Timeline*, BBC NEWS (Dec. 5, 2016), http://www.bbc.com/news/world-africa-14019202; Press Release, U.S. Dep't of State, U.S. Concern About Violations of Cessation of Hostilities in South Sudan (Feb. 8, 2014), https://www.state.gov/r/pa/prs/ps/2014/02/221487.htm.

[32] Press Release, Intergovernmental Auth. On Dev., IGAD Monitoring and Verification Teams Commence Operations in South Sudan (Apr. 11, 2014), http://igad.int/attachments/804_Press%20release%20MVM%20team%20Commence%20operations%20in%20South%20Sudan.pdf.

[33] Press Release, Intergovernmental Auth. On Dev., Phase II of IGAD-Led South Sudan Talks Resume in Addis Ababa (Apr. 28, 2014), https://docs.google.com/file/d/0B5FAwdVtt-gCWFFac2dfbUdiWFZqdGx2cFotRVJPYkY0UnI0/edit.

[34] Agreement to Resolve the Crisis in South Sudan, GRSS-SPLM/A (In Opposition), INTERGOVERNMENTAL AUTH. ON DEV. (May 9, 2014), https://sites.tufts.edu/reinventingpeace/2014/05/10/agreement-to-resolve-the-crisis-in-south-sudan/.

[35] *Communique of the 26th Extraordinary Session of the IGAD Assembly of Heads of State and Government on the Situation in South Sudan*, INTERGOVERNMENTAL AUTH. ON DEV. (June 10, 2014), https://docs.google.com/file/d/0B5FAwdVtt-gCZHhMYXE2WmdBVDNnaG51ejhtekVFbm10Z1Vn/edit.

[36] Press Release, Intergovernmental Auth. On Dev., Inclusive Negotiations for South Sudan Launched: Stakeholders to Discuss Security and Transitional Government Arrangements (June 20, 2014), https://docs.google.com/file/d/0B5FAwdVtt-gCZ1NQRjN0MUlkWkRWUWtVQkVwb0R5MTNQZFBF/edit.

[37] Press Release, Intergovernmental Auth. On Dev., Multi-Stakeholder South Sudan Peace Talks Adjourn for Consultations (June 23, 2014), https://docs.google.com/file/d/0B5FAwdVtt-gCRElfc2UtNjBkcUx4MndPTl9XQWN4ckRMdGZF/edit.

[38] *South Sudan Rivals Sign New Ceasefire Deal*, AL JAZEERA NEWS (Aug. 25, 2014), http://www.aljazeera.com/news/africa/2014/08/south-sudan-ceasefire-deal-201482513582380054 3.html; *Communique of the 27th Extraordinary Session of the IGAD Assembly of Heads of State and Government on the Situation in South Sudan*, INTERGOVERNMENTAL AUTH. ON DEV. (Aug. 25, 2014), https://drive.google.com/file/d/0B5FAwdVtt-gCeURpOGdEZkRXNFBIZjhobXlIRUg3X3l5Tkx3/edit.

ment for the formation of a transitional government of national unity in 45 days.[39] While the parties did not reach an agreement within the 45-day timeline, they did, however, sign an agreement for the *Re-Dedication of and Implementation Modalities for the Cessation of Hostilities Agreement Signed on 23rd January 2014 Between the Government of the Republic of South Sudan and the Sudan People's Liberation Movement/Army (In Opposition)* on November 9, 2014.[40]

Within forty-eight hours the agreement to cease hostilities was violated when a battle broke out between SPLM and SPLM-IO troops.[41] On January 21, 2015, the parties signed the *Agreement on the Reunification of the SPLM*.[42] The agreement included commitments to comply with the existing cessation of hostilities agreements, to hold negotiations on a sustainable peace agreement, and to support the establishment of an unspecified comprehensive system of transitional justice.[43] Due to the parties failure to comply with existing ceasefire agreements, on February 2, 2015, Kiir and Machar signed a new agreement which provided for a ceasefire, committed to a final and comprehensive peace agreement by March 5, 2015, and confirmed agreed areas between the parties.[44] Despite the "power sharing" language contained in the agreement, Kiir and Machar failed to compromise on a mutually agreeable "power sharing formula" and the violence continued.[45] Finally, on August 26, 2015 both parties signed the *Agreement on the Resolution on the Conflict in the Republic of South Sudan* under threat of UN sanctions, despite Kiir's reservations.[46] The signing of this peace agreement marked the

[39] *IGAD Gives South Sudanese Rivals 45 Days to End Conflict*, SUDAN TRIBUNE (Aug. 25, 2014), http://www.sudantribune.com/spip.php?article52166; *South Sudan Rivals Sign New Ceasefire Deal*, AL JAZEERA NEWS (Aug. 25, 2014), http://www.aljazeera.com/news/africa/2014/08/south-sudan-ceasefire-deal-2014825135823800543.html; *Communique of the 27th Extraordinary Session*, *supra* note 38.

[40] Re-Dedication of and Implementation Modalities for the Cessation of Hostilities Agreement Signed on 23rd January 2014 between GRSS-SPLM/A (In Opposition), INTERGOVERNMENTAL AUTH. ON DEV. (Jan. 23, 2014), http://southsudan.igad.int/attachments/article/272/CoH%20Implementation%20Matrix%20and%20Addendum%20signed%209%20%20November.pdf.

[41] The Associated Press, *South Sudan: Cease-Fire Ends After 48 Hours*, N.Y. TIMES (Nov. 10, 2014), https://www.nytimes.com/2014/11/11/world/africa/south-sudan-cease-fire-ends-after-48-hours.html.

[42] Agreement on the Reunification of the SPLM, SUDAN TRIB. (Jan. 21, 2015), https://www.sudantribune.com/IMG/pdf/agreement_on_reunification_of_splm_210115_.pdf.

[43] *Id.*

[44] Reuters, *Rebels Agree to Cease-Fire in South Sudan*, N.Y. TIMES (Feb. 1, 2015), http://www.nytimes.com/2015/02/02/world/africa/rebels-agree-to-cease-fire-in-south-sudan.htm; *South Sudan Parties Sign Areas of Agreement on the Establishment of the Transitional Government of National Unity*, INTERGOVERNMENTAL AUTH. ON DEV. (Feb.2, 2015), https://igad.int/index.php?option=com_content&view=article&id=1041:south-sudan-parties-sign-areas-of-agreement-on-the-establishment-of-the-transitional-government-of-national-unity&catid=1:latest-news&Itemid=150.

[45] Statement Attributable to the Spokesman for the Secretary-General on South Sudan, U.N. Secretary-General (Feb. 3, 2015), https://www.un.org/sg/en/content/sg/statement/2015-02-03/statement-attributable-spokesman-secretary-general-south-sudan; Press Release, Office of the UK Foreign Minister for Africa, FCO Regrets Failure of South Sudan Leaders to Reach a Peace Agreement (Mar. 7, 2015), https://www.gov.uk/government/news/fco-condemns-failure-of-south-sudan-leaders-to-reach-a-peace-agreement.

[46] *Agreement on Resolution*, *supra* note 6; Press Release, Security Council, Security Council, in Statement, Welcomes Peace Accord Signing by South Sudan's President, Affirming Readiness to Ensure Full Compliance (Aug. 28, 2015), https://www.un.org/press/en/2015/sc12029.doc.htm [hereinafter Security Council Press Release]; *South Sudan President Salva Kiir Signs Peace Deal*, BBC NEWS (Aug. 26, 2015), http://www.bbc.com/news/world-africa-34066511.

first concrete and comprehensive step toward establishing a transitional government of national unity and achieving sustaining peace in South Sudan.[47]

III. Discussion

While the parties' subsequently failed to abide by the permanent ceasefire provision of the *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, this agreement establishes a transitional government of national unity, Commission for Truth, Reconciliation and Healing, the Hybrid Court of South Sudan, Compensation and Reparation Authority/Fund, parameters for a permanent constitutions, and the Joint Monitoring and Evaluation Commission.[48]

A. Agreement on the Resolution of the Conflict in the Republic of South Sudan

The August 2015 peace agreement between SPLM and SPLM-IO was signed in Addis Ababa, Ethiopia and witnessed by members of IGAD.[49] Kiir initially refused to sign the agreement, but ultimately signed the document a full week after Machar under the threat of a US-drafted resolution that would have imposed an arms embargo and other targeted sanctions.[50] Since the signing of the August 2015 peace agreement, the conflict has continued, and the parties have failed to establish or enforce any of the agreement's provisions aside from those identified below.[51]

Chapter 1 of the August 2015 peace agreement commits the signatories to the establishment of the transitional government of national unity of the Republic of South Sudan ("TGoNU").[52] Over a year after the ratification of the August 2015 peace agreement, Kiir in his role as President of South Sudan appointed the TGoNU on April 28, 2016.[53] Chapter 1 requires the TGoNU to hold elections within sixty days of the transition period, thereby establishing a democratically elected government. Additionally, this chapter establishes a "power-sharing ratio" for composition of the TGoNU Executive Branch including the President, First Vice President, Vice President, Council of Ministers and the Deputy Ministers, and state governments.[54] Individuals indicted or convicted by the Hybrid Court of South Sudan ("HCSS"), established in Chapter 5 of the August 2015 peace agreement, are not eligible for participation in the TGoNU or the following

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[47] Security Council Press Release, *supra* note 46.

[48] *Agreement on Resolution*, *supra* note 6.

[49] *Id.*

[50] *South Sudan President Salva Kiir Signs Peace Deal*, *supra* note 46.

[51] Letter from the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206 (2015) Addressed to the President of the Security Council, S/2016/963 (Nov.15, 2016), http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/963.

[52] *Agreement on Resolution*, *supra* note 6.

[53] *South Sudan: Security Council Calls on Transitional Government to Implement Peace Accord*, UN NEWS CTR. (May 4, 2016), http://www.un.org/apps/news/story.asp?NewsID=53854#.WG2l7bGZNsM [hereinafter *Security Council Calls*].

[54] *Id.*

permanent government for a specified time to be determined by law, or if these individuals are members of the TGoNU or its successor government, they will lose their position in government.[55] Chapter 1 establishes the responsibility of the TGoNU for implementing the provisions of the agreement itself, and appointed Kiir as President, Machar as First Vice President/ Vice President for the duration of the Transition Period subsequent to change upon democratic elections.[56] Chapter 1 also establishes the Transnational Legislative Assembly, which is to be replaced upon the end of the Transition Period by the National Legislative Assembly along with those members whom are democratically elected, and the National Constitutional Amendment Committee.[57]

Chapter 2 of the August 2015 agreement provides for a permanent ceasefire; establishes prohibited actions; commits the parties to a "Permanent Ceasefire and Transitional Security Arrangements workshop"; establishes a "Temporary National Architecture for the Implementation of Permanent Ceasefire" and unification of forces; provides for the transition of the existing IGAD monitoring and verification mechanism into the "Ceasefire and Transitional Security Arrangements Monitoring Mechanism"; and forms a "Strategic Defense and Security Review Board".[58]

Chapter 3 establishes "agreed principles for humanitarian assistance and reconstruction", and a Special Fund for Reconstruction administered by the Board of Special Reconstruction Fund".[59]

Chapter 4 provides for "resource, economic and financial management" through the following means.[60] First, the TGoNU is required to review all national legislation specifically including the legislation governing the Bank of South Sudan with the ultimate goal of restructuring, the Anti-Corruption Commission Act and National Audit Chamber Act. Next, the TGoNU is required to establish specified new institutions; to implement the provisions of the Petroleum Revenue Management Act; expedite specified land policy and administration measures; develop environmental protection policies; establish effective revenues, revenue collection and revenue allocation. Finally, the TGoNU is required to establish an effective public expenditure system and borrowing requirements; establish various enterprise development funds; and establish an Economic and Financial Management Authority[61] Additionally, this chapter requires the Ministry of Finance and Planning to develop a Strategic Economic Development Roadmap.[62]

Chapter 6 and 7 establish parameters for a permanent constitution and establish a "Joint Monitoring and Evaluation Commissioner", respectively. Finally,

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[55] *Agreement on Resolution*, *supra* note 6, at 45.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Agreement on Resolution*, *supra* note 6, at 45.

[62] *Id.*

Chapter 8 concerns the supremacy of the August 2015 peace agreement over any national legislation and provides procedures for the agreement's amendment.[63]

B. Hybrid Court of South Sudan

Chapter 5 of the August 2015 peace agreement states agreed upon principles for transitional justice, and commits the signatories to the establishment of "The Commission for Truth, Reconciliation and Healing ("CTRH"), the Hybrid Court of South Sudan ("HCSS"), and the Compensation and Reparation Authority ("CRA").[64]

The CTRH requires at least a month-long period of public consultations to accurately document the experiences of victims of the conflict with specific inquiry into human rights violations, breaches of the rule of law, and excessive abuses of power committed against citizens of South Sudan.[65] Additionally the CTRH will recommend process and mechanisms to allow victims the right to seek remedy for the crimes and abuses perpetrated against them.[66]

The HCSS is an independent hybrid judicial court to be established by the African Union Commission with a mandate to investigate and prosecute individuals criminally responsible for the perpetration of violations of international and/or South Sudanese law committed from December 15, 2013 through the end of the transitional period.[67] The HCSS is independent from South Sudan's judiciary and the Chairperson of the African Union Commission will appoint the seat, prosecutors, defense counsel, and the registrar of the HCSS.[68] In order to maintain impartiality, the majority of judges, prosecutors, defense counsels, and the registrar are to be composed of individuals from African states other than South Sudan.[69] This chapter also permits the HCSS to use the African Union Commission of Inquiry on South Sudan and other existing materials, not limited to those possessed by the African Union, in carrying out its investigations so long as the use of these documents are in accordance with "applicable international conventions, standards and practices."[70]

The TGoNU is further required through this Chapter to establish the Compensation Reparation Fund ("CRF") and the Compensation Reparation Authority ("CRA") to manage this fund through the reception of applications of victims that participated in the CTRH, and the dispensation of compensation and reparation to these victims.[71]

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[63] *Agreement on Resolution*, *supra* note 6, at 45.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Agreement on Resolution*, *supra* note 6, at 43.

[68] *Id.* at 43-44.

[69] *Id.* at 43.

[70] *Id.* at 44-45; *Final Report of the African Union Commission of Inquiry on South Sudan*, AU Commission of Inquiry on South Sudan (Oct. 15, 2014), http://www.peaceau.org/uploads/auciss.executive.summary.pdf [hereinafter *Final Report*].

[71] *Id.* at 45.

IV. Analysis

To achieve the ultimate goal of the August 2015 peace agreement, sustainable peace, the African Union Commission and the government of South Sudan must take concrete steps toward the establishment of the HCSS. Furthermore, the establishment of the HCSS is preferable, for achieving national unity and sustainable peace, over the establishment of a national truth and reconciliation commission as the sole form of transitional justice in South Sudan, as advocated for by Kiir and Machar.[72]

A. Argument in Support of the Hybrid Court of South Sudan

The African Union Commission, IGAD, IGAD+, UN, South Sudanese and international non-governmental organizations, and certain South Sudanese civilians all support and specifically call for the establishment of the HCSS as a means of achieving sustainable peace, justice and criminal accountability.[73] The African Union Commission's final report on South Sudan (October 2014), recommended the "creation of a Africa-led, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account."[74] This recommendation followed consultations and interviews with numerous South Sudanese victims of the conflict, citizens, regional and international leaders, civil society organizations and intellections, and government and opposition officials.[75] These consultations further revealed that many South Sudanese view reconciliation as dependent upon justice and that "those who committed atrocities should be prosecuted, and that victims and communities are unlikely to embrace reconciliation otherwise, given the culture of impunity in South Sudan."[76] As the ICC currently does not have jurisdiction to investigate and prosecute the crimes related to the conflict, and because of deficiencies in South Sudan's current judicial system, the HCSS is the best means of prosecution, so conditional to reconciliation in South Sudan.[77]

In addition to the aforementioned considerations, hybrid courts are lauded for their domestic capacity for the following reasons. First, hybrid courts are generally located closer to the location of the crimes' commissions allowing for easier participation by witnesses and victims and reducing costs. Second, hybrid courts

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[72] Kiir & Machar, *supra* note 7 (Machar has now disowned authorship on this piece).

[73] *Joint Letter: A Way Forward for the Hybrid Court for South Sudan*, HUMAN RIGHTS WATCH (Nov. 1, 2016), https://www.hrw.org/news/2016/11/01/joint-letter-way-forward-hybrid-court-south-sudan-0; *Final Report*, *supra* note 70. *UN Rights Chief Urges Establishment of Hybrid Court for Atrocities in South Sudan*, UN NEWS CTR. (Dec. 14, 2016), http://www.un.org/apps/news/story.asp?NewsID=55801#.WHFlc7YrJsM.

[74] *Final Report*, *supra* note 70, at 24-25.

[75] *Id.* at 6.

[76] *Id.* at 25.

[77] *Looking for Justice: Recommendations for the Establishment of The Hybrid Court for South Sudan*, AMNESTY INT'L & INT'L FED'N FOR HUMAN RIGHTS (Oct. 2016) at 9-10, https://www.amnesty.org/download/Documents/AFR6547422016ENGLISH.pdf.

allow for the "insulation of the independence of the bench" through use of both national and international judicial personnel. Third, hybrid courts have the potential to assist in strengthening the national judicial system through the interaction between international and national judicial personnel.[78] Any challenges to the use of a hybrid courts may be significantly decreased by the structure and organization of the court as proposed in Section V.

Additionally, the relative success of the use of hybrid court in Sierra Leone among other countries offers insight into the promise of the HCSS to ensure justice and promote sustainable peace. The Special Court for Sierra Leone ("SCSL") was established by an agreement between the United Nations and the Government of Sierra Leone.[79] The SCSL was located in Sierra Leone and mandated to try those bearing the most responsibility for national and international crimes committed during country's civil war.[80] The SCSL composition included both international and national judges and staff members, whom successfully tried and convicted nine people prior to its transfer to a residual mechanism.[81]

Based on the above, the HCSS currently provides the best means of prosecution, punishment and redress for the people of South Sudan. As such, it's establishment pursuant to the August 2015 peace agreement must be pursued by the AUC and the government of South Sudan.

B. An Examination of the National Truth and Reconciliation Commission

Despite signing the August 2015 peace agreement, Kiir and Machar jointly wrote an article in the *New York Times* requesting the international community and signatories to the agreement to reconsider the HCSS in favor of a "national truth and reconciliation commission" as the sole form of transitional justice for South Sudan.[82] The "national truth and reconciliation commission" would investigate and interview the people of South Sudan, with those who tell the truth about their actions or events they witnessed receiving amnesty from prosecution.[83] In advocating for this commission, Kiir and Machar argue for "truth, not trials", stating that disciplinary justice would destabilize efforts to unite South Sudan.[84] However, the establishment of a truth and reconciliation commission without a complementary judicial system for prosecution, such as the HCSS, will not be effective. During the course of the conflict, the government of South Su-

[78] *Id.* at 11; Ending the Era of Injustice: Advancing Prosecutions for Serious Crimes Committed in South Sudan's New War, HUMAN RIGHTS WATCH (Dec. 10, 2014), https://www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans?_ga=1.227964440.429423661.1399935943/.

[79] *Final Report*, *supra* note 70; Elise Keppler, *Dispatches: Giving Justice the Slip in South Sudan*, HUMAN RIGHTS WATCH (June 8, 2016), https://www.hrw.org/news/2016/06/08/dispatches-giving-justice-slip-south-sudan; Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 299-300 (2003).

[80] *Final Report, supra* note 70, at 12-14.

[81] *Id.*

[82] Spokesman Statement, *supra* note 45.

[83] *Id.*

[84] *Id.*

dan has failed to prosecute human rights abuses committed against civilians and has instead granted de facto amnesty to the perpetrators.[85] As the conflict continues, it is clear that neither truth alone nor amnesty will provide the solution to sustainable peace. Both the international community and many South Sudanese people call for prosecution and accountability through the establishment of the HCSS.[86] The "national truth and reconciliation commission" proposed by Kiir and Machar is a self-serving effort to avoid prosecution and accountability for their own roles in conflict-related crimes.[87]

Though complementary, truth alone is not an alternative to justice. For the foregoing reasons, the establishment of the HCSS is preferable to the establishment of a "national truth and reconciliation commission" as the sole means of transitional justice for South Sudan.

V. Proposal

Since the signing of the August 2015 peace agreement, few concrete steps have occurred to formally establish and implement the HCSS.[88] Commitments on a national level through the August 2015 peace agreement and on a continental level through the African Union Peace and Security Council's authorization for the Chairperson of the AUC to take all steps necessary to establish the HCSS provide sufficient authority for the AUC to establish the HCSS.[89] Despite the continuance of the conflict, delays in implementing other elements of the peace agreement, such as the ceasefire agreement, should not hinder the establishment of the HCSS.[90] It should be noted that the August 2015 peace agreement established both the HCSS and the CTRH, so while the establishment of the HCSS is crucial to achieving sustainable peace, justice and accountability, the HCSS and the CTRH are not mutually exclusive. The HCSS may be effectively established in conjunction with other forms of transitional justice as provided for in the August 2015 peace agreement.

Through its authority in this capacity, the AUC should consider implementing the following in establishing the HCSS.

First, as called for in an open letter to H.E. Mme. Nkosazana Dlamini-Zuma, Chairperson of the AUC, from South Sudanese and International Non-Governmental Organizations, the AUC in consultation with the South Sudanese stakeholders and individuals with relevant experience on international and hybrid

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[85] Spokesman Statement, *supra* note 45.

[86] Letter from South Sudanese and International Non-Governmental Organizations, to H.E. Mme. Nkosazana Dlamini-Zuma (Nov. 1, 2016) [hereinafter Letter to Mme. Nkosazana Dlamini-Zuma]; *Final Report*, *supra* note 70; Keppler, *supra* note 79.

[87] *South Sudan's Kiir and Machar profited during war – report,* BBC News (Sept. 12, 2016), http://www.bbc.com/news/world-africa-37338432.

[88] Keppler, *supra* note 79.

[89] Communiqué of 547th Meeting of the Peace and Security Council (Sept. 26, 2015); Letter to Mme. Nkosazana Dlamini-Zuma, *supra* note 86.

[90] H.E. Festus G. Morgae, *On Status of the Implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan* (2016), http://www.jmecsouthsudan.com/index.php/reports/jmec-quarterly-reports.

justice tribunals should form a comprehensive draft statute for the HCSS.[91] This draft should address the court's jurisdiction and location; composition of judges and staff; provide for victim participation; victim and witness protection; public outreach; rights of the accused, cooperation from national authorities; the court's investigative branch; and the court's funding mechanism.[92]

In addressing the most basic elements of the HCSS draft statute, the following should be considered. The August 2015 agreement provides that the Chairperson of the AUC will decide the seat of the HCSS, whether within South Sudan or another country.[93] South Sudan is the preferable location of the court as it better facilitates witness, victim and public accessibility, increased public visibility, increased understanding of South Sudan's culture by international members of the Court's staff, and enhances the court's legitimacy in South Sudan.[94] However, increased violence in the country provides a security risk to victims, witness, and court personnel. Additionally, unless indicted or convicted by the HCSS, individuals responsible for crimes remaining in positions of power may negatively influence witnesses, court personnel, or court proceedings.[95] In considering the composition of the court's judges and staff, the August 2015 peace agreement provides that the majority of HCSS judges should be from African states other than South Sudan.[96] The inclusion of qualified South Sudan judges is important to increase the national legitimacy of the court, enhance capacity building, knowledge and skills transfer from non-South Sudanese judges to South Sudanese judges to ensure the improvement of the domestic judicial system once the HCSS has dissolved.[97] Currently, the most pressing matter for the court's establishment, which is to be addressed in the draft statute, is the creation of an investigation branch—the most immediate purpose of which is to collect and preserve evidence for later use in HCSS trials.[98] This investigative body may be established before the rest of the HCSS, as has occurred in other international and hybrid courts including the Special Criminal Court for the Central African Republic.[99]

Second, though the August 2015 peace agreement provides the AUC with the power to establish the HCSS, the agreement also requires that the TGoNU initiate legislation necessary for the HCSS's establishment.[100] Though the AUC has already provided numerous commitments to the HCSS's establishment, this will likely require further commitment from the government of South Sudan.[101]

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91 Keppler, *supra* note 79, at 2.

92 *Id.*; U.N. S/2014/537, *supra* note 21.

93 *Security Council Calls*, *supra* note 53.

94 *Final Report*, *supra* note 70, at 21-22.

95 *Security Council Calls*, *supra* note 53; U.N. S/2014/537, *supra* note 21 at 22.

96 *Security Council Calls*, *supra* note 53.

97 *Final Report*, *supra* note 70, at 22; Keppler, *supra* note 79; *Final Report*, *supra* note 70, at 21.

98 Keppler, *supra* note 79, at 2; *Final Report, supra* note 70, at 21.

99 *Final Report*, *supra* note 70, at 21; Keppler, *supra* note 79, at 2.

100 *Agreement on Resolution*, *supra* note 6, at 40.

101 *Id.*

While this is not necessary for the AUC's draft of the aforementioned statute, an agreement between the AUC and the government South Sudan pertaining to the passive of proper legislation by the TGoNU should ultimately be considered.

VI. Conclusion

The HCSS offers the best means of achieving sustainable peace in South Sudan, as truth alone is not an alternative to criminal justice. Despite the continuing conflict, the AUC should heed the call by both the South Sudanese and international community to take concrete steps towards the court's establishment.