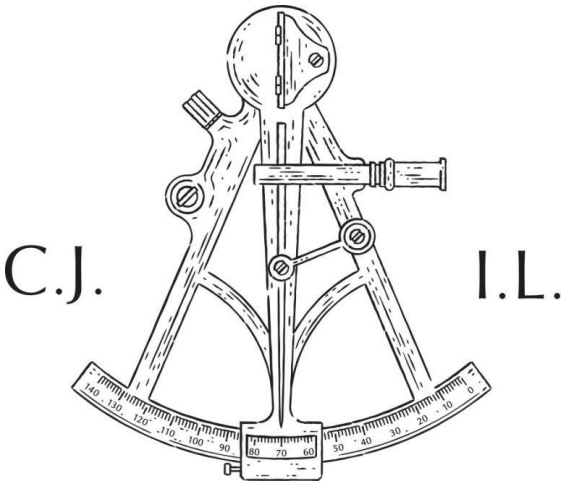

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International Shoe in Sub-Saharan Africa: Navigating the Complexities of Ascertaining Jurisdiction in Contemporary Cross-Border Employment Cases

Theophilus Edwin Coleman†

ABSTRACT

This article explores the mechanisms through which courts in Sub-Saharan Africa can exercise personal jurisdiction in contemporary cross-border employment cases. The article examines whether the current grounds of ascertaining jurisdiction in Sub-Saharan Africa, with specific reference to the law in Kenya, South Africa, Ghana, and Nigeria, are appropriate in a technologically driven era characterized by remote work, platform work, and digital nomadism. The article suggests that, considering the unique nature of modern employment contracts coupled with the tactics of some multinational corporations to escape the doctrine of presence, courts in Sub-Saharan Africa must draw some dialectical parallels from the decision of the U.S. Supreme Court in International Shoe. Co. v. Washington 326 U.S. 310 (1945) *and the minimum contacts test. This article argues that the continuous reliance on the age-long Anglo-American common law doctrine of physical presence, without judicial innovation, will create an avenue where some foreign corporations will be insulated from being sued in Sub-Saharan Africa. The contribution accordingly calls for a recalibration of the basis upon which courts in Sub-Saharan Africa exercise personal jurisdiction beyond the doctrine of physical presence. This call for a reassessment of the jurisdictional rules is justified because it will ensure that workers whose employment relationships have been unfairly terminated or entitled to any individual labor rights are not robbed of receiving remedies from Sub-Saharan Africa courts. The article concludes with a call for the jurisdictional rules in Sub-Saharan Africa to align with contemporary demands and societal contexts.*

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I. INTRODUCTION

Employment relationships are at the precipice of structural and legal changes. Contemporary modes of work, the emergence of technologically driven forms of employment, and employers' desire to adopt emerging technologies, such as artificial intelligence, are some driving forces for these changes.[1] In this contemporary era, employment relationships have been stretched beyond the traditional conceptualization and understanding. Hence, it is not uncommon to have working arrangements and contracts, in general, that have foreign elements. These foreign elements in employment arrangements include situations where the contracting parties vest a foreign court or forum with the authority to resolve disputes arising from their contract.[2] Contracting parties may also designate a foreign law to govern and determine their respective rights and obligations under their employment contract.[3] A forum selection agreement in a contract can exclude the jurisdiction of a court to determine a case.[4] Similarly, a choice of law clause in a contract can

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[1] *See* Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 63 U. CHI. LEGAL. F. 63, 65-84 (2017); Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 257-325 (2018); Kurt Parli, *Impacts of Digitalisation on Employment Relationships and the Need for More Democracy at Work*, 51(1) INDUS. L.J, 84, 84-108 (2021); Ronald C. Brown, *Robots, New Technology, and Industry 4.0 in Changing Workplaces. Impact on Labor and Employment Laws*, 7(3) AM. U. BUS. L. REV. 349, 350-360 (2018); John Burgess & Julia Connell, *New Technology and Work: Exploring the Challenges*, 31(3) ECON. LAB. REL. REV. 310, 310-323 (2020); Tammy Katsabian, *It's the End of Working Time as We Know it: New Challenges to the Concept of Working Time in the Digital Reality*, 65(3) MCGILL L.J. 379, 379-381 (2020).

[2] John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV.,127, 129 (2022); Ashlee Schaller, *Interpretation of Forum Selection Clauses: A Survey of Select English- and German-Speaking Jurisdictions*, 44 N.C. J. INT'L L. 117, 119 (2018); Sacha Dyson & Kevin D. Johnson, *My Sandbox or Yours? Enforcement of Forum Selection Clauses in Employment Agreements*, FED. LAWYER, Nov.–Dec. 2011, at 19-21; Louis J. Papa, *Employee Beware! Employment Agreements and What the Technology Related Employee Should Know and Understand Before Signing that Agreement: A Practical Guide*, 19 TOURO L. REV. 393, 408-09 (2003).

[3] Dyson & Johnson, *supra* note 2 at 19-21; Gary Born & Cem Kalelioglu, *Choice-of-Law Agreements in International Contracts*, 50 GA. J. INT'L & COMPAR. L. 44, 44-71 (2021); Uglješa Grušić, *Private International Law Regulation of Individual Employment Relationships within the European Union*, EUR. LAB. L. J. 1, 1-16 (2024); David Greene, *Conflicts of Law and Choice of Law Issues in Cross-border Employment Disputes*, *in* INTERNATIONAL EMPLOYMENT LAW: THE MULTINATIONAL EMPLOYER AND THE GLOBAL WORKFORCE (C. Campbell & D. Dowling, eds., 2000) at 53-63; UGLJEŠA GRUŠIĆ, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF EMPLOYMENT 56-90 (Cambridge University Press ed., 2015).

[4] Traditionally, courts in sub-Saharan Africa construed jurisdiction clauses as ousting their jurisdiction. They opposed jurisdiction clauses because a constitution or statute confers jurisdiction. For South Africa, *see* Goldschmidt v. Folb, 1974 (3) SA 778 (T); Astra Furnishers Ltd. v. Arend 1973 (1) SA 466 (C); Mediterranean Shipping Co. v. Speedwell Shipping Co. 1986 (4) SA 329 (D). *Contra* Benedai Trading Co. v. Gouws & Gouws Ltd. 1977 (3) SA 1020 (T); Reiss Eng'g Co. v. Insamcor Ltd. 1983 (1) SA 1033 (W). *See also* Elsabe Schoeman, *South Africa: Time for Reform*, OPTIONAL CHOICE OF COURT AGREEMENTS IN PRIVATE INTERNATIONAL LAW 364

exclude the applicability of domestic laws in favor of foreign laws.[5] The liberty of private parties to choose a foreign forum or arbitral tribunal to resolve their dispute and a foreign law to govern their contract is anchored in the doctrine of party autonomy. This doctrine is widely upheld as a foundational principle in contractual relations in many Sub-Saharan African countries.[6]

(Mary Keyes ed., 2020). For Nigeria, *see* Ventujol v. Compagnie Francaise de'Afrique Occidental [1949] 19 NLR 32; Sonnar (Nig) Ltd. v. Partenreederi M.S Nordwind [1987-1990] 3 NSC 175; Nika Fishing Co. v. Lavina Corp. [2008] 16 NWLR 805; MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd. [1993-1994] NSC 182; Onward Enters. v. MV Matrix [2010] 2 NWLR 530 CA 555; Abubakari Yekini, *The Effectiveness of Foreign Jurisdiction Clauses in Nigeria: An Empirical Inquiry*, 19 J. PRIV. INT'L L. 67, 67-91 (2023); Kraus Thompson Org. v. Unical [2004] 9 NWLR pt. 879 at 631. For Ghana, *see* Fan Milk Ghana Ltd. v. State Shipping Corp., 1 GLR 238 (1971); C.I.L.E.V v. Black Star Line Ltd., 1 GLR 744 [1967]. For Kenya, *see* Raytheon Aircraft Corp. v. Air Al Faraj Ltd., (2005) eKLR; Nedemar Tech. BV Ltd. v. Kenya Anti-Corruption Comm'n, (2008) eKLR; United India Ins. Co. Ltd. v. East African Underwriters (Kenya) Ltd., (1985) K.L.R. 898; Universal Pharmacy (K) Ltd. v. Pacific Int'l Lines (PTE) Ltd., (2015) eKLR.

[5] Ugljesa Grusic, *The Territorial Scope of Employment Legislation and Choice of Law*, 75 MOD. L. REV 722, 722–52 (2012); Jacquelin Mackinnon, *Dismissal Protections in a Global Market: Lessons to be Learned from Serco Ltd v. Lawson*, 38 Indus. L. J. 101, 101–12 (2009); JEREMY LEWIS ET AL., WHISTLEBLOWING: LAW AND PRACTICE 335–60 (4th ed., Oxford Univ. Press 2022) (2007); Anne Davies, *Fixed-Term Employment in the European Schools: Secretary of State for Children, Schools and Families v. Fletcher*, 2 Eur. Lab. L. J. 182, 182-87; *Duncombe v. Secretary of State for Children, Schools and Families*, 2 Eur. Lab. L.J. 182, 182–90 (2011). *See also, Duncombe v. Sec'y of State for Children Schs. and Fams.* [2011] UKSC 14; Serco Limited v. Lawson [2006] UKHL 3; New Zealand Basin Ltd. v. Brown [2016] NZCA 525 (Nov. 4, 2016).

[6] For a detailed discussion of the efficacy of the doctrine of party autonomy in Sub-Saharan Africa, s*ee* Theophilus Edwin Coleman, *Assessing the Efficacy of Forum Selection Agreement in Commonwealth Africa*, 7 J. COMPAR. L. AFR. 1, 1-40 (2020); RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA (Cambridge University Press, 2013). For South Africa, s*ee* City of Johannesburg Metropolitan Municipality v. International Parking Management (Pty) Ltd. & Others [2011] ZAGPJHC 5 (S. Afr.); Telcordia Technologies v. Telkom SA Ltd. [2006] ZASCA 112, 2007 (3) SA 266 (SCA) (S. Afr.); Lufuno Mphaphuli & Associates (Pty) Ltd. v. Andrews & Another [2009] ZACC 6, 2009 (4) SA 529 (CC) (S. Afr.); Close-Up Mining (Pty) Ltd. & Others v. The Arbitrator, Judge Phillip Boruchowitz & Another [2023] ZASCA 43, 2023 (3) SA 38 (SCA); Lugedlane Development (Pty) Ltd. & Another v. Mjejane Parent Game Reserve Home Owners Association & Others [2024] ZAGPJHC 391; CHRISTOPHER FORSYTH, PRIVATE INTERNATIONAL LAW: THE MODERN ROMAN DUTCH LAW INCLUDING THE JURISDICTION OF HIGH COURTS (4th ed. 2012); Jan L. Neels, *The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law*, 22 UNIF. L. REV. 443, 443-451 (2017); Theophilus Edwin Coleman, *Reflecting on the Role and Impact of the Constitutional Value of Ubuntu on the Concept of Contractual Freedom and Autonomy in South Africa*, 24 POTCHEFSTROOM ELEC. L. J. 1, 1-68 (2021); D. Hutchison, *The Nature and Basis of Contract* in THE LAW OF CONTRACT IN SOUTH AFRICA (D. Hutchison et. al. eds.) (3d ed. 2017) at 26; C.J. Pretorius, *General Principles of the Law of Contract*, 2007 ANN. SURV. S AFR.'N. L, 469, 500-503 (2007). For Nigeria, s*ee* Owners of MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd. [2003] 15 NWLR 469; Transocean Shipping Ventures Private Ltd. v. MT Sea Sterling [2018] LPELR (CA); Engineer Frank v. Colonel Abdu Ltd. [2003] FWLR (Pt. 158) 1330, 1355-56; OSHC v. Ogunsola [2003] 14 NWLR (Pt. 687) 431; Onuselogu Enterprise Ltd. v. Afribank (Nig) Ltd. (2005) 1 NWLR (Pt. 940) 577; Maritime Academy of Nigeria v. AQS (2008) ALL FWLR (Pt. 406) 1872); MV Pornomos Bay v. Olam (Nig) PLC [2004] 5 NWLR 1, 14; Sino-Africa Agriculture & Ind Company Ltd. v. Ministry of Finance Incorporation [1999] 9 NWLR (Pt. 520) 224, 248; CHUKWUMA SAMUEL ADESINA OKOLI & RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN NIGERIA 128 (1st ed. 2020); Chukwuemeka E. Ibe, *Party Autonomy and the Constitutionality of Nigerian Arbitration and Conciliation Act, 1988, Sections 7(4) and 34 – Commentary on Agip Oil Co. Ltd. v. Kremmer and Others, Chief Felix Ogunwa*, 28 J. INT'L. ARB., 495 (2011). For Kenya, *see* Euromec International Limited v. Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR); Kenya Alliance Insurance Co. Ltd. v. Annabel Muthoki Muteti [2020] KLR; Nedemar Technology BV Limited v. Kenya Anti-Corruption Commission & Another [2008] KLR; Nyutu Agrovet Ltd. v. Airtel Networks Kenya

The conflict of law issues in Sub-Saharan Africa has been heightened by technological advancement and contemporary forms of work, such as remote work and digital nomadism. Also, technological advancement amplified by access to the Internet has enabled foreign corporations outside of Africa to engage the services of individual African workers without directly carrying on business or having a registered place of business or incorporation in Sub-Saharan Africa.[7] The benefits of such cross-border employment opportunities in Sub-Saharan Africa will not be belabored. However, it poses several legal concerns. For instance, where a foreign corporation is not physically present in a Sub-Saharan African country, it becomes practically impossible for courts to exercise jurisdiction over such a foreign corporation, let alone apply their domestic labor laws or civil procedure rules extraterritorially to such a foreign corporation.

To make matters worse, some multinational corporations outsource their operations to third-party corporations instead of directly operating in Sub-Saharan Africa.[8] This outsourcing approach anonymizes and distances their operations in Sub-Saharan Africa. Hence, a multinational corporation can indirectly achieve its objectives by engaging the services of individual African workers without being physically present to be subjected to the laws and jurisdictional competence of the courts in Sub-Saharan Africa. In employment law, this tactic of some foreign corporations engaging African workers without being physically present in Sub-Saharan Africa has legal implications. For instance, a worker whose employment contract has been unfairly terminated by a foreign corporation may be denied the opportunity to successfully sue in a Sub-Saharan African court or be protected by domestic labor laws. Indeed, the option for the worker is to sue at the employer's location, which might be financially onerous and impractical.

The situation whereby some foreign corporations operate in Africa but are not physically present, coupled with the reality that some corporations arrange their affairs to anonymize and distance their operations, has been lamented by courts. For instance, in the Kenyan case of *Kanuri Limited & 33 others v. Uber Kenya Limited*,[9] Judge Tuiyott expressed discontent in the argument by the defendant, Uber BV, that there existed no connection or relationship between them and Uber Kenya Limited and should thus be struck off the as a party to a

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Limited, Chartered Institute of Arbitrators -Kenya Branch (Interested Party) [2019] KESC 11; Ririani & Another v. Childs & 7 Others [2024] KEHC 2474 (KLR); Synergy Industrial Credit Ltd v. Cape Holdings Ltd. [2020] KLR; World Vision International v. Synthesis Limited & Another [2019] KLR. For Ghana, s*ee* Godka Group of Companies v. PS International Ltd. [1999-2000] 1 GLR 409; Fan Milk Ghana Ltd. v. State Shipping Corporation [1971] 1 GLR 238; C.I.L.E.V v. Black Star Line Ltd & Another [1967] 1 GLR 744; CSPC Ghamed Pharmaceutical Ltd. v. Octoglow Ghana Ltd. [2023] GHAHC 45 (Ghana High Ct.); Carbon Commodities DMCC v. Trust Link [2024] GHAHC 59 (Ghana High Ct.).

[7] In Dorcas Kemunto Wainaina v. IPAS [2018] eKLR par.31 (Kenya)., the Kenyan Employment and Labor Relations Court (ELRC) referred to cross-border employment relationships as "modern employment law".

[8] Lere Amusan, *Multinational Corporations' (MNCs) Engagement in Africa*, 5(1) J. AFRI. FOREIGN AFF. 41, 41-43 (2018); Elisa Giuliani & Chiara Macchi, *Multinational Corporations' Economic and Human Rights Impact on Developing Countries: A Review and Research Agenda*, 38(2) CAMB. J. ECONS. 479, 493 (2014); Hassan M. Ahmad, *The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law States*, 70 AM. J. COMP. L. 227, 232,242 (2022); Daleen Millard & Monray Marsellus Botha, *The Buck Stops…Where, Exactly? On Outsourcing Liability Towards Third Parties*, 34(3) OBITER 476, 476, 493 (2013).

[9] *See* Kanuri Limited v. Uber Kenya Limited, Civil Case 356 of 2016, Ruling High Ct. Nairobi (2021) KLR.

dispute before the court.[10] The extent to which foreign corporations operate in Sub-Saharan Africa but are not physically present has triggered litigations in Kenya and South Africa. It has also placed courts in those countries to navigate the seemingly complex issues in employment relations laced with conflicts of laws.

At the core of the problem is the continued reliance on the doctrine of physical presence as the primary basis for courts in Sub-Saharan Africa to exercise personal jurisdiction. The doctrine of physical presence is one of the main grounds of jurisdiction in Sub-Saharan Africa.[11] The doctrine of presence is a long-standing common law mechanism courts use to exercise personal jurisdiction.[12] Presence underscores the idea that the defendant against whom an action has been instituted is within a court's geographical or territorial confines.[13] Physical presence is often understood through the lenses of a court exercising physical power over a defendant.[14] Underlying the doctrine of presence is the understanding that a defendant must be physically present within a particular country or geographical boundaries of a court before that court can exercise jurisdiction over the defendant. This is irrespective of how short or transient the defendant is within the court's territory.[15] In the United States, physical presence as a foundation upon which courts assume personal jurisdiction over a defendant was established in *Pennoyer v. Neff*.[16] In *Pennoyer*, the United States Supreme Court held that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and that "no State can exercise direct jurisdiction and authority over persons and property outside its territory."[17] Relative to corporations or business entities, physical presence means that the corporation has a place of incorporation or is carrying on business in the geographical location where the court sits.[18]

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[10] *Id*. at para. 9.

[11] *See generally*, OPPONG, *supra* note 6.

[12] Rosana A. Blake, *Conflict of Laws – Physical Presence and Appearance as Bases of Jurisdiction*, 33 KENT. L.J 126 (1945); Wendy Collins Perdue, *What's Sovereignty Got to Do with It? Due Process, Personal Jurisdiction and the Supreme Court*, 63 S.C. L. REV 729 (2012).

[13] Roy Mitchell Moreland, *Conflict of Laws – A Rationale of Jurisdiction*, 65 KENT. L. J. 5, 9-11 (1965); Eric P. Heichel, *Physical Presence Basis of Personal Jurisdiction Ten Years After Shaffer v. Heitner: A Rule in Search of a Rationale*, 42 NOTRE DAME L. REV. 713, 713-17 (1987); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105 (1991).

[14] McDonald v. Mabee, 243 U.S 90, 91 (1916) (Per Justice Holmes: "The foundation of jurisdiction is physical power"). Before *Mabee*, Justice Holmes in *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1916), had linked the exercise of sovereign power to imprison or seize a person to *in personam* jurisdiction. *See also*, Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719 (2022); Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 627-268 (2017); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1615-1620 (2003); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005).

[15] Peabody v. Hamilton 106 Mass. 217, 221 (1870); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Jeffrey E. Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607 (1979); David H. Vernon, *Single Factor Bases of In Personal Jurisdiction – A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273 (1978); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1987).

[16] Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

[17] *Id*. at 722.

[18] LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS, at 4-5 (2018).

The Anglo-American doctrine of presence had several downsides and proved unworkable after some time.[19] The impracticality and difficulties of the presence doctrine were manifest in *International Shoe. Co. v. Washington*,[20] where the United States Supreme Court had to navigate the situation of a non-resident artificial entity, which, by the very structure of its affairs, sought to escape the doctrine of presence.[21] In that case, the U.S. Supreme Court averred that due process requires a defendant to have certain minimum contacts with the forum in order to be subjected to a judgment *in personam* if he is not present within the territory of the forum, such that maintenance of the suit does not offend traditional notions of 'fair play and substantial justice".[22] Following *International Shoe*, there was recognition that rules on jurisdiction must align with societal progress. In *Hanson v. Denckla*,[23] the U.S. Supreme Court, recognizing the changing dynamics in society owing to technological advancement, stated: "As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone similar increase."[24]

The above statement by the U.S. Supreme Court in *Hanson* is particularly relevant today, given the profound impact of contemporary developments such as easy access to the internet in many countries and the preference of workers to work remotely, among others. These technological advancements in society necessitate the development of jurisdiction rules that reflect emerging circumstances.[25] Unfortunately, in many Sub-Saharan African countries, the rules on jurisdiction have not seen considerable development as the doctrine of presence remains one of the foremost grounds courts use to exercise personal jurisdiction. The lack of development in the rules on jurisdiction has amplified "International-Shoe-like cases" in some Sub-Saharan African countries. Through these "International-Shoe-like cases," some foreign corporations have distanced and anonymized their presence in Sub-Saharan Africa, even though they are engaging individual African workers. The "International Shoe-like cases" seem to pose immense challenges for African courts as, on the one hand, they are barred from employing judicial innovation and craftiness to exercise jurisdiction, but on the other hand, not exercising jurisdiction would mean that the existing rules on jurisdiction are insulating foreign corporations from being successfully sued in a Sub-Saharan African court.[26]

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[19] Michael Vitiello, *Limiting Access to US Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 UC DAVIS J. INT'L L. & POL'Y, 209, 227 (2015); Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1594 (2018).

[20] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[21] LITTLE, *supra* note 18, at 5.

[22] Int'l Shoe Co., 326 U.S. 310 at 316.

[23] Hanson v. Denckla, 357 U.S. 235 (1977).

[24] *Id*. at 250-51.

[25] *See* Motaung v. Samasource Kenya EPZ Limited t/a Sama, Petition E071 of 2022, Ruling Emp. and Lab. Rels. Ct. Nairobi (2024) KLR (The Kenyan ELRC hinted at technological advancement and emerging modes of work. However, the court did not mention the increasing difficulty posed by technology and the necessity to realign the rules on jurisdiction to meet the changing times).

[26] *See*, e.g., the Ghanaian case of Bimpong Buta v. General Legal Council [2003-2005] 1 GLR 738 (The Supreme Court held: "The court cannot behave like an octopus and stretch its tentacles for jurisdiction"); Intercontinental Group (GH) Ltd v. Zenith Bank (Ghana) Limited Suit No. CM/BDC/0219/2023 (Unreported) ("The court cannot behave like a midfield libero in football parlance who can surge forward and backward and not restricted to any particular position on the field.")

This article argues that with the emergence of "International Shoe-like" cases[27] in Sub-Saharan Africa—with specific reference to Kenya, South Africa, Nigeria, and Ghana—courts can draw some dialectical parallels from the U.S. Supreme Court decision in *International Shoe* on the minimum contacts to establish a jurisdictional rule that suits contemporary contexts. This article calls for a reassessment and recalibration of jurisdictional rules in Sub-Saharan Africa beyond the contours of the doctrine of physical presence to a framework that considers or is linked to the specific conduct of foreign corporations in Africa. The article suggests that adopting *International Shoe* can create a legitimate pathway for courts to exercise personal jurisdiction over foreign corporations that have structured their business operations to escape the doctrine of presence in Sub-Saharan African countries. This article is organized as follows: Part I provides an overview of personal jurisdiction by reflecting on the traditional basis upon which courts exercise personal jurisdiction. It explores the early conceptualization of the doctrine of physical presence under English common law. Part II of this article provides an overview of the rules on personal jurisdiction in Ghana, Nigeria, Kenya, and South Africa, especially from the lenses of the status of the doctrine of physical presence. Part III deals with the minimum contacts test and its development by the US Supreme Court. Part IV thoroughly explores "International-Shoe-like" cases in some Sub-Saharan Africa and the jurisdiction questions in those cases. Part V analyzes the facts of the "International Shoe-like" cases in Sub-Saharan Africa through the prism of the minimum contacts test. While it is admitted that the rules on jurisdiction in the United States is plagued with undesirable unpredictability and uncertainty,[28] there are some benefits. Sub-Saharan African countries can still draw dialectical parallels from the decades of development and extensive scholarly works on the minimum contact test to develop jurisdictional rules beyond the doctrine of physical presence.

II. IN PERSONAM JURISDICTION

A. *Early Conceptualization of the Doctrine of Presence as a Basis for Jurisdiction*

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[27] This article uses the term "International Shoe-like cases" to describe litigated cases in Sub-Saharan African courts in which some foreign corporation defendants have structured and organized their business operations and activities to obscure and distance their operations in Africa. This is done to circumvent the doctrine of physical presence, as was evident in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[28] *See,* e.g., Friedrich K. Juenger, *A Shoe Unfit for Globetrotting,* 28 U.C. DAVIS 1027, 1027 (1995) ("American jurisdictional law is a mess…The Court is unable to devise a satisfactory approach to a simple question of where a civil action may be brought"); Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy,* U.C. DAVIS L. REV. 561, 564 (1995) ("Jurisdiction in the United States is a mess"); William M. Richman, *Understanding Personal Jurisdiction,* 25 ARIZ. ST. L.J. 599, 600 (1992) (personal jurisdiction doctrine is an "unsatisfactory body of law that is extremely difficult for jurisdiction scholars to organize, synthesize, and comprehend."); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Towards a Mixed Theory of Personal Jurisdiction,* 108 YALE L.J, 189, 189 ("Ambiguity and incoherence have plagued the minimum contacts tests for more than five decades during which it has served as a cornerstone of the Supreme Court's personal jurisdiction doctrine."); Russel J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction,* 22 RUTGERS L.J. 611, 625 (1991) ("jurisdiction doctrine is a chaos"); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box,* 32 B. C. L. REV. 529, 529-30 (1991) ("Court [Supreme Court] has been unable to develop a coherent doctrine"); Stephens, *supra* note 12 at 105 ("doctrine in the personal jurisdiction area is less clear, less tied to the state and theoretical underpinnings…"). *See also*, Patrick J. Borchers, *The Problem of General Jurisdiction,* 2001 U. CHI. LEGAL F. 119, 119 (2000); Douglas D. McFarland, *Drop the Shoe: A Law on Personal Jurisdiction,* 68 MISSOURI L. REV. 753, 766 (2003).

Historically, English common law has long held the view that the exercise of jurisdiction by courts must not be at variance with the due process rights of the disputing parties. This principle was eminently established in *Buchanan v. Rucker*.[29] In *Buchanan*, the plaintiff sought to enforce a judgment from Tobago in England. Following local procedures, the summons was pasted on the notices of the Courthouse door. In England, Lord Ellenborough asked, "Can the Island of Tobago pass a law to bind the rights of the whole world?" Would the world submit to such an assumed jurisdiction?"[30] In answering, Lord Ellenborough averred that for a court to exercise jurisdiction over a person (*in personam* jurisdiction), it must have a reasonable foundation or basis to do so. In identifying a reasonable foundation or basis for a court to assume jurisdiction, there must be sufficient contact to substantiate why a non-resident of the Island of Tobago defends a suit in that local jurisdiction.[31] Consequently, the pasting of the summons on the door of the local courthouse is insufficient to provide notice to a foreign defendant.[32] Accordingly, the judgment was not enforced for failure to comply with due processes of law.[33] In principle, therefore, for a court to assume jurisdiction over a person or a subject matter, there must be a reasonable basis or foundation to do so.[34]

It is trite, also, that the exercise of jurisdiction must be preceded by satisfactory service of process to the defendant. The service of process perfects the court's competence to hear and determine a case. Professor Laura E. Little, commenting on the significance of service of process as a precondition for jurisdiction from an American context, opined that "rules governing service of process are largely technical . . . . proper service of process is a necessary precondition for the court to have jurisdiction over the case . . . service of process is the means by which a court ensures that personal jurisdiction has been perfected".[35] Also, John O'Brien explains the underlying idea of the strict insistence of service of process as a precondition before a court could assume jurisdiction. O'Brien asserts that "the purpose of serving writ is to give the defendant proper notice of a claim."[36] The service of process and the reasonable basis for a court to exercise jurisdiction legitimizes the foundation upon which a court could assume jurisdiction over a person.

Early conceptualization of jurisdiction under English common law was that a person invokes the jurisdiction of English courts in a personal action by serving a writ or an originating process on a defendant physically present in England.[37] This principle was adorned in *Colt Industries v. Sarlie (No. 1)*,[38] where a Company in New York sought to

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29 Buchanan v. Rucker (1908)103 Eng. Rep. 546); 9 East, 192.

30 *Id*. at 547.

31 *Id*.

32 *Id*.

33 *Id*.

34 *Id*.

35 LITTLE *supra* note 18, at 6.

36 JOHN O'BRIEN, CONFLICT OF LAWS 181 (2d ed. 1999).

37 J.G. COLLIER, CONFLICT OF LAWS 72 (3d ed. 2001); ADRIEN BRIGGS, THE CONFLICT OF LAWS 2013); PIPPA ROGERSON, COLLIER'S CONFLICT OF LAWS 143 (4th ed. 2013); ABLA MAYSS, PRINCIPLES OF CONFLICT OF LAWS 170, 172 (Cavendish Publ'g ed., 3d ed. 1999); GILES CUNIBERTI, CONFLICT OF LAWS: A COMPARATIVE APPROACH: TEXT AND CASES 191-197 (Edward Elgar 2017).

38 Colt Industries v. Sarlie (1965) 1 WLR 440 (QB).

enforce a judgment against a French man in England.[39] Processes were served on him at a London hotel where he stayed for one night.[40] The Court in England held that it had jurisdiction over him so long as he was physically present and had been duly served. According to the Court, it was immaterial how long he was present within the territories of the Court.[41] Similar views were held in *Maharanee of Baroda v. Wildenstein*,[42] where a writ of service was served on the defendant in England for a one-day visit to Ascot races. Even though the defendant in the case objected to the jurisdiction of the Court, the Court of Appeal held that because he had been duly served, it had the competence and jurisdiction to hear the case.[43]

The doctrine of presence as a basis of jurisdiction is also conceptualized through the exercise of the physical power of a court over a person present within the territories of the court.[44] In some jurisdictions, presence was seen through the lens of the defendant being 'arrested' to appear before a court.[45] Physical presence means the defendant is geographically present within the court's territory.[46] The foundation upon which a court exercises jurisdiction over a person could be interspersed with several constitutional issues, particularly the utmost compliance with a defendant's right to due process.

Within employment relations, when an employee seeks to enforce a right that an employer has breached, that employee must be allowed to seek legal redress against the employer. However, where a plaintiff (employee) sues has several implications, even on the case outcome. The venue a plaintiff sues to enforce a right is thus crucial. The most reasonable option for a plaintiff (employee) is to initiate action at the place where the employer is physically present or has assets.[47] This will enable easy recognition and enforcement of the judgment against an employer present in the court's geographical territories.[48] In most cases, however, plaintiffs also sue at convenient locations, especially in forums where they understand court structure and operations.[49] It is common for parties to sue in locations or argue for a more convenient forum to litigate their disputes.[50] Hence, suing

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39 *Id*.

40 *Id*. at 441.

41 *Id*. at 440.

42 Maharanee of Baroda v. Wildenstein (1972), 2 WLR 1077 (CA).

43 *Id*. at 1078.

44 McDonald v. Mabee, 243 U.S 90 (1916).

45 *See*, e.g., South Africa, where before the decision in *Bid Indus. Holdings (Pty) Ltd v. Strang* [2007] SCA 144 (RSA), the Roman-Dutch doctrine of "arrest and attachment" served as a basis for which a court could exercise personal jurisdiction. For further discussion, *See* Elsabe Schoeman, *Bid Industrial Holdings (Pty) Ltd v. Strang & another (Minister of Justice and Constitutional Development, Third Party: An Analysis*, In THE COMMON LAW JURISPRUDENCE OF CONFLICT OF LAWS (Sarah McKibbin & Anthony Kennedy, eds 2023) at 191-206.

46 Blake, *supra* note 12, at 126; Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag*?, 46 N.M. L. REV., 1, 3 (2016).

47 LITTLE, *supra* note 18, at 2.

48 *Id*.

49 *Id*.

50 *See* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289-314 (1956); B.D. Inglis, *Forum Conveniens – Basis of Jurisdiction in the Commonwealth*, 12 AM. J. COMP. L. 583, 583-594 (1964); Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. DIG. 157 (2012); Charles P. Schropp, *Civil Procedure – Forum Non-Conveniens – Closing the Gap Between the Procedural Rights of Residents and Non-Residents in New York State*, 58 CORNELL L. REV. 782 (1973); Daniel J. Dorward, *The Forum Non Conveniens*

at a location where an employer is physically present increases the odds of enforcing the judgment against the employer or the employer's assets. The physical presence of a defendant within the territories of a court renders a judgment more effective, in terms of its enforcement. Flowing from the idea that judgments of courts must be effective (discussed in the next section), many courts in Sub-Saharan Africa continue to subscribe to the age-long English common law doctrine of physical presence as one of the primary bases of exercising personal jurisdiction.

III. IN PERSONAM JURISDICTION IN SUB-SAHARAN AFRICA

A. *General Remarks and Special Rules*

The Sub-Saharan African countries under discussion here rely heavily on the age-old English common law doctrine of physical presence as a foundation for courts to exercise personal jurisdiction over individuals (both natural and private corporations).[51] The exercise of jurisdiction in the Sub-Saharan African countries under discussion operates in a very restricted scope in terms of strict compliance with domestic civil procedure rules.[52] In addition, special rules on jurisdiction inhibit courts from innovating or employing judicial craftiness to exercise jurisdiction over a person or subject matter.[53] Some of the special rules on jurisdiction include the idea that the competence of a court to discharge, adjudicate, dispose, and deal with disputes is defined by a constitution or statute.[54] Beyond the scope of the constitution and statute, courts are barred from utilizing judicial craftiness and innovation to exercise jurisdiction over a person.[55]

Also, the exercise of a court's jurisdictional power over a person or subject matter is enmeshed in the axiomatic expression touted in the Supreme Court of Ghana case of *Bimpong Buta v. General Legal Council & others*[56] that a "court cannot behave like an

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Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs, 19 U. PA. J. INT'L ECON. L. 141, 141-168 (1998); Alhagi Marong, *Unlocking the Mysteriousness of Complementarity: In Search of a Forum Conveniens for Trial of the Leaders of the Lord's Resistance Army*, 40 GA. J. INT'L & COMPAR. L. 67, 67-103 (2011); MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW (Brill 2004).

51 OPPONG, *supra* note 6, at 49, 64-65.

52 *See*, e.g., Ord. 8 Rules 1-2 High Ct. (Civ. Proc.) Rules, 2004 (C.I.47) (for Ghana); Emp. and Lab. Rels. Ct. (Proc.) Rules (2016); Civ. Proc, Rules (2010) (for civil procedure rules on employment and labor relations and general rules on civil procedure in Kenya respectively). In Nigeria, each State High Court has its own civil procedure rules. Also, the Federal High Courts have their civil procedure rules. *See*, e.g., High Ct. Lagos State (Civ. Proc.) Rules (2004); High Ct. (Civ. Proc.) Rules Kaduna State (2007); High Ct. Fed. Cap. Territory, Abuja Civ. Proc. Rules (2018); Fed. High Ct. (Civ. Proc.) Rules (2000). For further discussion on personal jurisdiction in Nigeria, *see* Gbenga Bamodu, *In Personam Jurisdiction: An Overlooked Concept in Nigerian Jurisprudence*, 7 J. PRIV. INT'L L. 273, 274 (2011).

53 See, e.g., *Samuel Kamau Macharia v. Kenya Commercial Bank Limited* (2012) eKLR (Per the Supreme Court of Kenya: "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution").

54 *Id*.

55 *Id*.

56 [2003-2005] 1 GLR 738 (Ghana).

octopus and stretch its tentacles for jurisdiction."[57] Further, in *Intercontinental Group (GH) Ltd v. Zenith Bank (Ghana) Limited*,[58] The Supreme Court of Ghana again re-emphasized that

> …the issue of a court's jurisdiction to entertain a matter is very central to every issue. That is why the court itself cannot raise it *suo motu*. The court cannot behave like an octopus and stretch its tentacles for jurisdiction. The court cannot behave like a midfield libero in football parlance who can surge forward and backward and not restricted to any position on the field.[59]

In addition to the foregoing, an unbroken chain of case law in Sub-Saharan African countries under discussion establishes the principle of the duty of courts to ensure that its jurisdiction has been properly invoked.[60]

However, there are situations where, in furtherance of achieving justice, some courts exercised jurisdiction over parties even though the action presented to them seems "octopus-like" and omnibus. This power for courts to advance the virtues of justice is also rooted in a constitution or statute. In the Kenyan case of *Patrick Chege Kinuthia & 2 others v. Attorney General*,[61] Judge Lenaola remarked:

> From my reading of the Petition and the proceedings, although I will not grant the orders sought in the present Petition which was omnibus, octopus-like, dispirited and lacking in focus, Article 23 of the Constitution gives this Court the leeway to grant any appropriate order to meet the ends of justice.[62]

The special rules governing jurisdiction and the restrictions on courts not to innovate and act like an 'octopus' in jurisdiction matters are aimed at ensuring that the due process rights of a defendant are not unduly impaired. Suffice it to say, the discussion below provides an overview of the status of old-age English common law doctrine of presence as a basis for courts to exercise jurisdiction in the Sub-Saharan African countries under discussion.

B. *Ghana*

The preponderance of cases in Ghana on *in personam* jurisdiction over corporations deals with issues where the corporations were physically present or resident in Ghana.[63] The

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[57] *Id.*

[58] *See, e.g.*, Intercontinental Group (GH) Ltd. v. Zenith Bank (Ghana) Ltd. Suit No. CM/BDC/0219/2023, at *5 (unreported) ("Jurisdiction has been defined as the authority which a court has to decide matters which are litigated before it or take cognizance of matters presented before it in a formal way for its decision. The limits of this authority are imposed, a charter or commission under which the court is constituted, and may be extended or restricted by like means").

[59] *Id.*

[60] *See, e.g.*, Suleain Mwamlole Warrakah v. Mwamlole Tchappu Mbwana [2018] eKLR (Kenya); Daniel Kimani v. Francis Mwangi Kimani [2015] eKLR (Kenya); Kipngok v. Kotut (Application 34 of 2019) [2020] KESC 26 (KLR)(Kenya); Adega v. Kibos Distillers Ltd. [2020] KESC 36 (KLR) (Kenya); Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] eKLR (Kenya); Anthony Miano v. Attorney General [2021] eKLR (Kenya).

[61] Patrick Chege Kinuthia v. Attorney General [2015] eKLR (Kenya).

[62] *Id.*

[63] *See generally*, RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN GHANA (2012).

doctrine of presence still applies under Ghanaian law. It serves as a basis upon which Ghanaian courts will assume jurisdiction over a person or a corporation.[64] No matter how fleeting or short a defendant is within the territories of Ghana, Ghanaian courts will have the power and competence to exercise jurisdiction. The transient rule, therefore, applies under Ghanaian law. The doctrine of presence and the territorial theory of jurisdiction was established in *Tafa & Co (Ghana) Limited v. Tafa & Co. Limited*,[65] where the plaintiff sued the foreign corporation for carrying on business in Ghana. A writ of summons was served on the company director, who held himself out as a substitute for the foreign corporation. The High Court held that because the company director was within the court's jurisdiction, it was sufficient to serve the writ of summons on him. Accordingly, the court had the power to exercise jurisdiction *in personam*.[66] In the words of Judge Edusei:

> The presence of a foreigner within this jurisdiction is sufficient to serve a writ of summons on him. Jurisdiction, in my view, is granted upon territorial dominion, and any person within the territorial dominion owes obedience to its sovereign power and, therefore, must be obedient to its laws and the jurisdiction of its courts.[67]

According to *Ackerman v. Société General de Compensation*,[68] courts can exercise jurisdiction over a foreign corporation resident in Ghana.[69] To determine whether a foreign corporation is resident in Ghana, the corporation must have a permanent place of business or carry on business in Ghana.[70] These issues are determined considering the facts and circumstances at the commencement of the legal action or suit.[71] A foreign corporation does need to have a permanent place of business in Ghana to be considered to be doing business in Ghana. This principle was affirmed in the case of *Attorney General v. Levandowsky & others*,[72] where Archer JA opined that selling products or providing services is enough to establish that a foreign corporation was doing business in Ghana.[73] A foreign company duly incorporated according to the laws of a foreign country can sue in Ghanaian courts. In *Edusei v. Dinners Club Suisse SA*,[74] Ghanaian courts permitted a company incorporated outside Ghana to have the capacity to sue in Ghana so long as it discloses its place of incorporation in the writ of summons.[75] This position of Ghanaian law underscores the Ghanaian court's 'open door' policy to foreign corporations to institute legal proceedings in Ghanaian courts so long as the writ of summons indicates their place of incorporation. However, when a corporation or an entity is not incorporated, per the decision in *Kimon Compania Naveria*

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64 RICHARD FRIMPONG OPPONG & KISSI AGYEBENG, CONFLICT OF LAWS IN GHANA 49 (2021).
65 Tafa & Co (Ghana) Ltd. v. Tafa & Co. Ltd. [1977] 1 GLR 422 (Ghana).
66 *Id*.
67 *Id*. at 425.
68 Ackerman v. Société General de Compensation [1967] GLR 212 at 214 (Ghana).
69 *Id*.
70 Tafa & Co. (Ghana) Ltd. v. Tafa & Co. Ltd. [1977] 1 GLR 422 (Ghana).
71 Ackerman v. Société General de Compensation [1967] GLR 212 at 214 (Ghana).
72 Att'y Gen. v. Levandowsky [1971] 2 GLR 58.
73 *Id*.
74 Edusei v. Dinners Club Suisse SA [1982-83] GLR 809.
75 *Id*.

SARP v. Volta Line Ltd (Consolidated),[76] that unincorporated entity is prohibited from instituting or even suing in Ghanaian courts through an attorney.[77]

In Ghana, before a court can exercise jurisdiction over a foreign corporation, it must be preceded by service of processes. [78] The service process must comply with the Companies Act, 2019 (Act 992) procedure and not the High Court (Civil Procedure) Rules.[79] Sections 291 and 333 of the Companies Act deal with the service of documents and external companies, respectively. Under the Companies Act, a company is external if it is a body corporate formed outside Ghana but has an established place of business in Ghana.[80] An external company is said to have an established place of business in Ghana if that company has a branch, registered office, factory, management, share, mine, or other fixed place of business in Ghana.[81] Under the Companies Act, a body corporate will only be deemed to have an established place of business in Ghana if it carries on business dealings in Ghana through a broker or general commission agent acting in the ordinary course of his business.[82]

The Companies Act requires that, in order for an agency to apply for a determination of whether a foreign corporation has established a place of business in Ghana, the agent must and should habitually exercise general authority to negotiate and conclude contracts for and on behalf of the foreign corporation.[83] Also, according to the Companies Act, the mere fact that an external company has a subsidiary that is incorporated, carrying on business, or resident in Ghana does not indicate that that body corporate has a place of business in Ghana.[84] Hence, the Companies Act is somewhat restrictive to Ghanaian courts assuming jurisdiction over foreign corporations.[85] It can, therefore, be argued that in terms of the scope or parameters based on which a Ghanaian court can assume jurisdiction over a foreign corporation, the Companies Act reduces that scope and establishes a narrowly defined framework based on which a foreign corporation can be deemed to be present or have an established place of business or be carrying on business in Ghana. Suffice it to say, there are certain circumstances where Ghanaian court will permit a plaintiff to serve a foreign defendant or corporation outside Ghana.[86] This service process must strictly comply with the High Court Civil Procedure Rules. One cardinal rule for service out of the jurisdiction (service ex juris) is that it must be with the leave or permission of the court, and it is granted when it is reasonably necessary for the court to do so.[87]

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[76] Kimon Compania Naveria SARP v. Volta Line Ltd. (Consolidated) [1973] 1 GLR 140.

[77] *Id*.

[78] Oppong & Agyebeng, *supra* note 64, at 49.

[79] The Companies Act, §§ 291 and 333 (2019) (Ghana). *See also* Oppong & Agyebeng, *supra* note 64, at 58.

[80] *Id*. at § 329(2).

[81] *Id*. at § 329(3).

[82] *Id*. at § 329(4)(a).

[83] *Id*. at § 329(3).

[84] *Id*. at § 329(4)(b).

[85] *Id*.

[86] OPPONG & AGYEBENG, *supra* note 64, at 49-50.

[87] Service *ex juris* is permissible only where a court has granted leave for a foreign defendant to be served. *See* Lokko v. Lokko, [1989-1990] 1 GLR 96; Jonathan Nortey Sowah v. Lands Comm'n, Suit No. H1/12/2017 (unreported); Shirlstar Container Transp. Ltd v. Kadas Shipping Col. Ltd, [1989-1990] 1 GLR 401; Kwabena Osei Assibey v. Nana Amo Adjepong, Suit No. H1/42/2016 (unreported).

Ghanaian courts recently acknowledged the challenges posed by technological advancement and the advent of social media in conflict of laws. In *Ace Anan Ankomah v. Kevin Ekow Baidoo Taylor*,[88] a tort case where the plaintiff, a renowned Ghanaian lawyer, sued the defendant, a resident of the United States, for defamation on social media. The court had to address whether it had jurisdiction over the defendant, who was not a resident of Ghana, and the subject matter of defamation on social media. The novelty of the subject matter required that the High Court innovate to exercise jurisdiction. With the defendant not based or resident in Ghana, Justice Ackah Boafo held:

> I am satisfied that this Court can exercise jurisdiction over the subject matter on the basis of not only the private international law grounds but also on the basis of the real and substantial connection as a legal concept. I am of the opinion that a real and substantial connection exists for the purposes of assuming jurisdiction against a defendant who are foreign based.[89]

The court reasoned that the rule falls within one of the connections set out in the High Court Civil Procedure Rules regarding the tort having a substantial connection with Ghana for purposes of service *ex juris*.[90] Unfortunately, the Court's reliance on the grounds of service as a basis of jurisdiction is problematic. This is because jurisdiction is entirely distinct from service, albeit related.[91] Suffice it to say, the court's willingness to acknowledge the complications posed by technological advancement and thereby innovating to exercise jurisdiction seems progressive.

C. *Nigeria*

Nigeria also utilizes the age-long common law doctrine of presence as a basis for a court to exercise personal jurisdiction over a defendant.[92] A defendant's physical presence within a particular state in Nigeria entitles the courts to exercise personal jurisdiction so long as that defendant has been properly served with a writ of summons.[93] The principle of presence under Nigerian law was eminently captured in the Supreme Court Nigeria case of *British Bata Shoe Co. Ltd v. Melikan*,[94] where the competence of the Lagos State High Court to exercise jurisdiction in action *in personam* was held to be appropriate.[95] The Supreme Court of Nigeria emphasized that as long as a defendant resided in the jurisdiction of the Court, the Lagos State High Court could exercise jurisdiction *in personam*.[96] In *Misr (Nig) Ltd v. Yesuf Ibrahim*,[97] the Kano State High Court relying on section 22(2) of the High Court Law of Imo State, held that it had the power to exercise jurisdiction over a defendant in respect of contract

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88 Anan Ankomah v. Kevin Ekow Baidoo Taylor, Suit No. GJ/1692/2019 (unreported).
89 *Id*.
90 *Id*.
91 *See* Court's Act (1993); HIGH COURT (CIVIL PROCEDURE) RULES (2004).
92 OKOLI & OPPONG, *supra* note 6, at 56.
93 *Id*.
94 British Bata Shoe Co. Ltd. v. Melikan [1956] 1 FSC 100.
95 *Id*.
96 *Id*.
97 Misr (Nig) Ltd. v. Yesuf Ibrahim [1974] Suit No. k/65/70 (unreported) (Kanu State).

wherever made.[98] Also, in *Ogunsola v. All Nigeria People's Party*,[99] the Court of Appeal of Nigeria held that where a defendant resided or carried on business within the jurisdiction of the court, the High Court of the Federal Capital Territory had jurisdiction over that defendant.[100]

The transient rule is applicable under Nigerian law.[101] Therefore, no matter how short a defendant is within the geographical location of the court, that court can exercise *in personam* jurisdiction so long as the defendant has been served with a writ of summons.[102] Also, under Nigerian law, jurisdiction founded on presence has similitudes with jurisdiction grounded on residence. In *Ayinule v. Abimbola*,[103] the defendant was present in Nigeria but ordinarily resided in Ghana. While in Lagos, Nigeria, he was served with a writ of summons. The Court, among other things, held that even though the defendant was ordinarily a resident of Ghana, it made no difference as he was "precisely in the same position as the person within the jurisdiction when he was properly served with the writ."[104]

Further, Nigerian courts have expressed that presence can be maintained even if a defendant is outside the court's jurisdiction.[105] This principle was upheld in the Nigeria Court of Appeal decision of *United Bank for Africa v. Odimayo*.[106] In that case, the plaintiff sought to enforce a judgment from the United States District Court of Southern New York against the defendant. The defendant entered a conditional appearance and requested that the writ of summons be struck out because the defendant was not resident within the jurisdiction of the High Court at the time of service. The defendant also contended that the action did not comply with the High Court Civil Procedure Rules, mainly because the defendant was not personally served, but the service was through substituted service.[107] At the High Court, the defendant's arguments were upheld.[108] However, on appeal, the Court of Appeal held that presence could be maintained even though the defendant was outside the court's jurisdiction.[109] The court reasoned that the defendant, though outside the Court's jurisdiction and in the United Kingdom at the time of service, was still carrying on business within the Court's jurisdiction.[110]

In Nigeria, a company is deemed to be a resident within the jurisdiction of a court if that company has its principal office or headquarters there, per the decision in *University of Nigeria v. Orazulike Trading Company*.[111] According to Okoli and Oppong, when determining the principal office or headquarters, attention must be placed on where the Board

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98 *Id*.
99 Ogunsola v. All Nigeria People's Party [1975] NCLR 233.
100 *Id*.
101 OKOLI & OPPONG, *supra* note 6, at 55.
102 *Id*. at 57.
103 Ayinule v. Abimbola [1957] LLR 41.
104 *Id*. at 42.
105 United Bank for Africa v. Odimayo [2005] 2 NWLR 21.
106 *Id*.
107 *Id*.
108 *Id*.
109 *Id*.
110 *Id*.
111 Univ. of Nigeria v. Orazulike Trading Co. [1989] 5 NWLR 19. *See also* RFG Ltd. v. Skye Bank Plc [2013] 4 NWLR 250, 273; George v. SBN Plc. [2009] 5 NWLR 302.

of Directors operates, the manager's place of business, or the parent company's location.[112] Most crucially, under Nigerian law, determining whether a defendant is a resident or present within the territories of the court for purposes of *in personam* jurisdiction is a question of fact.[113] It requires a holistic assessment of prevailing factors when the action was initiated before it can be conclusively established that a defendant is resident within the court's jurisdiction.[114] In addition to residence, when a defendant company carries on business in Nigeria, it can serve as a sufficient basis for Nigerian courts to assume jurisdiction.[115] However, "carrying on business" has a carefully restrictive meaning.[116] Okoli and Oppong explain that:

> . . . the phrase carrying on business means more than casually dealing with customers that are remote and away from a company's headquarters or head office. There must be something to show that the company truly carries on business within a particular jurisdiction…a foreign company cannot be regarded as carrying on business with the court's jurisdiction by merely owning share capital in a Nigerian company.[117]

Where a foreign corporation operates through an agent within the territories of the court, that principal/foreign corporation of the agent will be deemed as carrying on business in Nigeria.[118] A foreign corporation that intends to conduct business in Nigeria must be incorporated following the laws of Nigeria as a separate legal entity.[119] Okoli and Oppong mention that unless a foreign company is incorporated, it will not be considered to have a place of business or an address of service.[120] To the authors, this provision in the laws of Nigeria:

> reduces the scope for private international law problems generated in the context of transactions involving foreign companies, especially with jurisdiction issues. For example, once a foreign company is incorporated as a separate entity in Nigeria, the new entity becomes obviously present or resident in Nigeria and subject to the jurisdiction of Nigeria courts.[121]

It is noteworthy that Nigerian courts can grant permission or leave for a writ of summons to be served outside the court's jurisdiction, mainly where a statute permits the court to grant such an order.[122]

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112 OKOLI & OPPONG, *supra* note 6, at 57.

113 Univ. of Nigeria v. Orazulike Trading Company [1989] 5 NWLR (pt. 119) 19 (Nigeria).

114 *Id*.

115 *Id*.

116 Ezebube v. Alpin & Co. Ltd. [1966] 2 ALR Comm. 97 (Nigeria).

117 OKOLI & OPPONG, *supra* note 6, at 57.

118 Spiropoulos & Co. Ltd. v. Nigerian Rubber Co. Ltd. [1970] NCLR 94 (Nigeria).

119 *See* Companies and Allied Matters Act (2004) Cap. 20 LFN, § 54 (Nigeria).

120 OKOLI & OPPONG, *supra* note 6, at 58.

121 *Id*.

122 *Nwabueze v. Obi-okoye* [1988] 4 NWLR (pt. 91) 664 (Nigeria) ("Generally, courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction . . . The court has no power to order service out of the area of its jurisdiction except where so authorised by statute or other rule having force of statute"). *See also* Adegoke Motor Ltd. v. Adesanya [1989] 3 NWLR (pt. 107) 250; Agip (Nig) Ltd. v. Agip Petroli International [2010] 5 NWLR (pt. 2) 348 (Nigeria); The Owners of the MV 'MSC Agata' v. Nestle (Nig) Plc [2014] 1 NWLR 270, 288-290 (Nigeria); Mako v. Umoh [2010] 8 NWLR (pt. 1195) 82, 108 (Nigeria); Owners of the MV 'Arabella' Nigeria Agricultural Insurance Corporation [2008] 11 NWLR (pt. 1097) 182 (Nigeria).

D. *Kenya*

Jurisdiction connotes a court's competence, authority, or power to determine a dispute submitted by individuals in a legal proceeding.[123] In *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others*,[124] The Kenyan High Court, the Constitutional and Human Rights Division explained:

> . . . jurisdiction is meant at the authority which a court has to decide matters that are litigated before it, or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means.[125]

Kenyan law on jurisdiction is mainly influenced by English common law.[126] Firstly, the competence of a court to assume jurisdiction over a person or a dispute is grounded in the Constitution of Kenya, statutes and civil procedure rules.[127] Jurisdiction is the lifeblood of any adjudication process.[128] The territorial foundation upon which a Kenyan court can exercise personal jurisdiction over persons physically present in Kenya was established in *James Finlay (Kenya) Limited v. Elly Okongo Inganga & others*:[129]

> There has been a strong presumption against extraterritorial application of domestic law because of the theory of sovereignty. Sovereign power, it is trite, has a territorial limit, hence the prerequisite for the enforcement of foreign judgments by domestic courts. As a consequence, territorial boundaries have for a long time acted as a restriction on judicial and legislative jurisdiction/power.[130]

According to the Supreme Court of Kenya in *Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & others*,[131] a "court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law".[132] A court either has jurisdiction to

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[123] OPPONG, *supra* note 11, at 55-60.

[124] Benson Makori Makworo v. Nairobi Metropolitan Services [2022] eKLR (Kenya).

[125] *Id*. at para. 13. *See also*, Public Service Commission v. Eric Cheruiyot & 16 others; Cty. Gov't of Embu v. Eric Cheruiyot (Consol. Civ. Appeal No. 139 of 2017) (Kenya).

[126] Sandra F. Joireman, *The Evolution of the Common Law: Legal Development in Kenya and India*, 41(2) COMMONWEALTH COMP. POL. 190, 190-210 (2006); Eugene Cotran, *The Development and Reform of Law in Kenya*, 27(1) J. AFRI. LAW. 42, 42-61 (1983); Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 34(4) J. MOD. AFRI. STUD. 571 (2001); G.G.S Munoru, *The Development of the Kenya Legal System, Legal Education and Legal Profession*, 9 E. AFRI. L. J. 1, 1 (1973).

[127] *See generally* CONSTITUTION art. 163-7 (2010) (Kenya); CIVIL PROCEDURE (2012) Cap. 21 (Kenya).

[128] Wilson Kaberia Nkunja v. Magistrates and Judges Vetting Board [2018] eKLR (Kenya); Zahara Mohammed v. Independent Electoral & Boundaries Commission (IEBC) [2018] eKLR (Kenya); Zipporah Njoki Kangara v. Rock and Pure Limited [2021] eKLR (Kenya).

[129] James Finlay (Kenya) Ltd. v. Elly Okongo Inganga & others [2019] eKLR.

[130] *Id*.

[131] Samuel Kamau Macharia v. Kenya Commercial Bank Ltd. [2012] eKLR (Kenya).

[132] *Id*. at para. 68. *See also* In the Matter of the Interim Independent Electoral Commission [2011] eKLR (Kenya) (per the Supreme Court of Kenya, the Constitution of Kenya exhaustively outlines the

entertain a matter or not – and according to Kenyan courts, there are no two ways about it.[133] The Kenyan Court of Appeal in *Jamal Salim v. Jusuf Abdullahi Abdi & another*[134] reiterated that "jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties".[135] Similar views were shared in *Adero & another v. Ulinzi Sacco Society Limited*:[136]

> jurisdiction either exists or does not *ab initio*, jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction, jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.[137]

Determining the jurisdiction of a court based on a legally justified or prescribed ground is essential as such basis shields the judgment from being set aside or being capable of enforcement.[138] These rules are pre-defined and aimed at ensuring certainty and predictability in the dispute resolution process.[139] The centrality and importance of jurisdiction was explained by the Court of Appeal in *Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others*[140]:

> So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings are concerned. It is a threshold question and best taken at its inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in *barren-cui-de-sac*. Courts, like nature, must not sit in vain.[141]

The foundation of jurisdiction in *personam* in Kenya is service.[142] The presence of a defendant in Kenya who has been properly served following the service requirements espoused in the Civil Procedure Rules of 2010 is sufficient for a Kenyan court to assume jurisdiction over a person or a matter.[143]

As was held by the Kenyan Courts of Appeal in *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited*,[144] "jurisdiction is everything without it a court has no more power to make one more step." Jurisdiction under Kenyan law encompasses jurisdiction

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jurisdiction of the. The court must operate within the constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation).

133 James Marienga Obonyo & v. Suna West National Government Constituency Development Fund Committee, petition no. 6 (2019) eKLR (Kenya) (unreported).

134 Jamal Salim v. Jusuf Abdulahii Abdi (2018) eKLR. (Kenya).

135 *Id*. at para. 17.

136 Adero v. Ulinzi Sacco Society Ltd. (2002) 1 KLR. 577 (Kenya).

137 *Id*.

138 Kakuta Maimai Hamisi v. Peris Pesi Tobiko (2013) eKLR. (Kenya).

139 *Id*.

140 *Id*. *See also* Gitere v. Gitere Kahura Investments Ltd. (2023) KLR 20838 (K.E.E.L.C.) (Kenya); Moses Kithinji v. Mohammed Abdi Kuti (2020) eKLR (Kenya).

141 *Id*.

142 OPPONG, *supra* note 6, at 54.

143 *Id*.

144 Owners of Motor Vessel "Lilian S" v. Caltex Oil (1989) KLR (Kenya).

rationae materiae, jurisdiction *rationae personae*, and jurisdiction *rationae temporis*.[145] Jurisdiction *rationae personae* refers to the power of the court to decide or entertain a subject matter of a dispute.[146] For instance, if a court is empowered to have original and exclusive jurisdiction over a particular dispute, such as labor and employment relations, it will have jurisdiction *rationae materiae* because it is vested with that authority to deal with such subject matters.[147] Jurisdiction *rationae personae* refers to the parties' rights to appear before a court, either as a defendant or a respondent.[148] Jurisdiction *rationae temporis* refers to the effect of time on a court's competence to adjudicate a matter,[149] such as, for instance, when a is barred by a statute of limitations. The Court of Appeal explained the three concepts informing jurisdiction under Kenyan law in the Kenyan case of *National Social Security Fund Board of Trustees v. Kenya Tea Growers Association & 14 others*[150]:

> A court of law is invested with jurisdiction to hear matter when: (a) it is properly constituted as regards number and qualification of members of the bench, and no member is disqualified for one reason or another, (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and (c) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. The above three ingredients must co-exist in order to infuse jurisdiction in a court. Where a court is drained of a matter, the proceedings following from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency, and objectivity injected into it, will be marooned in the intractable web of nullity.[151]

Under certain restricted circumstances, Kenyan courts can grant leave for service out of jurisdiction (service *ex juris*).[152] Leave for service out of the jurisdiction operates as an exceptional measure.[153] The grant of leave for service *ex juris* is discretionary because the court considers several grounds before allowing or refusing a defendant to be served out of Kenya.[154] The scope of allowing service out of jurisdiction was explained in *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others*,[155] that

> firstly the plaintiff has to seek leave of court to serve such summons outside court's jurisdiction. The purpose of seeking leave is for the court to weigh the reasons adduced by the plaintiffs and determine whether a proper case has been made out for service of summons outside the jurisdiction…Secondly, the summons must be served upon such leave being

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145 Palms Resort Limited v. Qureshi (2023) KLR (K.E.H.C.) para. 13 (Kenya); Sheila Munubi v. Adah Onyango (2021) KLR.; Muriuki v. Wagai (2023) KLR para. 12. (K.E.H.C.) (Kenya).

146 Meta Platforms Inc. v. Samasource Kenya *supra* note 30, at para. 30

147 *Id*.

148 *Id*.

149 *Id*.

150 National Social Security Fund Board of Trustees v. Kenya Tea Growers Ass'n, et al. ([2023]) K.E.C.A. 80 (KLR) (Kenya).

151 *Id*. at para. 5.

152 OPPONG, *supra* note 11, at 55-56. *See also* DNK v. GS (22022) K.E.H.C. 547 KLR.; Assaman and Sons Ltd. v. East African Records Ltd. (11959) 1 EA 360.

153 OPPONG, *supra* note 11, at 55-56.

154 *Id*.

155 Misnak International (UK) Limited v. 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan (2019) KLR (Kenya).

> granted . . . It is only upon such a service of the summons that the court assumes jurisdiction over a foreign defendant and not a moment sooner.[156]

In the context of juristic persons, Kenyan courts can assume jurisdiction over a juristic person where that entity has a place of business, is carrying on business, is incorporated, or is a registered corporation under the provisions of the Companies Act.[157] Also, a foreign company that does business within the territories of Kenya can be sued within Kenya.[158] The strict confines within which Kenyan courts must assume jurisdiction over a person or dispute make the court's competence a fundamental prerequisite in any process.[159] For a Kenyan court to assume jurisdiction over a foreign company not doing business in Kenya, that jurisdiction must be preceded by a proper service *ex juris*, with the leave of the court.[160] A foreign defendant could challenge the service *ex juris* if the leave of the court were not sought by entering a conditional appearance to move the court to set aside the process.[161] The understanding that jurisdiction is territorial is at the core of Kenyan rules on jurisdiction. Thus, courts must be mindful when applying domestic law in foreign jurisdictions as they are territorially constrained. *James Finlay (Kenya) Limited v Elly Okongo Inganga & 6 others,*[162] established "there has been strong presumption against the extraterritorial application of domestic law in a foreign jurisdiction because of the theory of sovereignty."[163]

In sum, the power of courts to exercise personal jurisdiction is circumscribed through carefully defined legal rules. A court that does not have the vesting authority either through a statute or the Constitution is barred from determining any case, failing which any decision by that court will be a nullity. Assuming jurisdiction over a foreign defendant or party to a dispute also requires a carefully curated procedure, preceded by a court's permission of a plaintiff to serve a defendant in another jurisdiction. A foreign defendant who opposes the basis of the service or jurisdiction of the court must enter a conditional appearance in opposition to the basis or grounds utilized by the court to assume jurisdiction.[164]

E. *South Africa*

In assessing the doctrine of presence as a basis of jurisdiction for courts, a historical appraisal of the context and interplay of doctrines is crucial. The first important doctrine is the doctrine of effectiveness. This doctrine is to the effect that a court presented with a dispute must be able to give meaningful judgment.[165] Thus, if a court has no control over a person or a property, it cannot guarantee the plaintiff anything more than a theoretical proposition in

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156 *Id*., at para. 29.

157 OPPONG, *supra* note 6, at 55-56.

158 Dorcas Kemunto Wainaina v. IPAS (2018) KLR. (Kenya).

159 Owners of Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Ltd. (1989) KLR. (Kenya).

160 *See*, CIVIL PROCEDURE RULES (2010), Order 5 Rule 21. *See*, FED. R. CIV. P. 21.

161 Raytheon Aircraft Credit Corporation v. Air Al-Faraj Ltd. (2005) KLR (Kenya).

162 Finlay (Kenya) Ltd. v. Elly Okongo Inganga (2019) KLR (Kenya).

163 *Id*.

164 In the context of employment relations for which the ELRC could grant permission for *service ex-juris*, the Employment and Labour Relations Court (Procedure) Rules of 2016 are silent on service *ex-juris* where the defendant is domiciled outside Kenya. Nevertheless, it was suggested that strict compliance with the Civil Procedure Rules was imperative.

165 FORSYTH, *supra* note 6, at 170.

his favor.[166] The doctrine of effectiveness underscored the basis of jurisdiction under South African law. In *Utah International Inc v. Honeth*,[167] Van Schalkwyk AJ explained the doctrine of effectiveness, the factors informing the bases of jurisdiction in South Africa, and exceptions in the following manner:

> The doctrine of effectiveness is a jurisprudential principle which, together with several others, forms the basis of the practice whereby the court will in certain circumstances assume jurisdiction over a *peregrinus*. The object, however, is always to secure jurisdiction, and once that object has been attained, the court will not concern itself whether the judgment might be given will be effective or not…that is not the court's concern once jurisdiction has been established.[168]

In addition to the doctrine of effectiveness, there is the principle of division of action into three classes. Under Roman Law, legal actions were categorized into two main categories: action *in rem* and action *in personam*.[169] According to Forsyth, the division of action into classes "profoundly influenced the rules of jurisdiction; the *forum rei sitae* was competent if the action was in rem, and the *forum domicilii rei* if the action was *in personam*."[170]

Until the South African Supreme Court of Appeal (SCA) rendered the doctrine of arrest unconstitutional, the doctrine of arrest remained one of the crucial aspects of courts determining jurisdiction.[171] By this doctrine, an *incola*[172] was permitted to sue in his local

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[166] *See* Visser N.O & others v. Van Niekerk & others 2018 ZAFSHC 218 (S. Afr.) (The doctrine of effectiveness was explained in the following manner: "The court must be empowered to give the most effective and proper judgment."); Bisonboard Ltd v. Braun Woodworking Machine (Pty) Ltd. 1991 (1) SA 482 (A) (S. Afr.) ("The nature of inquiry into whether a court has jurisdiction is a dual one: (1) is there a recognized ground of jurisdiction; and if there is, (2) is the doctrine of effectiveness satisfied – has the Court power to give effect to the judgment sought?"); Veneta Mineraria Spa v. Carolina Collieries (Pty) Ltd. (In Liquidation) 1987 (4) SA 883 (A) (S. Afr.) ("The court will only have jurisdiction to adjudicate a matter if its orders are effective'); Silverstone (Pty) Ltd & another v. Lobatse Clay Works (Pty) Ltd. 1996 BLR 190 (CA) (Botswana) ("The doctrine of effectiveness is an essential feature of jurisdiction. A judgment would not be effective if it should yield empty result and that would occur if the judgment were obtained against a foreign peregrinus who owned no assets in the country in which judgment is given against him"). For further discussion on the doctrine of effectiveness, *see* Nowete Transport (Pty) Ltd. v. Kanjee & others 2021 ZANWHC 50 (S. Afr.); Zokufa v. Compuscan (Credit Bureau) 2011 (1) SA 272 (ECM) (S. Afr.); Parry v. Astral Operations Ltd. 2005 (26) ILJ 1479 (LC) (S. Afr.); Multi-Links Telecommunications Ltd. v. Africa Prepaid Services Nigeria Ltd. 2013 (4) All SA 346 (GNP) (S. Afr.).

[167] Utah International Inc. v. Honeth 1987 (4) SA 145 (W) (S. Afr.).

[168] *Id*. at 147B-F. *See also* Barclays National Bank Ltd. v. Thompson 1985 (3) SA 778 (A) (S. Afr.); Bettencourt v. Kom & another 1994 (2) SA 513 (T) (S. Afr.); Coin Security Group (Pty) Ltd. v. Smit NO & others 1992 (3) SA 333 (A) (S. Afr.); Argos Fishing Co. Ltd v. Friopesca *SA* 1991 (3) SA 225 (Namibia); Thermo Radiant Oven Sales (Pty) Ltd v. Nelspruit Bakeries (Pty) Ltd. 1969 (2) SA 295 (A) (S. Afr.).

[169] FORSYTH, *supra* note 6, at 171.

[170] *Id*. at 171-72.

[171] Bid Industrial Holdings (Pty) Ltd v. Strang & others 2008 (3) SA 355 (SCA) (S. Afr.); *see also* Omphemetse Sibanda, *Jurisdictional Arrest of a Foreign Peregrinus Now Unconstitutional in South Africa: Bid Industrial Holdings v. Strang*, 4 J. PRIV. INT'L. L. 329 (2008); Thino Bekker & Daniel van Loggerenberg, *Freedom from Arrest for the Foreign Debtor: A Jurisdictional Perspective*, 75 T.H.R.H.R 70 (2012); Constantine Theophilopoulos, *Arresting Foreign Perigrinus: Bid Industrial Holdings (Pty) Ltd v. Strang and a New Jurisdictional Lacuna*, 21 STELL. L. REV. 132 (2010); Christian Schulze, *Conflict of Laws*, 2008 ANN. SURV. S. AFRI. L. 1 (2008).

[172] The term *incola* refers to a person domiciled or resident within the area of jurisdiction of the court. *See* CHRISTIAN SCHULZE, ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY

forum after attaching the goods of a foreigner or arresting his person. The arrest doctrine was for the *incola's* benefit because it avoided the cost and inconvenience of suing or pursuing a *peregrine*[173] in his forum.[174] It also served the interest of the *incola* by ensuring that the trial is preserved because the attached property serves as a guarantee for that *incola* against which a judgment rendered by the court could be executed.[175] The doctrine of arrest or attachment coincided with the doctrine of effectiveness, which underscored the notion that courts will exercise jurisdiction only under the circumstance that it can give effective judgment.[176]

As mentioned, several constitutional issues arise with this doctrine of arrest or attachment. Constitutionally, holding a person because of a civil claim erodes that person's liberty and a core fundamental right in the Constitution of the Republic of South Africa that a person shall not be deprived of his or her freedom without a just cause.[177] Consequently, in *Bid Industrial Holdings (Pty) Ltd v. Strang & others*,[178] the South African Supreme Court of Appeal (SCA), in a unanimous decision, held that "the common law rule that arrest is mandatory to found or confirm jurisdiction is contrary to the spirit, purport ad object of the Bill of Rights. The common law must be, and is hereby, developed by abolishing the rule."[179] The essential question is, to what extent does the doctrine of arrest to find or confirm jurisdiction (which has been rendered unconstitutional) impact the common law conceptualization of presence?

Forsyth asserts that there are potentially far-reaching indirect effects and no direct impact on the rules on jurisdiction. To Forsyth, this indirect effect stems from the issue that the Supreme Court of Appeal did not provide the context where jurisdiction based on the doctrine of arrest is forbidden under South African law.[180] Forsyth further explains that where there is no alternative to arrest (as it has been declared unconstitutional), the *incola* as a plaintiff would not be able to sue in South African court but rather sue the *peregrine* defendant in his court.[181] The declaration of the doctrine of arrest as unconstitutional led to an elevation of the English common law doctrine of presence as a basis for a South African

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JUDGMENTS 11 (UNISA Press 2005); Roshana Kelbrick, *The Incola Plaintiff, Consent and Arrest or Attachment to Found Jurisdiction*, 25 C.I.L.S.A. 332 (1992).

[173] The term *peregrinus* refers to a person who is not domiciled or resident within the geographical area or jurisdiction of the court. *See* Schulze, *supra* note 173, at 11; Ewing McDonald Co. Ltd v. M & M Product Co. 1991 (1) SA 252 (AD) (S. Afr.).

[174] FORSYTH, *supra* note 6, at 196-98.

[175] *Id*.

[176] *Id*. *See also* Schlimmer v. Executrix in Estate of Rising 1904 TH 108 (S.Afr.); *Zakowski v. Wolff* 1905 TS (S.Afr.).

[177] *See* S. AFR. CONST., 1996, §§14, 36 (on the prohibition of seizure of private possessions and the threshold on limiting rights, respectively).

[178] Bid Industrial Holdings (Pty) Ltd v. Strang & others 2008 (3) SA 355 (SCA).

[179] *Id*. ("There is a crucial difference between attaching property and arresting a person. Attachment ordinarily involves no infringement of a constitutional right [absent, for example, seizure of the means by which the defendant's livelihood is earned]. But, more importantly, the property attached will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution."). For further discussion on the requirements of attachment doctrine, *see* Cape Explosives Works Ltd SA v. SA Oil & Fat Industries (1) 1921 (CPD).

[180] FORSYTH, *supra* note 6, at 197.

[181] *Id*.

court to exercise personal jurisdiction over a *peregrinus*.[182] In elevating the English common law doctrine of presence, Howie P in *Bid Industrial Holdings* averred:

> It would suffice to empower the court to take cognizance of the suit if the defendant were served with summons while in South Africa, and in addition, there are adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts that can be developed case by case. Obviously, the strongest connection would be provided by the cause of action arising within that jurisdiction.[183]

Through *Bid Industrial Holdings*, the English common law doctrine of presence, with modifications hinged on "adequate connection" between the forum and the suit, became a sufficient ground for courts in South Africa to exercise jurisdiction *in personam*.[184] Thus, presence alone suffices for a South African court to exercise personal jurisdiction. The *Bid Industrial Holdings* court utilized the broad concept of adequate connection and appropriate and convenient parameters to determine whether it could assume jurisdiction, particularly over a foreign defendant. [185] Accordingly, even when a defendant is present in South Africa, a comprehensive assessment is required to determine whether the South African court is the appropriate and convenient forum to deal with the dispute, coupled with the fact that there must be an adequate connection between the suit and the defendant. According to some scholars, this introduces the doctrine of *forum conveniens* under South African law.[186] Forsyth asserts:

> The SCA has recently recognized presence as a ground of international competence (that justified the enforcement of a foreign judgment). But more than presence at the time of service was required. Adequate connection is clearly a significantly wider concept than that implied when the cause of action is local. Moreover, determining connection involves discretion in which appropriateness and convenience play an important role. The discretionary part of this process clearly indicates that the South African law of jurisdiction is moving towards adopting or widening the doctrine of forum conveniens . . . .[187]

Notwithstanding the changes in the South African laws on jurisdictional rules, Forsyth opines again that the approach, on balance, will assist the emergence of South African courts as a natural venue for international commercial litigation.[188] Thus, in South Africa, the presence of a defendant and other connecting factors can empower a South African court to exercise personal jurisdiction. The leading connecting factors include the defendant's residence. Like in other Sub-Saharan African countries discussed above, the parameters of determining whether a natural person is resident within the geographical area of a court are different from those of corporations. Regarding corporations, the decision in *Bisonboard Ltd*

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182 *Bid Industrial Holdings,* para. 56.

183 *Id*.

184 *Id*.

185 FORSYTH, *supra* note 6, at 197.

186 FORSYTH, *supra* note 6, at 197; Seig Eiselen, *Goodbye Arrest Ad Fundandam, Hello Forum Non Conveniens*, 4 J. S. AFR. L. 794 (2008); Richard Frimpong Oppong, *Roman-Dutch Law Meets the Common Law on Jurisdiction in International Matters*, 4 J. PRIV. INT'L L. 329 (2008).

187 FORSYTH, *supra* note 6, at 197.

188 *Id*.

v. K Braun Woodworking Machinery (Pty) Ltd,[189] provides that a corporation incorporated in South Africa (domestic corporation) resides at the principal place of business. The principal place of business is the company's registered office or the office where the corporation's affairs are controlled.[190]

In *TW Beckett & Co. Ltd v. H Kroomer Ltd*,[191] the court, on explaining the residence of a national corporation, held:

> The only home which a corporation can be said to have is the place where the operations for which it was called into existence is carried on….The doctrine is firmly established that where a company carries on business at more places than one its true residence is located where its general administration is centered.[192]

When determining the residence of a domestic company, due consideration must be given to the provisions of the Companies Act 1973 (as amended by Companies Act 71 of 2008). Section 170(1)(b) of the Companies Act of 1973 (as amended) provides that every company in South Africa shall have a registered office in South Africa to which all communications and notices may be addressed, and at which all processes may be served.[193] Based on section 170(1)(b) of the Companies Act, Eloff J in *Dairy Board v. John T. Rennie & Co. (Pty) Ltd*,[194] held that "a company registered in South Africa resides in the law where the registered office is. If its principal place of business is situated elsewhere it may also reside at that latter place".[195] This decision was criticized in *ISM Inter Ltd v. Maraldo & another*,[196] where the court, in unequivocal terms, held: "a party can only be resident at one place at a given moment (at least for jurisdictional purposes.)"[197]

Regarding foreign corporations, South African law requires that a foreign corporation or an external company doing business in South Africa must have a registered office in South Africa. An external company with a registered office in South Africa does not indicate the corporation is a resident of South Africa. This principle was established in *Skjelbreds Rederi A/S & others v. Hartless (Pty) Ltd*,[198] where the court held that the mere physical presence of a branch office carrying on business within the jurisdiction of a South African court constitutes residence for purposes of courts assuming jurisdiction.[199] The registered office may be a place where notices and summons can be served on the company, that is, *domicilium*

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189 *Id*.

190 1991 (1) SA 384 (AD) at 7, 18, 34, 35 ("Since residence is a concept based on the habits of a natural man, the notion of a company's residence…is necessarily a somewhat abstruse and nebulous one. In so far as the law requires the concept to be assigned to a corporation, however, it seems to me that the idea of the registered office of a domestic South African company as its home represents a juristic abstraction which is by no means unsound in principle.")

191 1912 AD 324, at 310.

192 *Id*. at 334.

193 Companies Act 61 of 1973 § 170(1)(b) (S. Afr.). *See also* Companies Act 71 of 2008 §§ 13 and § 23(2) (S. Afr.) on the incorporation of companies and definition of an external company.

194 1976 (3) SA 768 (W).

195 *Id*.

196 1983 (4) SA 112 (S. Afr.).

197 *Id*. at 116. (clarifying that the possibility of service and jurisdiction are distinct questions and that "the question of service does not affect the question of jurisdiction").

198 1982 (2) SA at 710 (S. Afr.).

199 *Id*.

citandi et executandi.[200] Also, courts have insisted that a plaintiff must substantiate that they have jurisdiction over a cause of action before they can exercise jurisdiction over a defendant.[201] Professor Schulze opines that determining the residence of a corporation, particularly a foreign corporation, is the decisive factor when establishing the jurisdiction of South African courts.[202] In sum, the presence or residence of a corporation is not necessarily sufficient for a South African court to assume jurisdiction over a foreign corporation. South African law requires adequate connecting factors that link the defendant to the suit or the forum before the court will assume jurisdiction over the defendant.

IV. IN PERSONAM JURISDICTION IN THE UNITED STATES

A. *Pennoyer and the Physical Presence Doctrine*

The doctrine of physical presence as a basis of personal jurisdiction was established in the US Supreme Court in *Pennoyer v. Neff*.[203] In *Pennoyer*, the US Supreme Court explored the nexus between the doctrine of personal jurisdiction and the Due Process Clause under the Fourteenth Amendment of the United States Constitution.[204] The US Supreme Court concluded that a court's power to assume jurisdiction over a defendant was linked to that defendant's presence in the geographical territory of the court.[205] By implication, therefore, where a defendant is not physically present in the geographical location of the court, exercising jurisdiction over that defendant will be at variance with the defendant's right to due process. The linkage of a court's jurisdiction to the defendant's physical presence in the forum's territory follows the age-long English common law approach on physical presence as a basis for jurisdiction. However, through *Pennoyer*, the US Supreme Court, on the one hand, "cemented the physical power doctrine in this country" [206] but, on the other hand, construed the Due Process Clause as "a limitation on the jurisdiction of state courts to enter judgments affecting the rights or interests of non-resident defendant."[207] The application of the presence doctrine varies, depending on whether a defendant is a natural person, a corporation or juristic person, or a partnership firm.[208] The transient rule becomes applicable when the defendant is a natural person.[209] The transient rule essentially speaks to whether

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[200] SCHULZE, *supra* note 172, at 10.

[201] Grimshaw v. Mica Mines Ltd. 1912 (3) TPD at 450, 456 (S. Afr.).

[202] SCHULZE, *supra* note 172, at 10.

[203] 95 U.S. 714 (1877).

[204] *Id*. at 733-34; *See also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burham and Back Again*, 24 U.C. DAVIS L. REV. 19, 25-30 (1990) for a discussion on pre-Pennoyer cases.

[205] *Pennoyer*, 95 U.S. at 722.

[206] Barbara S. Goto, *International Shoe Gets the Boot: Burham v. Superior Courts Resurrects the Physical Power Theory*, 24 LOYOLA L. REV. 851, 856 (1991).

[207] *Id*.

[208] *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940). *See also* Kyle Voils, *Making Sense of Sovereignty: A Historical Understanding of Personal Jurisdiction from Pennoyer to Nicastro*, 110 NW. UNIV. L.REV. 679, 686 (2016).

[209] Burham v. Superior Court, 495 U.S. 604, 611-12, 618, 625, 630 (1990); Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, EMORY L.J. 729, 743 (1981) (Posnak referred to the transient rule as the "gotcha" jurisdiction); Ehrenzweig, *supra* note 15, at 306 (describing the transient rule as "catch-as-catch-can"). *See also* Christine M. Daleidon, *The Aftermath of Burnham*

the defendant must be substantially present within the territories of the court before that court can exercise jurisdiction. Until the decision in *Shaffer v. Heitner*,[210] where some academics aver that the transient rule ceases to qualify as a legitimate basis for jurisdiction in the United States, several court decisions[211] and the Restatement (Second) on Conflict of Laws accepted the transient rule.[212]

A corporation is physically present if it has a place of business, a registered office, or a place of incorporation within the court's territory.[213] In *St. Clair v. Cox*,[214] the US Supreme Court noted that the rule in *Pennoyer* applied to natural and juristic but with considerable differences. According to the US Supreme Court, "a corporation, being an artificial being, can act only through agents, and only through them can be reached, and process, therefore, be served upon them."[215] Whether a corporation is carrying on business or has a place of incorporation or registered office is determined within the framework of corporate or company law. While it is easy for a court to exercise jurisdiction over a corporation that is physically present within the territories of the court, it gets complicated when the corporation is not directly carrying on business in the forum's territory. As society evolved, especially with the increase in inter-state commercial activities, the presence doctrine proved to be unworkable and inflexible,[216] especially in situations where the corporations, by their structure, distanced and anonymized their operations to escape the doctrine of presence.

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v. Superior Court: A New Rule of Transient Jurisdiction, 32 SANTA CLARA L. REV. 989, 989 (1992); Arthur Lenhoff, *International Law and Rules on International Jurisdiction*, 50 CORNELL L. REV. 5, 5, 8 (1964); Curtis A. Bradley, *Universal Jurisdiction and the US Law*, 2001 UNIV. CHI. LEGAL F. 323, 348 (2001); Scott Dodson, *Personal Jurisdiction in Comparative Context*, 68 AM. J. COMPAR. L. 701, 701-721 (2020); Andrea Coles-Bjerre, *A Linguistic Critique of Tag Jurisdiction: Justice Scalia and the Zombie Metonymy*, 68 AM. U. L. REV. 1, 1 (2018).

[210] Shaffer v. Heitner, 433 U.S. 186 (1977).

[211] *See* Peabody v. Hamilton, 101 Mass. 217 (1870); Grace v. Arthur, 170 F. Supp. 442 (E.D. Ark. 1959); Darrah v. Watson, 36 Iowa 116 (1872); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, (1895). Martin F. Noonan, *Civil Procedure – Personal Jurisdiction: Evolution and Current Interpretation of the Stream of Commerce Test in the Third Circuit*, 40 VILL. L. REV. 779, 784 (1995); Milton D. Green, *Jurisdictional Reform in California*, HASTINGS. L. J. 1219, 1228 (1970); Robert C. Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, U. KAN. L. REV. 61 (1977); Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV.1031 (1978).

[212] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 78 (AM. L. INST 1956).

[213] See Jacobs, *supra* note 46, at 12–19, for a comprehensive assessment of the historical appraisal of the doctrine of presence to artificial persons. *See also* David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court's Decision in Quartet*, 71 RUTGERS U. L. REV. 1 (2018); Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L. J. 1161 (2015); Edward D. Cavanagh, *General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 ME. L. REV. 287 (2016); John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decision in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707 (2013); Danielle Tarin & Christopher Macchiaroli, *Refining the Due Process Contours of General Jurisdiction over Foreign Corporations*, 11 J. INT'L BUS. & L. 49 (2014).

[214] St. Clair v. Cox, 106 U.S. 350 (1882).

[215] *Id*. at 353.

[216] *World-Wide Volkswagen*, 444 U.S. at 294 ("[T]he requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer v. Neff* to flexible standards of *International Shoe Co. v. Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation.") *See also* Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests under Uniform*

B. Specific/Conduct-Linked Jurisdiction

1. *International Shoe and the Introduction of Minimum Contacts Test*

The inflexibility and the difficulty with the presence doctrine led the US Supreme Court to abandon it in favor of the minimum contacts test. In *International Shoe Co. v. Washington*,[217] International Shoe Company was a Delaware Corporation, a shoe and footwear manufacturer with its principal place of business in St. Louis, Missouri.[218] Although the shoes were manufactured out-of-state, they were distributed inter-state, including Washington.[219] International Shoe did not have a place of business in the State of Washington but employed residents of Washington as sales personnel who solicited orders and displayed samples for International Shoe.[220] The sales personnel were not allowed to conclude contracts or make collections.[221] International Shoe was, however, required by Washington state to make contributions to the State Unemployment Compensation Fund after it set up the unemployment compensation plan.[222] When International Shoe failed to make contributions to the Unemployment Compensation Fund, one of International Shoe's agents in Washington was served with a notice of assessment. International Shoe contested the service because it was not doing business in Washington state or carrying on business there.[223] The bottom line of the internal business structure of International Shoe Company was to escape the doctrine of presence as a basis of courts assuming personal jurisdiction over them.[224]

The US Supreme Court, upon considering the impracticality of the presence doctrine in such scenarios, declared that a defendant need not be physically present in the forum before jurisdiction can be exercised.[225] The US Supreme Court emphasized that minimum contacts with the forum state was a sufficient basis for that forum state to have personal jurisdiction.[226] To the Court, "due process requires only that in order to subject a defendant to a judgment *in personam* . . . he have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."[227] The US Supreme Court held that International Shoe had contacts with Washington. Further, the Court held that the contacts were sufficient to permit the forum state to exercise personal jurisdiction.[228] The Court reasoned that the operations and activities of International Shoe were not casual or

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Standards, 37 VAND. L. REV. 1 (1984). Suffice it to say, the rule in *Pennoyer* is conceived as predictable and certain. *See* Jacobs, *supra* note 19, at 1625-28.

217 Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

218 *Id*. at 313.

219 *Id*.

220 *Id*.

221 *Id*. at 314.

222 *Int'l Shoe Co.*, 326 U.S. 310, 311 (1945).

223 *Id*. at 317.

224 LITTLE, *supra* note 18, at 5.

225 *Int'l Shoe Co.*, 326 U.S. at 316.

226 *Id*.

227 *Id*.

228 *Id*.

irregular and thus amounted to large interstate business operations by the corporation.[229] In *International Shoe*, the minimum contacts test of jurisdiction was born. However, even though the minimum contacts theory is heralded for being flexible, it has also been criticized massively for creating a jurisdictional regime plagued with uncertainty and lack of clarity.[230]

2. *Minimum Contacts Test after International Shoe*

Following *International Shoe*, several decisions have been made to define the contours of the minimum contacts test. In *McGee v. International Life Insurance*,[231], the plaintiff instituted an action in California to recover insurance against International Life Insurance. The issue, however, was that the International Life Insurance needed to carry on business and had done business in California, but for the single insurance policy.[232] The Court, upon assessing the nature of International Life Insurance's business operations, concluded that a substantial connection existed between the insurance contract and the forum state, California.[233] The Court reasoned that the insurance contract was delivered in California, the premiums for the policy were mailed from California, the solicitation by International Life Insurance had been mailed to the insured in California, and finally, before the insured died, he was resident in California.[234] Most importantly, the US Supreme Court accentuated that

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[229] *Int'l Shoe Co*., 326 U.S., at 320.

[230] *See* Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 445 U.S. 907, 911 (1980) (per dissenting opinion of White: "The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective."); Patrick J. Borchers, *J. Mcintyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1247 (2011) ("[T]he minimum contacts test is deeply incoherent . . ."); Mark P. Gregen, Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156, 160 (1982) ("[The minimum contacts test] . . . is unpredictable, it offers no guidance to persons seeking to avoid being subject to a state's jurisdiction. Each decision is too fact-bound for general application, and the weight given to each competing variable is left to the discretion of individual judges . . . it is impossible for individuals to predict with any certainty where their conduct will render them subject to suit."); Cody Jacobs, *A Fork in the Stream: The Unjustified Failure of the Concurrence in J. McIntyre Machinery Ltd. v. Nicastro to Clarify the Stream of Commerce Doctrine*, 12 DEPAUL BUS. & COM. L.J. 171, 198 (2014) ("International manufacturers seeking entry into the American market and the domestic distributors who sell their products have no way to apportion the risk of liability between themselves, or to plan to avoid liability in certain jurisdictions altogether."); Bruce Posnak, *The Court Doesn't Know its Asahi from Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 885-86 (1990) (submitting that the jurisdictional rules of the Supreme Court create unpredictable outcomes).

[231] *McGee*, 355 U.S. at 200. For further discussion on the minimum contacts test post-*International Shoe*, *See* Francis U. Seroogy, *State Expansion of Personal Jurisdiction Under the International Shoe and McGee Cases*, 42 MARQ. L. REV. 537 (1959); Carl W. Funk, *The McGee Case and the Banks*, 15 BUS. LAW. 737 (1959); Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Bob R. Bullock, *The Expanding State Judicial Power over Non-Residents*, 13 WYO. L.J. 155 (1959); Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 S.M.U. L. REV. 107 (2015); Charlotte Hoffmann, *Personal Jurisdiction and the Due Process Clause: An Evaluation of the Fairness Factors*, 19 PAC. L.J. 1459 (1988).

[232] *McGee*, 355 U.S. at 200.

[233] *McGee*, 355 U.S. at 223.

[234] *McGee*, 355 U.S. at 223-24.

the State of California has an interest in ensuring that the residents are afforded means of remedy or legal redress.[235]

3. *Purposeful Availment*

The minimum contacts test established in *International Shoe* has seen some refinements. The US Supreme Court limited the broad notion of the concept in *Hanson v. Denckla*,[236] where it carefully defined the scope and framework of the minimum contact test. In *Hanson*, Dora Donner executed a trust instrument in Delaware. She made a Delaware trust company a trustee for certain securities, including reserving the income for life and providing that the remainder be paid to persons she appointed by a testamentary instrument.[237] At the time of her death, she was domiciled in Florida. She, however, executed an *inter vivos* instrument appointing certain beneficiaries to receive $400000 of the trust property.[238] The trust also contained a residuary clause covering "all property, rights, and interests over which I may have the power of appointment which prior to my death has not been effectively exercised."[239] A dispute arose over who had the right to certain assets under the trust. A court in Florida held that one group in Donner's will was entitled to the assets under the trust.[240] The Delaware court, however, held that a separate group under the trust was entitled to the assets under the trust.[241]

The Delaware court reasoned that the Delaware trustee company named under Dora Donner's trust was not subject to the personal jurisdiction of the Florida court.[242] Consequently, the court in Delaware refused to grant full faith and credit to the judgment from the Florida court.[243] At the US Supreme Court, the decision of the Delaware Court was affirmed by the majority of the Justices because the Delaware trust company did not have minimum contact with Florida based on which personal jurisdiction could be exercised.[244] According to the US Supreme Court, the minimum contacts threshold established in *International Shoe* cannot exist unless "some act by which the defendant purposefully avails itself of conducting activities within the forum state, thus invoking the benefits and protection of its laws."[245] To the US Supreme Court, "the unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity".[246] Hence, because the contact of the Delaware trustee with Florida was not purposeful, the Florida court could not exercise personal jurisdiction over the Delaware trustee.

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235 *Id*.
236 Hanson v. Denckla, 357 U.S. 235 (1958).
237 *Id*. at 238.
238 *Id.* at 235.
239 *Id*.
240 *Id*. at 243.
241 *Id*. at 253 (referencing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).
242 *Id*.
243 *Id*.
244 *Id*. at 238.
245 *Id*. at 252.
246 *Id*.

The dissenting opinion, however, is instructive because the Justices believed that the Florida court had the power to adjudicate the effectiveness of Mrs. Donner's appointment in Florida. According to Justice Black (Justices Burton and Brennan joining), this did not violate the Due Process Clause.[247] Justice Black wrote:

> It seems to me that, where a transaction has much relationship to a state as Mrs. Donner's appointment had to Florida, its courts ought to have the power to adjudicate controversies arising out of that transaction unless litigation there would impose such a heavy and disproportionate burden on a non-resident defendant that it would offend what this court referred to as "traditional notions of fair play and substantial justice.[248]

To the minority, there was still contact with Florida, which entitled the Florida court to exercise personal jurisdiction over the Delaware trustee.[249] Suffice it to say, the implication of the majority decision in *Hanson* for purposes of the discussion in this article is that for a court to exercise personal jurisdiction over a corporation that is not carrying on business or has principal place of business or incorporation in the forum state, sufficient relationship must exist between the defendant, the forum state, and the litigation.[250] Where there is no such relationship between the defendant, the litigation, and the forum state, the exercise of personal jurisdiction by a state court will be at variance with the due process.[251]

The test that minimum contact with a forum state must be sufficiently purposeful presented some difficulties to courts and plaintiffs, especially in cases that involved stream of commerce.[252] The difficulty was evident in the case of *World-Wide Volkswagen Corp v. Woodson*.[253] In *World-Wide Volkswagen*, Harry and Kay Robinson (Robinsons) purchased an Audi car in New York from Seaway Volkswagen, Inc (Seaway). After their purchase, they left for Arizona for a new home. Another car struck them behind their vehicle while driving through Oklahoma.[254] The accident caused the fire, which led to Mrs. Robinson and the children being burned.[255] In a product liability claim, they sued Audi for being responsible for their injuries because of their alleged design defects in the placement of its gas tank and fuel systems on the vehicle. They also sued the World-Wide Volkswagen Corporation, the

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247 *Id*. at 258-59 (Black, J., dissenting).

248 *Id*. *See* Megan LaBelle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 EMORY L. J. 781, 796 (2023), (for further assessment of the dissenting opinion).

249 *Id*.

250 *See* Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 173 (2012); A. Kimberly Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239 (1987-88); Shane Yeargan, *Purpose and Intent: Seeking a More Consistent Approach to Stream of Commerce Personal Jurisdiction*, 90 WASH. U. L. REV. 543 (2012); Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L. J. 855 (1987); Jonathan Stephenson, *Mass Inaction: An Analysis of Personal Jurisdiction in Mass Actions in Federal Court*, 59 SANTA CLARA L. REV. 453 (2019); Carol Rice Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999 (2012); Tracie E. Wandell , *Geolocation and Jurisdiction: From Purposeful Availment to Avoidance and Targeting on the Internet*, 16 J. TECH. L. & POL. 275 (2011), (for further discussion on the purposeful availment jurisdiction).

251 LaBelle, *supra* note 248, at 796.

252 *Id*.

253 *World-Wide Volkswagen Corp*., 444 U.S. 286 (1980).

254 *Id*. at 562.

255 *Id*.

manufacturer of the car, the regional distributor, and the company that imported the vehicle. World-Wide Volkswagen was a New York Corporation with its main office in New York.

Seaway was also a New York Corporation, having its main office in New York. World-Wide Volkswagen and Seaway were not conducting business in Oklahoma.[256] They did not send products or have agents to receive, process, or promote them in Oklahoma.[257] The trial court in Oklahoma exercised personal jurisdiction over the defendants because the accident was foreseeable.[258] At the US Supreme Court, the majority of Justices, relying on the notion of fairness and purposeful availment test in *Hanson*, held that the Court in Oklahoma lacked jurisdiction.[259] The Court held that "personal jurisdiction may be appropriate if an out-of-state defendant established contact with the forum state such that it should have reasonably anticipated being brought into court in that state based on its conduct and connection to it."[260] The US Supreme Court, on emphasizing the doctrine of minimum contacts as a basis of jurisdiction relative to the notion of reasonableness, fairness, and the factors a court must consider before exercising jurisdiction over a defendant, wrote:

> . . . a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State . . . . We have said that the defendant's contacts with the forum must be such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there". Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant . . . will, in an appropriate case, be considered in light of other relevant factors, including the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum . . . .[261]

The fairness or reasonableness factors outlined by the US Supreme Court in *World-Wide Volkswagen* aim to protect defendants from the difficulties of litigating in an inconvenient and distant forum.[262] Essentially, even with minimum contacts, that assessment must be through the prism of the fairness factors in *World-Wide Volkswagen*.[263] Later decisions have expounded on the reasonableness/fairness factors outlined in *World-Wide Volkswagen*.[264] In *Burger King Corp. v. Rudzewicz*,[265] the US Supreme Court, on explaining the parameters of burden on the defendant, asserted that mere inconvenience on the defendant is insufficient.[266] To the Court, the assessment should rather be that litigating the dispute in the forum will be "gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in

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256 *Id*. at 563.
257 *Id*.
258 *Id*.
259 *Id*. at 564, 565-67.
260 *Id*. at 567.
261 *Id*. at 564.
262 *Id*.
263 *Id*.
264 *See* Keeton v. Hustler Magazine, Inc, 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984).
265 Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).
266 *Id*. at 2185.

comparison with his opponent."[267] Suffice it to say, the Court emphasized that unless there are strong reasons to the contrary, a defendant who has gained commercial benefits from their connections with a particular forum cannot escape the court's jurisdiction simply because of the adversary's greater net wealth.[268]

Also, in *Asahi Metal Industry Co. v. Superior Court of California*,[269] the US Supreme Court further explained the fairness factors. In *Asahi*, the US Supreme Court had to determine whether the contact of Asahi with California was purposeful and the appropriate type of contact and whether exercising jurisdiction comported with the 'traditional notions of fair play and substantial justice.'[270] On the first question, the Justices were divided about whether Asahi purposely availed itself of the California market. Justice O'Connor held that the facts of the case do not establish minimum contacts.[271] Without such minimum contacts, exercising personal jurisdiction will not comport with the 'traditional notion of fair play and substantial justice.'[272] Conversely, Justice Brennan disagreed with the interpretation of the stream of commerce and the conclusion that Asahi did not purposefully avail itself to the California market. Justice Brennan, however, agreed with the finding that asserting personal jurisdiction over Asahi would not align with the principles of fair play and substantial justice.[273]

In effect, Justice Brennan conceived Asahi being aware of the contact in California as sufficient to establish minimum contact. In contrast, Justice O'Connor thought that additional conduct from Asahi was required to establish purposeful availment.[274] The decision in *Asahi* also establishes that jurisdiction requires a two-pronged analysis involving an assessment of minimum contacts and whether exercising jurisdiction comports with the notion of fairness. Professor Little avers: "The two-pronged analysis focusing on minimum contacts and fairness is more complex and pervasive than the general/specific jurisdiction."[275] Suffice it to say, the consensus amongst academics and conflict of law scholars is that *Asahi* left many questions unanswered.[276]

The Supreme Court acknowledged this concern in a later decision of *J. McIntyre Machinery Ltd. v. Nicastro*,[277] that: "The rules and standards for determining when a state does or does not have jurisdiction over an absent party have been unclear because of the decades-old questions left open" in *Asahi*. [278] In *Nicastro*, Robert Nicastro, the Plaintiff, worked and lived in New Jersey. While using a shearing machine at the job, the Plaintiff severed four of his fingers. The machine was manufactured by J McIntyre Machinery Ltd. After the incident, Robert Nicastro filed a product liability suit in New Jersey court.[279] J

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267 *Id*.
268 *Id*. at 483 n.25; Motaung v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 320 KLR (Kenya) at 483.
269 480 U.S. 102 (1987).
270 *Id*. at 112-13.
271 *Id*. at 112.
272 *Id*.
273 *Id*. at 116.
274 LaBelle, *supra* note 248, at 799-800.
275 LITTLE, *supra* note 18, at 33.
276 LaBelle, *supra* note 248, at 802.
277 564 U.S. 873 (2011).
278 *Id*.
279 *Id*. at 878.

McIntyre Machinery Ltd challenged the jurisdiction of the New Jersey court. J McIntyre had not advertised, sent goods to, or targeted the state.[280] However, the Supreme Court of New Jersey held that they could exercise jurisdiction over a foreign manufacturer or a product so long as the manufacturer "knows or reasonably should know that its product is distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states."[281] The US Supreme Court accordingly granted certiorari and reversed the decision of the New Jersey Supreme Court.[282]

According to the US Supreme Court, personal jurisdiction founded on purposeful availment does not arise from placing a product in a stream of commerce when the defendant did not target a particular state.[283] Justice Kennedy, highlighting the foundational point of inquiry in the purposeful availment test, noted that "the principal inquiry . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must 'purposefully avai[l] itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws."[284] One interesting aspect of *Nicastro* is the role of fairness in establishing jurisdiction. Recurring statements in *Nicastro* seem to underscore that fairness is no longer a primary consideration in personal jurisdiction. Justice Kennedy noted that as a general rule, the exercise of jurisdiction requires the defendant to take actions that purposefully avail themselves of the privileges of conducting activities in the forum state, thereby invoking economic and legal protection.[285]

4. The Nexus/Connectedness Requirement

International Shoe established two situations where a court could assert personal jurisdiction. These two scenarios/situations are based on the Court's explanation:

> To the extent that a corporation exercises the privilege of conducting activities within the state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the defendant to respond to a suit brought to enforce them can, in most circumstances, hardly be said to be undue.[286]

The US Supreme Court also noted that "there have been instances in which continuous corporation operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities".[287] Under *International Shoe*, therefore, the US Supreme Court highlighted distinctions between forum contacts related to the claims of the plaintiff and those unrelated

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280 *Id*. at 783.
281 *Id*. at 877.
282 *Id*.
283 J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 882 (2011).
284 *Id*. at 877.
285 *Id*. at 882. *But see Id*. at 893, 910 (Ginsburg, J. dissenting, joined by Sotomayer, J. and Kagan, J.)(contemporary foundations of jurisdiction create fertile grounds and give "prime place to reason and fairness" and not state sovereignty).
286 International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
287 *Id*. at 318.

to the plaintiff.[288] Professors Von Mehren and Trautman compartmentalized this distinction as "specific jurisdiction" and "general jurisdiction."[289] After *International Shoe*, the decision that established the nexus requirement as a sufficient basis for specific jurisdiction was in *McGee v. International Life Insurance Co.*,[290] where the US Supreme Court stated: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state."[291]

Following *McGee*, later cases have reflected on the scope of the nexus requirement as a basis of specific jurisdiction. In *Helicopteros Nacionales De Colombia v. Hall*,[292] a case involving wrongful death action arising from a helicopter crash in Peru that killed four American citizens.[293] The defendant was a Colombian corporation that provided helicopter transportation in South America. The defendant purchased the helicopter involved in the crash in Texas.[294] The survivors of the helicopter crash sued in a Texas court. The US Supreme Court adopted the specific and general jurisdiction dichotomy propounded by Professors Von Mehren and Trautman.[295] The Supreme Court, in explaining the framework for specific jurisdiction, stated: "When a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contact with the forum, the State is exercising specific jurisdiction over the defendant."[296] Conversely, "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state has been said to be exercising general jurisdiction over the defendant."[297] Through the *Helicopteros* decision, the nexus or connectedness requirement became an official aspect or requirement of the minimum contacts jurisprudence.[298] In *Helicopteros*, however, the plaintiffs admitted that the nexus requirement was not satisfied because their claims did not "arise out of" and "not related to" the defendant's contact with Texas.[299] Courts have applied the nexus requirement in varying

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[288] *Id*.

[289] Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

[290] 355 U.S. 220 (1957).

[291] *Id*. at 223.

[292] Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408 (1984).

[293] *Id*. at 410.

[294] *Id*. at 411.

[295] *Id*. at 414 n.8.

[296] *Id*.

[297] *Id*. at 414 n.9.

[298] Levi M. Klinger-Christiansen, *The Nexus Requirement After Bristol-Myers: Does "Arise out of Relate to" Require Causation*?, 50 SETON HALL L. REV. 1145 (2020); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343 (2005); Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances?: It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 101, 103 (2004); Jessica Hylton, *Time for a New Shoe? Making Sense of Specific Jurisdiction*, 87 MO. L. REV. 565 (2022); Kevin M. Faulkner, *Personal Jurisdiction in Texas and Internet Web-Sites*, 4 TEXAS WESLEYAN. L. REV. 31 (1997).

[299] Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 415 (1984). For further discussion, *see* Anthony Petrosino, *Rationalizing Relatedness: Understanding Personal Jurisdiction's Relatedness Prong in the Wake of Bristol-Myers Squibb and Ford Motor Co.*, 91 FORDHAM L. REV. 1563, (2023); Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 32 (2019); Lea Brilmayer, *A General Look at Specific Jurisdiction: Towards a Unified Theory of "Arising out of" or "Related*

ways.[300] Notwithstanding the varied approaches, the Supreme Court recently provided some clarity about applying the nexus requirement.

In *Bristol-Myers Squibb v. Superior Court of California*,[301] the US Supreme Court carefully mapped out the nexus requirement: "There must be an affiliation between the forum and the underlying controversy, principally an activity or an occurrence that takes place in the forum . . . specific jurisdiction is lacking regardless of the defendant's unconnected activities in the state."[302] In a much more recent decision of *Ford Motor Co. v. Montana Eight Judicial District Court*,[303] the Supreme Court held that state courts might exercise specific jurisdiction in product liability suits stemming from a car accident that injured state residents "although the vehicles were designed and manufactured elsewhere, and originally were sold outside the forum state."[304]

C. *General/All-Purpose Jurisdiction*

After *International Shoe*, some cases expounded on the contours of general jurisdiction. However, compared to specific jurisdiction discussions, there are few cases on general jurisdiction.[305] In *Perkins v. Benguet Consolidated Mining Co.*,[306] the plaintiff, a resident of Ohio, filed a suit in Ohio State court against the defendant.[307] The defendant was a mining company incorporated in the Philippines.[308] Due to a halt in the operations of the defendant in the Philippines owing to Japanese occupation during the Second World War, the director of the company, upon his return to his Ohio home, established an office in Ohio.[309] While in Ohio, the manager distributed salary cheques and corresponded with and on behalf of the company. It was evident from the facts that the plaintiff's claims did not arise from or relate to those contacts with Ohio.[310] The US Supreme Court held that the Ohio State Court had the power to exercise personal jurisdiction over the defendant because it had "continuous and

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to" Jurisdiction Where the Defendant's Forum Conduct Contributed to the Plaintiff's Claims, 42 YALE J. INT'L L. 1, 2 (2017); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018).

300 There have been varying applications and interpretations of the nexus requirement. In tort law, for instance, some courts have applied the causation standards to satisfy the nexus requirement. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Towards a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 230-35 (2014). Other courts have relied on a less restrictive fairness approach to exercise personal jurisdiction. In this case, the operative question becomes whether exercising jurisdiction is fair regarding the ties between the plaintiff's claim and the defendant's forum. Some courts also adopted the "sliding scale" method, meaning that "the more contact a defendant has with the forum state, the less connected those contacts needed to be with the plaintiff's claim". *See also*, LaBelle, *supra* note 248 at 804.

301 Bristol-Myers Squibb Co. v. Superior Court of California**,** 582 U.S. 255 (2017).

302 *Id*. at 1781.

303 592 U.S. 351 (2021).

304 *Id*. at 1022-23.

305 Daimler AG v. Bauman, 571 U.S. 117 (2014) (Justice Ginsburg noted: "Our post-International Shoe opinions on general jurisdiction, by comparison, are few. [The Court's] 1952 decision in Perkins v. Benguet Consol. Mining Co. remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.").

306 Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

307 *Id*.

308 *Id*.

309 *Id*. at 447-48.

310 *Id*.

systematic" contacts with the forum state.[311] Aside from the "continuous and systematic" contacts test established in *Perkins*, the Supreme Court did not provide further guidance or factors to consider from the perspective of general jurisdiction. Later in *Helicopteros* (discussed above), the United States Supreme Court again held that the Texas court did not have general personal jurisdiction over the defendant as the facts were insufficient to meet the threshold requirement of "continuous and systematic."[312]

As the debate on specific jurisdiction raged for decades with no clarity, one important outcome noted by scholars was that lower courts often utilized general jurisdiction as a ground to exercise personal jurisdiction.[313] Flowing from lower court's consistent use of general jurisdiction was the reliance on the "doing business" theory of jurisdiction.[314] The reason for lowering court's reliance on the "doing business" theory of jurisdiction as a basis of courts assuming jurisdiction is well pointed out by Professor Monestier, who opines that courts construed corporations doing business in the forum state as that corporation having continuous and consistent contacts with the forum.[315] Also, Professor LaBelle, explaining the consequence of the "doing business" theory of jurisdiction, posits that: "Companies that participated in nationwide business activities could be sued in any state on any claim, even if that claim was wholly unrelated to their contacts with the forum state."[316] The "doing business" theory of jurisdiction was criticized because its parameters were not carefully defined and thus conceived by many scholars as overbroad.[317]

The US Supreme Court had the opportunity to pronounce on the contours of general jurisdiction in *Goodyear Dunlop Tires Operations v. Brown*.[318] In *Goodyear*, the plaintiffs, who were parents of two teenage boys from North Carolina, were involved in a bus accident that killed the two teenagers.[319] At the heart of the suit was the claim that the bus accident was caused by defective tires manufactured in Turkey, a foreign subsidiary of Goodyear Tires and Rubber Company incorporated in Ohio.[320] The suit was instituted in North Carolina. However, Goodyear objected to the jurisdiction of the court.[321] The Court rejected Goodyear's argument because they construed their product as having continuously and systematically entered the forum state through the stream of commerce theory.[322] At the US Supreme Court, the decision of the North Carolina court was reversed.[323] According to the US Supreme Court, the forum court can only exercise jurisdiction over the defendant if their

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311 *Id. at* 448-49.

312 Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 415-16 (1984).

313 *See,* Mary Twitchell, *Why We Keep Doing Business with Doing Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172-173 (2001) (Twitchell observed that "Courts seem to have articulated a fairly straightforward standard for doing business jurisdiction: states have general jurisdiction over corporations doing continuous and systematic business in the forum.").

314 *Id.* at 173.

315 Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1352 (2015).

316 LaBelle, *supra* note 248, at 810.

317 Borchers, *supra* note 28, at 129.

318 Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915 (2011).

319 *Id.* at 918.

320 *Id.*

321 *Id.* at 922-23.

322 *Id.*

323 *Id.*

contacts are so continuous and systematic as to "render them essentially at home."[324] For a defendant to be "at home", the primary point of consideration is the place of domicile, for individuals,[325] and corporations or juristic persons, the principal place of business or the place of incorporation.[326]

In *Daimler AG v. Bauman*,[327] the full impact of the decision in *Goodyear* manifested itself. *Daimler* involves a human rights violation that occurred in Argentina. The case was filed by a group of Argentinians in the US District Court for the Northern District of North Carolina against DaimlerChrysler, a manufacturer of Mercedes Benz vehicles with headquarters in Stuttgart, Germany.[328] At the heart of the claim was that the subsidiary of Daimler in Argentina, Mercedes Benz Argentina, worked with the Argentinian government during Argentina's Dirty War from 1976-1983 to kidnap, detain, torture, and kill certain MB Argentina workers and some of their family members, including the family members of the plaintiff.[329] While the plaintiffs contended that the court in California could exercise general jurisdiction because of Daimler's subsidiary in the United States, Mercedes Benz USA LLC, which was incorporated in Delaware and had its principal place of business in New Jersey but distributed vehicles in California, the defendant objected to the jurisdiction of the court by asserting that first, Daimler's contact with California was insufficient for purposes of general jurisdiction, and secondly, that the contacts of Mercedes Benz USA to California cannot be attributed to Daimler.[330]

The US Supreme Court granted certiorari for *Daimler*. However, in doing so, the Court laid down certain principles, emphasizing the "at home" jurisdiction established in *Goodyear* and abandoning the "doing business" ground as a basis for courts assuming jurisdiction.[331] Justice Ginsburg opined that a court can exercise general jurisdiction over foreign corporations if their connections to the state are continuous and systematic that they are rendered essentially at home in the forum state.[332] Through *Daimler*, the Supreme Court rejected the "doing business" theory as a basis of courts assuming general jurisdiction. In the words of Justice Ginsburg, the doing business theory is "unacceptably grasping."[333] Applying the new "at-home" theory of jurisdiction, Daimler and Mercedes Benz USA maintained a principal place of business in California or incorporated in California. As such, the court in California could not exercise general jurisdiction over them.[334] Finally, the "at home" theory of jurisdiction was cemented in *BNSF Railway Co. v. Tyrell*,[335] where the Supreme Court reversed the decision of the court in Montana to exercise general jurisdiction because BSNSF Railway Company had significant contact with the forum. BSNSF Railway had 2100

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324 *Id*. at 919.
325 *Id*. at 924.
326 *Id*.
327 Daimler AG v. Bauman, 571 U.S. 117 (2014).
328 *Id*. at 120-21.
329 *Id*. at 121.
330 *Id*.
331 *Id*. at 137-38.
332 *Id*. (quoting *Goodyear*, 564 U.S. at 919).
333 *Id*. at 137-38.
334 *Id*. at 139.
335 BNSF Ry. Co. v. Tyrell, 137 S. Ct. 1549, 1554 (2017).

employees, a brick-and-mortar facility, and a railroad track in the forum State.[336] The Supreme Court held again that the court in Montana could not exercise jurisdiction over the BNSF Railway Company because Montana was not the place of incorporation, and neither did the defendant have a principal place of place there.[337]

Post *Goodyear*, the disposition of the Supreme Court seems to establish a restricted scope of the basis for a court to exercise general jurisdiction over defendant corporations.[338] To some academics, the restricted scope of the basis for courts to exercise general jurisdiction somewhat tilts the balance of scale to protect corporations.[339] Moreso, the restrictive scope under which courts could exercise jurisdiction presents a difficult, if not impossible, challenge for courts to exercise jurisdiction.[340] The consequence and difficulties arising from the restrictive scope of general jurisdiction created by the US Supreme Court is what Professor La Belle describes to have led to plaintiffs turning "to traditional, *Pennoyer*-era grounds for personal jurisdiction, namely consent, to try to sue corporations other than where they are incorporated or headquartered."[341]

V. CROSS-BORDER EMPLOYMENT CASES IN SUB-SAHARAN AFRICA: EXPLORING THE FACTUAL MATRIX

A. International Shoe-like Cases

The first case where a foreign defendant corporation can be described as escaping the doctrine of presence and thereby the jurisdiction of a Sub-Saharan African court is the Kenyan case of *Motaung v. Samasource Kenya EPZ Limited t/a Sama & 2 Others (Motaung)*.[342] In *Motaung,* a group of Facebook content moderators sued Meta Platforms Incorporated (Meta), the parent company of Facebook and Meta Ireland Limited (Meta Ireland). There was no contract between Meta and the content moderators. The working arrangement was between Samasource International BV (a company registered in the Hague, the Netherlands) and the content moderators. Meta contracted Samasource International BV as a sub-contractor to moderate its content in southern and eastern Africa.[343] Samasource contracted the petitioners (content moderators) and others as part of its operations and created a hub in Nairobi, Kenya. Samasource BV established a subsidiary in Kenya, Samasource Kenya (Sama).[344] In 2023, Sama decided to end its operations, which, according to them, was triggered by economic reasons.[345]

The impact of Sama's withdrawal from Kenya was massive layoffs and the termination of the petitioners' employment contracts. The petitioners disagreed with the economic

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336 *Id*.
337 *Id*. at 1559.
338 LITTLE, *supra* note 18, at 19.
339 *Id*.
340 La Belle, *supra* note 248, at 815.
341 *Id*.
342 Motaung v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 320 KLR (Kenya).
343 *Id*. at para. 15.
344 *Id*.
345 Kevin Namunwa, *Facebook Parts Ways with African Content Moderation Firm Sama*, CIO AFRICA (Jan. 11, 2023), https://cioafrica.co/facebook-parts-ways-with-african-content-moderation-firm-sama/.

reasons as the basis of the termination of their employment. The petitioners contended that their employment contracts were terminated because they intended to unionize and had complained about their conditions of work, as well as the lack of mental health support by their employer.[346] The petitioners sued Samasource Kenya, Meta Platforms Incorporated, and Meta Platforms Ireland Limited by petitioning the Employment and Labour Relations Court (ELRC) in Nairobi for unfair dismissal under Kenyan law.[347] Although this case is a typical employment law case of unfair dismissal, it was also laced with conflict of laws issues. Indeed, the petition at the ELRC was a motion by Meta Platforms Incorporated and Meta Platforms Ireland Limited, contending that the ELRC lacked jurisdiction to entertain the petition. [348]

The conflict of law issue arises from the nature of the operations of Meta being a foreign company and not physically present in Kenya. Also, instead of Meta directly operating in eastern and southern Africa, they engaged a third-party sub-contractor. The third-party sub-contractor, in turn, contracted the petitioners (the content moderators) from Kenya and other southern African countries. Through the agreement between Meta and Samasource BV, Meta distanced its operations and physical presence in Kenya. It is, therefore, unsurprising that, first, Meta Platforms Incorporated and Meta Platforms Ireland Limited objected to the jurisdiction of Kenyan courts. According to them, they were foreign corporations that were neither residents nor physically present, nor did they trade in Kenya.[349] Because they were neither present nor trading in Kenya, Kenyan courts could not exercise personal jurisdiction.[350] According to section 3(1) of the Companies Act of 2015, a foreign company is a "company incorporated outside Kenya".[351] In the context of the nature of engaging the workers, Meta Platforms Incorporated and Meta Platforms Ireland Limited again submitted that no contractual relations existed between them and the content moderators.[352] The petitioners, however, submitted that the court had jurisdiction over the matter under articles 162 and 165 of the 2010 Constitution of Kenya regarding the violation, infringement, or threat to a right or fundamental freedom in the Bill of Rights.[353]

According to the Petitioners, the Constitution of Kenya and the Bill of Rights apply to all and bind all persons, including the Respondents (Meta Platforms Incorporated and Meta Ireland Limited).[354] Most importantly, the petitioners submitted that Meta Platform Incorporated and Meta Platform Ireland Limited provided the tools of trade they used to

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346 *Mental Trauma: African Content Moderators Push Big Tech on Rights*, THE ECONOMIC TIMES (October 16, 2023, 11:14 AM), https://economictimes.indiatimes.com/tech/technology/mental-trauma-african-content-moderators-push-big-tech-on-rights/articleshow/104457622.cms?from=mdr. Nita Bhalla, Mental Trauma: African Content Moderators Push Big Tech on Rights, Economic Times (Oct. 16, 2023, 1:00 AM), https://economictimes.indiatimes.com/tech/technology/mental-trauma-african-content-moderators-push-big-tech-on-rights/articleshow/104457622.cms?from=mdr.

347 *Motaung*, 320 K.L.R., at para. 1.

348 *Id*. at 1-4.

349 *Id*. at para. 73-76.

350 *Id*. at para. 2. §§1—2 at 2.

351 The Companies Act (2022) Cap. 486 § 3(1) (Kenya).

352 *Motaung*, at para.16 at 3.

353 *Id*. at para. 6 at 2.

354 *Id*. at para.7 at 2.

carry out their work.[355] Further, the Meta controlled the manner and standards of how they worked.[356] Hence, even though Meta Platforms Incorporated sub-contracted the content moderation to Samasource, it indirectly had contacts with the content moderators by setting the standards for the moderation, supervising, and providing the tools of trade.[357] Notwithstanding Meta's indirect contact with the petitioners, the mere fact that they were not physically present in Kenya posed a procedural challenge for the petitioners and the Court. Procedurally, the case was met with opposition because the Petitioners did not comply with the service processes required by the law. The procedural challenge led the court to address a vital issue of procedural and substantive fairness.[358] The discussion on procedural and substantive fairness became necessary because both Meta Platforms Incorporated and Meta Platforms Ireland Limited had argued that they be struck off as parties to the petition.[359]

The ELRC established that the respondents, though foreign companies, were carrying on businesses in Kenya.[360] However, the onus rested on the petitioners to establish that the two companies had registered offices in Kenya and "were indeed carrying on business in compliance with the provisions of the Companies Act of 2015".[361] The court expressed concerns about the service process and whether the case should be dismissed for want of proper service.[362] According to the court, striking out the petition against the respondents was one of the options available. However, that would leave some questions unanswered, especially to the detriment of the Petitioners.[363] Also, per the ELRC, it was bound to administer justice expeditiously without regard to procedural technicalities.[364] According to the court, "while the procedure is an elemental component in the administration of justice, substantive justice is the ultimate goal unless the procedural deficiency is sufficiently grave to render substantial justice unattainable."[365] The ELRC accordingly granted leave for the petitioners to properly serve Meta Platforms Incorporated and Meta Platforms Ireland Limited at their principal offices in the United States and Ireland, respectively.

Meta Platforms Incorporated appealed the decision of the Kenyan Employment and Labour Relations Court (ELRC) in the Court of Appeal at Nairobi in *Meta Platforms Inc & Another v Samasource Kenya EPZ Limited t/a Sama & 185 others; Central Organization of Trade Unions Kenya & others (Interested Parties)*,[366] and requested for a stay of proceedings in the ELRC.[367] Cardinal to the appeal was, again, the argument that the ELRC lacked jurisdiction to entertain, hear, and determine the matter against them. To Meta Platforms Incorporated, the position was "filed in violation of the mandatory provisions of the

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355 *Id*. at para.11 at 3.
356 *Id*.
357 *Id*.
358 *Id*. at para.118 at 12.
359 *Id*. at para. 57, 90.
360 *Id*. at para. 109.
361 *Id*.
362 *Id*. at para. 117 at 12.
363 *Id*. at para. 91 at 10.
364 *Id*. at para.117 at 12.
365 *Id*. at para. 118.
366 Meta Platforms, Inc. v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 999 KLR. (C.A.K.).
367 *Id*. at para. 1 at 1.

Constitution of Kenya, 2010 and the Law".[368] Meta Platforms Incorporated further submitted that the "learned judge erred in failing to find that the applicants ought to have been afforded the opportunity to object to the court's jurisdiction."[369] The Kenyan Court of Appeal rejected Meta Platforms' claims of objecting to the jurisdiction of the ELRC.[370] Even though the court refused Meta's claim that it did not have jurisdiction, the question remains as to whether the basis of exercising jurisdiction will pass the threshold test for the recognition and enforcement of the judgment against the foreign defendant.

The case of *Dorcas Kemunto Wainaina v. IPAS* ("*Dorcas Wainana*)[371] mirrors one of those instances where a foreign company directly engaged a worker in Kenya. Even though the foreign defendant corporation had directly concluded a contract of employment with the plaintiff, the jurisdiction of Kenyan courts and labor law was challenged as not applicable to the employment relationship. *Dorcas Wainaina* involved a Kenyan national employed as a senior international human resource associate with the Respondent, IPAS, a North Carolina company in the United States.[372] The employment contract did not contain a choice of law or jurisdiction clause to determine the rights and obligations of the parties and to resolve disputes arising out of the contract, respectively.[373] The plaintiff mainly operated from Kenya with work visits to other countries in the East African sub-region.[374] However, IPAS terminated the plaintiff's employment, and the plaintiff's position was eliminated due to restructuring.[375] According to the plaintiff, the basis of the termination was contrary to Kenyan law.[376] Upon termination of the employment contract, the claimant sued the Respondent for unfair termination of employment.[377]

The issues in dispute were, unfair, wrongful and unlawful termination of employment on allegation of redundancy, denial and retention of benefits, breach of trust and confidentiality by the employer and non-payment of notice pay and damages.[378] The conflict of law issue hovered around whether the ELRC had jurisdiction over the foreign defendant and the subject matter, and if so, what law applied to the employment contract: Kenyan or United States law. On the jurisdiction question, the respondent, IPAS, objected to the jurisdiction of the Kenyan Court. The basis of the objection, according to the respondent, was that the contract was concluded per the United States laws.[379] On the applicable law issue, the respondent submitted that the laws of the United States governed the employment

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368 *Id*. at para. 6 at 2.

369 *Id*. at para. 13 at 3.

370 *Id*. at para. 45 at 6.

371 *Dorcas Kemunto Wainaina v. IPAS* (2018) KLR.

372 *Id*. at para. 1.

373 *Id*. at para. 5.

374 *Id*. at para. 8-9.

375 *Id*. at para. 10.

376 *Id*. at para. 12. While it was submitted that the termination was in breach of Kenyan laws, many states in the United States, including North Carolina, allow for the termination of employment at will; hence, unless an employment contract or specific law stipulates otherwise, an employer can terminate at will. For further discussion on employment at will, *see* MARION CRAIN ET AL., WORK LAW: CASES AND MATERIALS (4th ed. 2020).

377 *See Wainaina*, at para. 14.

378 *Id*. at para. 2.

379 *Id*. at para. 27.

contract.[380] The ELRC in *Dorcas Wainaina* had to navigate an unchartered territory under Kenyan law on the confluence of employment law and conflict of laws.[381] The area was uncharted because the conflict of laws of the employment contract is not adequately discussed in case law, and there was not sufficient academic literature to guide the court. Notably, although the respondent directly engaged the petitioner by employing her, jurisdiction was not straightforward as the respondent was not physically present in Kenya.

In South Africa, a group of Uber drivers alleged they had been unfairly dismissed after Uber logged them off the Uber app. In *Uber South Africa Technological Services (Pty) Ltd v NUSPAW & SATAWU Obo Morekure and others*,[382] the Commission for Conciliation, Mediation and Arbitration (CCMA) was approached to address a critical question of whether Uber drivers were employees or independent contractors for purposes of an unfair dismissal claim against Uber South Africa.[383] Uber South Africa objected to the jurisdiction of the CCMA. However, in this case, Uber South Africa objected to the jurisdiction of the CCMA because the CCMA only had power to determine disputes involving employees.[384] Uber SA accordingly submitted that the drivers were not employees of Uber BV, let alone Uber SA.[385] The Commissioner of the CCMA held that the Uber drivers were employees of Uber SA and thus had jurisdiction to deal with the matter.[386] According to the Commissioner:

> The real relationship between drivers in South Africa is that Uber SA is the employer. Uber SA approves the vehicle they drive. The relationship between Uber BV and Uber SA is completely distant and anonymized. Uber BV provides the legal contract, technology, payment collection, and control drivers. It is at this point that drivers engage and occasionally negotiate . . . .[387]

The CCMA's decision was sent to the Labour Court for review.[388] Upon review, the Labour Court averred that the CCMA conflated Uber BV (the international corporation) and Uber South Africa (the subsidiary) organizational operations or requirements.[389] According to the Labour Court, Uber BV and Uber SA were different entities.[390] In the view of the Labour Court, there existed no contractual obligation between the Uber drivers and Uber

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380 *Id*. at para. 39.

381 *Id*.

382 Uber South Africa Tech. Servs. (Pty) Ltd. v. NUSPAW (2017) ZACCMA (S. Afr.).

383 *Id*. at para. 8-9.

384 *Id*. at para. 10.

385 *Id*. at para. 10.

386 *Id*. at para. 62.

387 *Id*. at para. 50.

388 *See* Uber South Africa Tech. Servs. (Pty) Ltd. v. Nat'l Union of Public Serv. and Allied Workers, 2018 ILJ 903 (LC); Kgomotso Mokoena, *Are Uber Drivers Employees or Independent Contractors: A Comparative Analysis*, 39 INDUS. L. J. 1453, 1453-69 (2018); Tumo Charles Maloka & Chuks Okpaluba, *Making Your Bed as an Independent Contractor but Refusing to Lie in It: Freelance Opportunism*, 31 S. AFR. MERCANTILE L. J. 54, 72-3 (2019); Kgomotso Mokoena, *Are Uber Drivers Employees? A Look at Emerging Business Models and Whether They Can be Accommodated by South African Labour Law*, 37 INDUS. L. J. 1574, 1574-78 (2016); Stefan van Eck & Ndivhuwo E. Nemusimbori, *Uber Drivers: Sad to Say, but Not Employees of Uber SA*, 81 T.H.R.H.R. 473, 473-78 (2018).

389 *See Uber South Africa Tech. Servs. (Pty) Ltd*, at para. 80.

390 *Id*. at 59.

SA.[391] While academics in South Africa have criticized the decision of the Labour Court,[392] the Labour Court cannot be faulted as the case before it was a review of the decision of the CCMA.[393] The Labour Court accordingly held that the CCMA lacked jurisdiction to deal with the matter because there existed no employment relationship between the Uber drivers and Uber SA.[394] While this case was instituted against Uber SA, questions arose about the actual relationship between Uber SA and Uber BV.[395] Had the Uber drivers initiated the claim against Uber BV, they would have faced a legal constraint in substantiating why the Court has jurisdiction over BV, a corporation not physically present in South Africa. This question is vital, considering that the basis of jurisdiction in South Africa is informed by the doctrine of effectiveness. Hence, it remains to be seen how the South African courts will address jurisdiction issues over a foreign corporation like Uber BV, which has its mobile application available to Uber drivers and customers in South Africa but not physically present within South Africa.

VI. BEYOND PRESENCE-BASED JURISDICTION IN SUB-SAHARAN AFRICA

A. Contextualizing the Facts and Legal Issues

Two main legal issues arise based on the facts in the cases in Part III of this article. The first issue relates to how courts should exercise personal jurisdiction in standard cross-border employment law cases where the employer is not physically present in a Sub-Saharan African country. This issue was evident in *Dorcas Wainaina*. The second issue relates to instances where foreign corporations distance and anonymize their operations to escape the doctrine of presence, thereby avoiding the jurisdiction of courts. Both issues unmask the stark reality and necessity for Sub-Saharan African countries to recalibrate jurisdictional rules and conflict of law rules to suit the contemporary era. Indeed, technological advancement amplified by access to the internet and technologically driven forms of work, digital nomadism, and remote work makes it necessary to re-align jurisdictional rules in Sub-Saharan Africa to meet the changing times and beyond the doctrine of physical presence. Such re-alignment will prevent instances where foreign corporations indirectly operate but can easily escape the court's jurisdiction in case of a breach of the legal entitlement of a worker.

Indeed, the concern that some foreign corporations structurally arrange their affairs to distance their operations and activities in Africa was hinted at by the Commissioner of the CCMA in *Uber South Africa*.[396] According to the CCMA Commissioner, the relationship between international corporations and their subsidiaries is anonymized and distant.[397] This is legally achievable because subsidiaries are treated as separate legal entities distinct from

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391 *Id*. at 82-88.

392 van Eck & Nemusimbori, *supra* note 387, at 478.

393 Theophilus Edwin Coleman & Letlhokwa George Mpedi, *Accommodating New Modes of Work in the Era of the Fourth Industrial Revolution in Ghana: Some Comparative Lessons from the United Kingdom and South Africa* 2023 C.I.L.S.A., 1, 1-35 (2023).

394 *Uber SA – LC* at 81.

395 *Id.*

396 *Id*. at 50.

397 *Id*.

foreign corporations.[398] Effectually, the tactics by some foreign corporations to distance and anonymize their operations and activities in Africa shield and insulate those foreign corporations from the jurisdiction of African courts.[399] Through the organizational structure of foreign corporations, they can easily escape the doctrine of physical presence as a basis upon which a court in Sub-Saharan Africa could exercise jurisdiction over them.

The gravamen of this jurisdictional problem and the possibility of foreign corporations escaping the doctrine of presence to shield themselves from courts exercising jurisdiction over them was expressed in the *Motaung*, where it was submitted to the court that "with today's reality of virtual offices, Meta's objection [to the court's jurisdiction] would only immunize multinational corporations from employment disputes arising in Kenya."[400] In South Africa, the actual legal effect in the *Uber SA - LC* was that the group of individuals who felt Uber had unfairly dismissed them were left without remedy since the very competence of the courts to determine the matter was successfully questioned and upheld by the Labour Court.[401] The decision by the South African Labour Court met the statutory threshold.[402] The Court could not exercise jurisdiction over a corporation not physically present in South Africa. Similarly, the South African Labour Court could not exercise jurisdiction over a domestic corporation that does not have a clear working relationship between it and the drivers. Besides, had the case been instituted against Uber BV, the Uber drivers would have been met with the hurdle of convincing a court to exercise jurisdiction over a corporation that is not present in South Africa – meaning the drivers should initiate the legal suit at the location where the defendant is physically present.

This leads to the indispensable question about the mechanics of how courts should navigate the basis of assuming jurisdiction in situations where, procedurally, they are barred from employing the tactics of judicial innovation and creativity, but substantively, refusing jurisdiction could mean that the court could insulate or aid foreign defendant and corporations to organize their business structure in a manner that can escape the doctrine of presence and the jurisdiction of the court. The following section argues that courts in Sub-Saharan African countries should consider a conduct-linked basis of jurisdiction like the US Supreme Court adopted to prevent situations where foreign corporations or non-resident corporations could escape the doctrine of presence and jurisdiction of the court by organizing its business structure in a manner that achieves that objective.

B. Towards a Conduct-linked Basis of Jurisdiction

The discussion in previous sections highlights the seemingly complex path for courts to exercise jurisdiction over a defendant corporation that is not directly carrying on business or physically present in the geographical area or territory where the court sits. The discussion also brings to bear the reality and possibility that private corporations can organize their business structure to avoid being present or seen to be carrying on business within a particular geographical area, especially for purposes of courts exercising jurisdiction over them. The difficulty and impracticality of the presence doctrine, especially where some private

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398 *Id*.
399 *Id*.
400 Motaung v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 320 KLR (Kenya) at 54.
401 Coleman & Mpedi, *supra* note 392, at 24.
402 *Id*.

corporations structure their business operations to escape physical presence, led the US Supreme Court to abandon the common law territoriality and presence doctrine in *Pennoyer* in favor of the minimum contacts test without impairing the defendant's due process rights. The minimum contacts test remains crucial in the United States for courts to exercise jurisdiction *in personam*, albeit plagued with uncertainty.[403] However, the philosophical roots and reasoning of the minimum contacts test mark a recognition that private corporations distance and anonymize their operations to escape the doctrine of presence and, by extension, the court's power to exercise personal jurisdiction over them.

In Sub-Saharan Africa, the basis for courts to assume jurisdiction is strictly applied. The strict application of the jurisdictional rules means that courts are barred from innovating and stretching beyond the contours of the statute that conferred jurisdiction. For instance, the Supreme Court of Kenya held that a court cannot expand its jurisdiction through judicial craft or innovation.[404] Kenyan courts are, *ab initio*, restricted by law to innovate regarding the grounds or basis upon which they can assume jurisdiction. Unfortunately, the basis for courts to exercise jurisdiction in cross-border employment cases in Sub-Saharan African countries is not set out in statutes, and case law and academic works on the subject matter are very thin. This was admitted by Judge Radido Stephen of the Employment and Labour Relations Court in *Dorcas Wainaina*: "Just to mention that domestic law in the area of conflict of laws within the labor/employment framework in Kenya under the current constitutional and statutory dispensation is scarce."[405] In addition, the Court of Appeal in *Meta Platforms & another* admitted that the nature of cross-border employment relationships is different from the three concepts of jurisdiction under Kenyan law. To the Court, "the jurisdictional question urged by the applicants before us is very different from the jurisdiction defined in the passage above [the three concepts encapsulating jurisdiction], which connotes the court's power to entertain a matter."[406]

The admission of the ELRC and the Kenyan Court of Appeal, for instance, leads to one conclusion: that the standard rules of jurisdiction under statutes and those as developed by courts do not fully capture cross-border employment relationships where the employer is a foreign entity or a foreign defendant corporation that is not directly operating or carrying on business in a Sub-Saharan African country but engages Africa nationals for their services or work. The critical question, then, is, how does the court innovate when, on the one hand, it is barred from utilizing judicial innovation to exercise jurisdiction over a defendant, but at the same time, the issue presented before it necessitates that it adopts strategies to exercise jurisdiction to prevent the possibility immunizing or shielding foreign corporations from the jurisdiction of the court when they engage African nationals in Sub-Saharan Africa for employment. As mentioned, case law and special rules on jurisdiction are clear, and a court cannot exercise jurisdiction over a defendant or a subject matter not granted by statute or the Constitution.[407] Also, the cases by courts clearly show that courts are precluded from the

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403 Stephens, *supra* note 12, at 105.

404 *In re* Interim Independent Electoral Commission, [2011] eKLR.

405 Dorcas Kemunto Wainaina v. IPAS [2018] eKLR at 6.

406 Meta Platforms, Inc. v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 999 KLR. (C.A.K.) at 33.

407 Samuel Kamau Macharia v. Kenya Commercial Bank Ltd. & others, [2012] eKLR; Intercontinental Group (GH) Ltd v. Zenith Bank (Ghana) Ltd. Suit No. CM/BDC/0219/2023 (Unreported).

extraterritorial application of their domestic laws.[408] More crucially, the Sub-Saharan African courts, as a matter of principle, determine whether their judgments will be given effect before they exercise jurisdiction over a foreign corporation or defendant.[409]

Notwithstanding limitations on judicial innovation and craftiness, in *Dorcas Wainaina*, the ELRC exercised jurisdiction over the foreign defendant, IPAS (a North Carolina-based corporation), by classifying the facts as an employment law issue (employer-employee relationship culminating in a breach of an employment contract) and not a general contract law issue.[410] The basis of the court's jurisdiction in the *Dorcas Wainaina* is not one that was grounded in statute *per se* since the Kenyan Employment Act of 2007 and the Labour Court's Act of 2007 do not provide an express framework on how the court could exercise jurisdiction over cross-border employment relationship.[411] Also, the classification approach is alien in the jurisdiction process in conflict of laws, but the court adopted that approach. Generally, classification in conflict of law is essential during the choice of law process, and it involves compartmentalizing the facts of a case and placing them in their appropriate legal category to ascertain the law applicable to such facts.[412] The characterization of the facts as one of employment law and not general contract law made it possible for the court to fortify the basis of exercising jurisdiction in the 2010 Constitution of Kenya, which vests the authority in Parliament to establish courts with the status of High Court to hear and determine disputes relating to employment and labor relations.[413]

The ELRC in the *Dorcas Wainaina,* after employing the innovative step of characterizing the facts as employment law, enabled the court to have the competence to address what it described as a modern employment contract with international elements.[414] The court also considered the general factors used to determine jurisdiction without a choice

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[408] Finlay (Kenya) Ltd. v. Elly Okongo Inganga & 6 others, [2019] eKLR.

[409] *See, e.g.*, South Africa: Visser NO & others v. Van Niekerk & others [2018] ZAFSHC 200 (9 November 2018) Bisonboard Ltd. Braun Woodworking Machine (Pty) Ltd. 1991 (1) SA 482 (A); Veneta Mineraria Spa v. Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883 (A) Silverstone (Pty) Ltd & another v. Lobatse Clay Works (Pty) Ltd. [1996] BLR 190 (CA); Nowete Transport (Pty) Ltd. v. Kanjee & others [2021] ZANWHC 50 (18 February 2021); Zokufa v. Compuscan (Credit Bureau) 2011 (1) SA 272 (ECM); Parry v. Astral Operations Ltd (2005) 26 ILJ 1479 (LC); Multi-Links Telecommunications Ltd. v. Africa Prepaid Services Nigeria Ltd. [2013] 4 ALL SA 346 (GNP).

[410] *Dorcas Wainaina* at 22-36.

[411] *Id.* at 29.

[412] *See, e.g.*, Ernest G. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws* 50 YALE L.J. 743, 743-761 (1941); Walter Wheeler Cook, *Characterization in the Conflict of Laws*, 51(2) YALE L.J. 191, 191-212 (1941); Robert A. Pascal, *Characterization as an Approach to the Conflict of Laws*, 2(4) LA. L. Rev. 715, 715-728 (1940); Veronique Allarousse, *A Comparative Approach to the Conflict of Characterization in Private International Law*, 23(2) CASE W. RES. J. INT'L L. 479, 479-516 (1991); Elvin E. Overton, *Analysis in Conflict of Laws: The Problem of Classification*, 21 TENN. L. REV., 600, 600-603 (1949–1951); W. R. Lederman, *Classification in Private International Law*, 9(1) CAN. B. REV. 3, 3-33 (1951); Laura E. Little, *Conflict of Laws Structure and Vision: Updating a Venerable Discipline*, 31(2) GA. ST. U. L. REV. 231, 231-288 (2015).

[413] CONSTITUTION art. 162 (2010) (Kenya). Basing the jurisdiction in section 162 of the 2010 Constitution of Kenya also meant that the court was statutorily grounded to deal with the issue under the Employment Act of 2007 and the Labour Relations Court Act of 2007. Section 12(1)(a) of the Labour Relations Courts Act provides that "the Employment and Labour Relations Court has exclusive original jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and employee."

[414] *Dorcas Wainaina* at para. 31.

of forum clause in an employment contract.[415] The factors include the *locus contractus*, *locus solutionis*, domicile, the nationality of the parties, and the possibility of the judgment being enforced in another jurisdiction.[416] To the ELRC, those factors must be weighed qualitatively to establish whether a court has jurisdiction.[417] After considering those connecting factors, the court concluded that it had jurisdiction over the matter and the defendant.[418] In the words of the ELRC:

> Considering the respondent's admission on the question of jurisdiction, that the contract provided that the claimant would be based in both Chapel Hill, North Carolina, and Nairobi, that the remuneration was subject to Kenyan tax laws and that the disputes concerns breach of contract and unfair termination of employment, the court will not belabor the point but find that it has jurisdiction over the dispute presented before it.[419]

The reliance on the connecting factors approach for the court to exercise jurisdiction, while successful in *Dorcas Wainana*, is still insufficient to address instances where a foreign defendant anonymizes and distances their operations in a forum. This is because merely assessing the preponderance of connecting factors may not suffice for a court to exercise personal jurisdiction over a foreign defendant who is not physically present within the territories of a court. Therefore, *Dorcas Wainana* can be described as a typical or standard conflict of law case where the working relationship between the worker and the employer (a foreign defendant corporation) is obvious and not elusive. Hence, ELRC, after acknowledging the difficulties posed by modern cross-border employment contracts and relationships in *Dorcas Wainaina*, was presented with a golden opportunity to consider a new theory of jurisdiction in employment law beyond the doctrine of presence and the mere counting of preponderance of connecting factors to a jurisdictional framework that considers the specific conduct of a foreign defendant employers whose contacts with Kenya could be sufficient for courts to exercise personal jurisdiction over them.

In analyzing *Dorcas Wainana* through the lenses of the minimum contacts test and the conduct-based jurisdiction, the employer, the foreign defendant based in Chapel Hill, North Carolina, in the United States, can be said to have had minimum contacts with Kenya. Considering that the minimum contacts tests require that a single contact alone does not suffice but that there should be a connection with the plaintiff's claim and the defendant purposefully availing itself with the forum, the foreign defendant employer, IPAS could be said to have purposefully availed itself to Kenyan forum having entered into a contract of employment that had several contacts with Kenya. A pronouncement that the foreign defendant had minimum contacts with the Kenyan forum ensures the respect of a foreign defendant's due process rights in Kenya. Also, considering that the defendant was a corporation in North Carolina, US, the adoption of the minimum contacts test and a proper

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415 *Id*. at para. 32-34.

416 *Id*. at para. 34.

417 *Id*.

418 *Id*. at para. 36. The ELRC wrote: "Considering the Respondent's admission on the question of jurisdiction, that the contract provided that the Claimant would be based in both Chapel Hill, North Carolina and Nairobi, that the remuneration was subject to Kenyan tax laws and that the dispute concerns breach of contract and unfair termination of employment, the Court will not belabour the point but find it has jurisdiction over the dispute presented before it".

419 *Id*. at para. 36.

application of same would create a legitimate pathway for the ELRC's jurisdictional competence not to be easily challenged during the stage of recognition and enforcement in the United States. This was a concern for the court before exercising jurisdiction over IPAS.[420] According to the ELRC, before exercising jurisdiction, due regard must be had to "whether any judgment it renders would be effective and capable of being enforced."[421]

In *Motaung*, the uniqueness of the issue made it difficult for the court to directly establish or characterize the facts of the case as purely an employer-employee relationship.[422] Meta had distanced the working relationship by outsourcing to a third-party company, Samasource International BV, which had established Samasource Kenya.[423] Therefore, Meta and the content moderators had no direct employment relationship.[424] The petitioners in the case had, however, alleged that a genuine working relationship existed between them and Meta because of the extent of control, supervision, standard-setting, and provision of tools of trade by Meta.[425] To the petitioners, the working relationship between Meta and them made it possible for the ELRC to exercise jurisdiction over Meta, a corporation not physically present in Kenya.[426] Meta's objection to jurisdiction ELRC was procedurally correct based on the rules of jurisdiction under Kenyan law.[427] Also, Meta's claim that their name should be struck off the suit because the court did not have jurisdiction was technically and procedurally placed.[428]

Even though case law is strict that courts cannot utilize judicial craft or innovation to assume jurisdiction, the case was presented as one of breach of fundamental human rights of the content moderators – and that the 2010 Constitution of Kenya was binding on the parties (though it was argued that this would make the 2010 Constitution apply extraterritorially).[429] The Court of Appeal commented on the issue by stating that it is not arguable

> that the Constitution does not apply to the applicants because they are foreigners. To our mind, the Constitution binds every person within the Republic and obligates every person to observe and respect it. We are alive to the fact that an arguable ground is not necessarily one that must succeed but merely one that deserves consideration by this court. Without saying more lest we embarrass the bench that will be seized of the main appeal.[430]

Hence, even though case law is strict on how a court can assume jurisdiction over a party, the ELRC employed an innovative mechanism by leveraging substantive justice over the procedural technicalities in the law.[431]

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420 *Id*. at para. 34.
421 *Id*. at para. 35.
422 Motaung v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 320 KLR (Kenya) at para. 1-27.
423 Kenyan courts had previously held in SBI International (K) Limited v. Fredrick Matheka Kisilu (2021) KLR. on subcontracting agreement that the person who assigned and supervised the work could not escape liability where an employee suffered harm in doing the work.
424 *Motaung* at para. 15.
425 *Id*. at para. 11.
426 *Id*.
427 *Id*.
428 *Id*.
429 *Id*.
430 Meta Platforms, Inc. v. Samasource Kenya EPZ Ltd. t/a Sama (2023) 999 KLR. (C.A.K.) at para. 34.
431 *Id*.

In the court's view, it would be premature to strike out the name of the Meta from the dispute as it would be unfair to the parties.[432] Though it advances the virtues of substantive justice over procedural technicalities, which is crucial in pursuing justice for the parties, the approach of privileging substantive justice over procedural technicalities does not synthesize with the position of Kenyan law that courts should not innovate or utilize judicial craft to assume jurisdiction over a party or a matter.[433] In analyzing *Daniel Motaung* through the lenses of the conduct-based dimension of jurisdiction, the petitioners and the court could have considered the exact relationship the extent of contact of Meta with Kenya by exploring the degree of control, supervision, standard-setting, and provision of tools of trade by Meta to the content moderators. Exploring the actual connection and contact of Meta in Kenya could have unveiled the anonymity and distance created by Meta to escape being present in Kenya. Through this, the tactics of escaping physical presence and the court's power to exercise personal jurisdiction over them would have been avoided.

C. Advantages of Adopting Rules of Jurisdiction beyond the Territoriality Theory and the Doctrine of Presence

The reliance on the doctrine of presence as a basis for courts to exercise jurisdiction is problematic when a foreign defendant is not physically present within the territories of a court. Indeed, almost eight decades after the United States identified that corporations could distance their operations in a particular State to escape the doctrine of presence, the tactics of anonymity and distancing of operations by corporations have assumed an international dimension.[434] With the advent of the internet and other technological advancement, more than physical presence alone as a basis for jurisdiction is required to deal with the increasingly changing dynamics of cross-border employment relationships. Admittedly, the presence doctrine is lauded for its predictability and certainty.[435] However, the complexities of contemporary cross-border working relationships necessitate reassessing the jurisdictional rules in many countries. In Sub-Saharan Africa, particularly those described in this article, the rules on jurisdiction are still firmly rooted in the doctrine of presence.[436] This continued reliance on the doctrine of presence has undeniably unmasked the challenges for courts to, on the one hand, ensure that the due process rights of defendants are not impaired, but at the same time, create a framework that does not insulate foreign corporations and their operations in Africa. Based on this difficulty, this Article suggests that courts in Sub-Saharan Africa adopt rules on jurisdiction that can be linked to the conduct of the foreign defendant.

In developing the rules on jurisdiction, this Article suggests that courts in Sub-Saharan African countries draw some dialectical parallels from the minimum contacts test (and the over seven decades of its development) established by the United States Supreme Court in *International Shoe*.[437] The minimum contacts test has several benefits. At the heart of those benefits is the belief by many academics that it "freed personal jurisdiction from the dark

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[432] *Id*.
[433] *Id*.
[434] *See Motaung*.
[435] Jacobs, *supra* note 19 at 1623-1625.
[436] *See generally* OPPONG, *supra* note 6.
[437] *See Int'l Shoe*, 326 U.S. 310.

age of territorialism and gave courts the flexibility to expand the scope of jurisdiction to keep pace with modern society."[438] The territorial rules on jurisdiction are rigid and inflexible when dealing with the complexities of modern jurisdictional questions .[439] Hence, rather than courts focusing on the rigid question of whether a foreign defendant corporation is present within its territories by doing business, the minimum contact test requires that a defendant not present within the territory of the forum has minimum contacts such that the maintenance of the suit in the forum will not offend the traditional notions of fair play and substantial justice.[440]

5. CONCLUSION

Considering the difficulties and complications in exercising jurisdiction in contemporary times, courts in Sub-Saharan Africa must consider a jurisdictional framework or rules beyond the age-long English common law doctrine of physical presence. In a globalized world, courts in Sub-Saharan Africa must adopt jurisdictional rules that consider the conduct of a foreign defendant. This Article suggests that contemporary employment relationships, particularly cross-border employment relationships, make it imperative to trigger judicial innovation and strategies to unmask the tactics employed by some foreign corporations to escape the doctrine of physical presence and the jurisdiction of African courts. This Article submits that contemporary forms of employment, amplified by platform work, remote working, and internet access, have enabled workers to work in one jurisdiction while the employer is in another country. In this contemporary era, the continued reliance on the doctrine of physical presence as a basis of jurisdiction is insufficient. It can insulate foreign corporations that have structurally organized their business operations to escape physical presence and the jurisdiction of the courts.

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438 Jacobs, *supra* note 19 at 1589.

439 Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and the Outcome Determination under International Shoe*, 28 U.C. DAVIS L. REV. 769, 782-83 (1995) ("Territoriality proved too inflexible a tool for a developing national economy…Besides increasing the potential for a non-resident to cause injury in a state, these developments made it harder to catch up with people whose conduct created mischief in the forum state").

440 *Id*.


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BILATERAL LABOR AGREEMENTS: ECONOMIC GAINS OR HUMANITARIAN LOSSES?

Carson Taylor

ABSTRACT

This paper will assess multiple bilateral labor agreements (BLAs) from the perspective of the migratory worker. A BLA is any agreement, be it formalized through a treaty or informal through a memorandum of understanding, between two states in which one provides a labor force to the other. Most analysis of these agreements and treaties focuses on a law and economics perspective, describing the economic benefit of these agreements. Although I recognize these benefits, this Article will argue that most of these agreements are insufficient to prevent individual injuries to workers because the agreements either refuse to recognize a cause of action for mistreated workers or are fully silent as to which domestic law controls these labor disputes. This Article will begin by assessing the history of BLAs and how they became such a prevalent global problem. Next, this Article will set forth why BLAs, as they currently stand, are an issue. This Article does argue that BLAs are beneficial to both exporting and importing nations, but it also analyzes the impacts that unregulated BLAs have on individual workers' rights. Ultimately, this Article argues that BLAs can and should be regulated through the International Labour Organization, the International Organization for Migration, or market influences. BLAs are a powerful tool for developing nations to gain income and a skilled workforce. They are also an unmatched tool for importing states to skirt around their own domestic laws and get cheap labor from workers whose human rights are often not as protected as domestic laborers. BLAs are common because they are mutually beneficial to the party states, but a regulated BLA can be mutually beneficial to all parties—the states, the workers, and the employers.

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I. INTRODUCTION

Since the beginning of the Israeli-Palestinian Conflict, major publication networks have failed to adequately address Israel's treatment of its foreign workers. During the first month of the conflict, 7,500 foreign passport holders were confirmed to be in Gaza, with many of them planned to be evacuated to Egypt.[1] As of April 25, 2024, fewer than 3,000 foreign workers have been sent to Palestine to replace and supplement the tens of thousands of foreign and Palestinian workers who make up nearly a quarter of Israel's workforce, with up to 10,000 Sri Lankan laborers contracted to be sent to Israel by the end of 2024. The largest foreign ethnic group affected by this conflict is Thais.[2] Nearly 6,000 Thais were employed by Israeli farmers, many of whom were poor, working under "[s]trict conditions" with "short contracts in manual work [and] with no right to raise families there."[3]

Following the start of the Israel-Hamas conflict, between 30,000 and 40,000 farm workers left, most of whom were Palestinians who were displaced to the West Bank, with over 10,000 of these workers being foreign.[4] Many Thais chose to stay, mostly because this labor is the only way that these workers can pay off their debts.[5] Although the United Nations International Organization for Migration (IOM) takes charge of the recruiting process that ultimately chooses which Thai citizens work in Israel, this oversight at one end does not stop the human rights infringements on the other.[6] To say Israeli farms have treated Thai migrant workers poorly is an understatement. Many workers are denied legal rights, including the right to safe working conditions and medical care.[7] Most workers are paid below minimum wage, and done so in either cash or direct deposit to Thai banks, restricting the workers' access to their earnings.[8] These workers are denied access to emergency healthcare, occupational medical exams, necessary vaccinations, personal protective equipment, and even at times bathrooms.[9]

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[1] *See* Yusri Mohamed et al., *At Least 320 Foreign Nationals and Some Wounded Leave Gaza for Egypt*, REUTERS (Nov. 1, 2023, 1:08 PM), https://www.reuters.com/world/middle-east/egypt-prepares-evacuees-gaza-arrive-through-rafah-crossing-2023-11-01/ (highlighting plan to bus foreign nationals from Gaza to Egypt).

[2] *See* Joseph Ataman et al., *Israel's Farms Need Foreign Labourers. The Hamas Attacks Triggered an Exodus*, CNN (Nov. 26, 2023, 9:42 PM), https://amp.cnn.com/cnn/2023/11/26/middleeast/israel-farms-foreign-workers-crisis-intl-cmd/index.html (noting large impact of October 7 attack on Thai population in Israel).

[3] *Id.*

[4] *See id.* (most all farm workers who left were non-Israeli).

[5] *See* Shaun Turton & Francesca Regalado, *How Thai Workers Became Integral to Israel's Economy*, NEKKESASIA (Oct. 18, 2023, 10:47 AM), https://asia.nikkei.com/Politics/Israel-Hamas-war/How-Thai-workers-became-integral-to-Israel-s-economy (explaining history of foreign labor in Israel's agriculture).

[6] *See id.* (noting 83% of Thai workers in Israel are paid under the legal minimum wage).

[7] *Id.* (Turton & Regalado specifically go on to discuss how Israeli farmers pressured Thai workers to return to otherwise evacuated regions to continue working directly following the October 7 attack. These same workers are often denied medical care).

[8] *See 2020 Snapshot: Migrant Workers from Thailand in Israeli Agriculture* at 2, KAV LAOVED WORKERS HOTLINE (Oct. 3, 2021), https://www.kavlaoved.org.il/en/wp-content/uploads/sites/3/2021/10/2020-Snapshot-Migrant-Agriculture-Workers.pdf (by law, Israeli employers are required to open a bank account in Israel for all migrant workers).

[9] *See id.* at 3 (detailing social harms faced by Thai farm workers in Israel).

Much of this mistreatment of migrant farmers occurs either because Israel lacks sufficient mechanisms to enforce their own laws, or because it refuses to do so.[10] 95% of migrant farm workers have never seen an inspection conducted on the farms in which they work.[11] Although some of the workers are on short-term contracts which last only an academic year,[12] most work on longer contracts which can last from two years to five years and three months.[13]

Israel has imported foreign workers in the agricultural sector since 1991, but signed a bilateral treaty with Thailand to make the process easier for Israeli employers to find Thai workers in 2011.[14] This treaty has been the subject of international scrutiny since its conception.[15] As of 2015, Israel failed to properly sanction its farmers who allowed the migratory workers to face abuse and death.[16] Although the United States initially saw this as fully compliant "with the minimum standards for the elimination of trafficking in persons" in 2013,[17] the Department of State now calls Israeli government's foreign labor recruitment "inconsistent and inadequate to prevent forced labor."[18] The U.S. has recently explicitly classified the use of Thai labor in Israel's agriculture sector as "forced labor[,]" especially in the labor conducted at the Israeli agricultural universities.[19]

However, the marginalized Thai workers have seemingly no route to recovery for their injuries in either Thailand or Israel. The Thai Prime Minister Srettha Thavisin urged all Thai workers to return to Thailand shortly after the October seventh attack.[20] In response, many Israeli employers either offered increased wages or fully postponed paying their employees in hopes that the workers would stay.[21] Under this agreement between the states, Thai law applies to the recruitment of workers and Israeli law applies to the grant of visas and

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[10] *See id.* at 4 (noting law enforcement rarely inspects farms).

[11] *Id.*

[12] *See id.* at 1 (explaining how academic programs are used to import workers beyond what is allowed).

[13] *See* Khaosod English, *Thais Have Been Supported to Work in Israel Before the Attack*, (Oct. 9, 2023, 5:27 PM), https://www.khaosodenglish.com/news/2023/10/09/thais-have-been-supported-to-work-in-israel-before-the-attack/ (noting initial contract between Israel and Thai workers lasts two years, but can be extended); *See also* Turton & Regalado, *supra* note 5 (noting maximum length for Thai agricultural contracts).

[14] *See* Agreement Between the Israeli and Thai Government Regarding the Recruitment of Thai Workers for Temporary Work in the Agricultural Sector in Israel, Isr.-Thai., (July 13, 2020), https://www.gov.il/files/mfa/amanot/0t0081zzh9t1.pdf (2020 treaty update); *see also* Nicholas McGeehan, *A Raw Deal Abuses of Thai Workers in Israel's Agricultural Sector*, HUM. RTS WATCH at 3 (Jan. 2015), https://www.hrw.org/sites/default/files/reports/israel0115_ForUpload.pdf (explaining history of Israeli-Thai cooperation agreement).

[15] *See generally*, McGeehan, *supra* note 14 (noting extent of worker mistreatment).

[16] *See id.* at 45 (imposing only fifteen fines totaling $334,845 for all farm employers from 2009–2014).

[17] U.S. Dep't of State, *Trafficking in Persons Report 2013*, 207 (June 2013), https://2009-2017.state.gov/j/tip/rls/tiprpt/2013/.

[18] U.S. Dep't of State, *2023 Trafficking in Persons Report: Israel, West Bank and Gaza*, (June 2023), https://www.state.gov/reports/2023-trafficking-in-persons-report/israel/#:~:text=Israeli%20children%2C%20Israeli%20Bedouin%20and,exploit%20girls%20in%20sex%20trafficking.

[19] *Id.* at 14-15.

[20] *See* Mitch Connor, *Thai PM Accuses Israeli Employers of Exploiting Thai Workers Amidst Crisis*, THE THAIGER (Oct. 25, 2023, 9:01 AM), https://thethaiger.com/news/national/thai-pm-accuses-israeli-employers-of-exploiting-thai-workers-amidst-crisis (explaining Thai governmental understanding posed by Israeli farmers).

[21] *See id.* (note that these are allegations based on statements by Thai farmers, which have not been substantiated).

protection of workers' rights.[22] If the Thai workers are mistreated in violation of international human rights standards but this is accepted by both Thai and Israeli law, then the Thai workers have no way to ensure their abusers, be it the Thai recruiters or Israeli farmers, face retribution.

Much of these problems stem from the inadequacy of the bilateral labor agreement between Thailand and Israel (the "Treaty"). This Treaty is a total of six pages and eight articles.[23] Of those eight articles, only Articles 3 and 4 discuss the requirements of each party.[24] By way of example, Article 3.1(b) states that Israel "shall endeavor to . . . [t]ake necessary actions, as appropriate, to protect Thai workers' rights[.]"[25]Further, Article 4 notes that "[t]he Parties shall cooperate and provide assistance in investigations and prosecution of offenses . . . subject to the laws of both countries."[26] It is important to note that although any investigation and prosecution is subject to the laws of both Israel and Thailand, nowhere in the Treaty is there a statement of where the individual workers may bring suit or, if there is a conflict of law in prosecution, which law rules.

Why is this? It is because the goals of states in creating these Bilateral Labor Agreements (BLA) are to either obtain a cheap, consistent, legal, and safe workforce, gain a quick influx of cash, or develop a skilled workforce once workers return.[27] However, given that there is a limited amount of public information and statistics on these agreements,[28] it is unclear if states truly benefit to the extent that they believe they are.[29] Further, although the International Labour Organization (ILO) has provided guidance on what should be in BLAs, the ILO cannot assist in drafting the agreements without consent of the states.[30] Given the strong benefits to the economies of all parties to a BLA, well drafted BLAs created with an understanding of its ramifications are extremely beneficial tools to the development of the global South and the expansion of Northern economies.[31] Even though they can benefit

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[22] *See* Agreement Between the Government of the State of Israel and Government of the Kingdom of Thailand Regarding the Recruitment for Employment of Thai Workers for Temporary Work in the Agricultural Sector in the State of Israel, Isr.-Thai., art. 3, § 3.1(a)-(b), 3.2, July 13, 2020.

[23] *Id.* at art. 1-8.

[24] *Id.* at art. 3-4

[25] *Id*. at art. 3, § 3.1(b).

[26] *Id*. at art. 4.

[27] *See generally* Adam S. Chilton & Eric A. Posner, *Why Countries Sign Bilateral Labor Agreements*, 47 J. LEGAL STUD. S45, S49 (2018) (explaining goals of BLA).

[28] Note that BLAs can be formed as official treaties which are deposited with the UN as contracts between two states, or as informal agreements to which no terms are defined. These problems will be discussed in further details in Part III, *infra*. Because of this wide range of underlying legal procedure behind each and every different BLA, this Note will use the words "treaty" and "agreement" interchangeably throughout in reference to BLAs.

[29] *See generally* Adam Chilton & Bartosz Woda, *The Expanding Universe of Bilateral Labor Agreements*, 23 THEORETICAL INQUIRIES L. 1, 3 (2022) (noting statistics of BLAs).

[30] *See id*. at 5-7 (explaining why so little data exists on BLAs); *see also* U.N. Network on Migration Thematic Working Group 4 on BMLAs, *Guidance on Bilateral Labour Migration Agreements*, 7-8 (Feb. 17, 2022), https://www.ilo.org/global/topics/labour-migration/publications/WCMS_837529/lang--en/index.htm (highlighting scope of BLA guidance by ILO).

[31] *See* Arturo Castellanos-Canales, *Bilateral Labor Agreements: A Beneficial Tool to Expand Pathways to Lawful Work*, NAT'L. IMMIGR. F. (July 20, 2022), https://immigrationforum.org/article/bilateral-labor-agreements-a-beneficial-tool-to-expand-pathways-to-lawful-work/ (explaining benefits of BLAs).

both,[32] many of these agreements fail to address the right to remedy for the workers themselves.

What is missing to make these agreements more responsive to the needs of the workers? To start, these agreements should be reported to the UN. Many states fail to report BLAs, possibly because they are seen as informal agreements rather than treaties.[33] This failure is potentially because states intend these agreements to be non-binding, as some are not treaties at all, but rather completed as memoranda of understanding.[34] However, this non-binding nature of BLAs forces states to treat people as an economic commodity.[35] BLAs provide benefits to both parties by building international trust, but the long-term advantages of increased regulation help minimize the risks of forced labor and unsafe work practices.[36]

Presently, there is little scholarly literature on the topics of the humanitarian implications of BLAs.[37] Of the existing literature, most focuses on the economic functions of BLAs, rather than the experiences of the individual workers.[38] As such, this Article is intended to fill a void in the literature regarding the humanitarian negatives, rather than the economic positives, of BLAs. Further, this Article assesses why BLAs often result in human rights abuses for the workers and how, through international cooperation, these BLAs can be adjusted to benefit all impacted parties, be it the states, the workers, or the employers.

Part II of this paper will discuss the history of BLAs. These agreements first arose after World War II and have become increasingly more popular, especially during and after the Trump administration. Part III will define the problems created by a lack of guidance over BLA formations—discussing how labor differs from trade and the impacts that occur as the result of unregulated BLAs. Part IV will assess BLA formation best practices as defined by the International Labour Organization's guidance as a recommended solution to the problems defined in Part III. Finally, Part V will suggest potential methods to implement oversight and international regulation over BLAs, be it through international institution direct oversight or market manipulation.

II. HISTORY

[32] *See* Yuval Livnat & Hila Shamir, *Gaining Control? Bilateral Labor Agreements and the Shared Interest of Sending and Receiving Countries to Control Migrant Workers and the Illicit Migration Industry*, 23 THEORETICAL INQUIRIES L. 65 (2022) (arguing BLA is beneficial in allowing increased boarder and migration control).

[33] *See* Tijana Lujic & Margaret E. Peters, *Informalization, Obfuscation and Bilateral Labor Agreements*, 23 THEORETICAL INQUIRIES L. 113 (2022) (explaining why there is little public information about BLA).

[34] *See* Tamar Megiddo, *Obscurity and Nonbindingness in the Regulation of Labor Migration*, 23 THEORETICAL INQUIRIES L. 95 (2022) (arguing why some nations choose BLA over multilateral agreements). See Part V(a) *infra* for a discussion of the non-binding nature of many BLAs.

[35] *See* Jennifer Gordon, *People are Not Bananas: How Immigration Differs From Trade*, 104 NW. UNIV. L. REV. 1109 (2010) (noting reasons why some states benefit more from BLA where others benefit from multilateral agreements).

[36] *See* Alan Hyde, *Getting China Into the Game: Bilateral Labor Agreements in the System of Global Labor Rights*, 23 THEORETICAL INQUIRIES. L. 205 (2022) (noting humanitarian advantages to regulated BLAs).

[37] *See* Chilton & Woda, *supra* note 29, at 5 (noting lack of scholarly literature on BLAs due to limited data).

[38] *See generally, e.g.*, Chilton & Posner, *supra* note 27 (highlighting economics of BLAs); see also, e.g., Gordon, *supra* note 35 (noting reasons why some states benefit more from BLAs where others benefit from multilateral agreements); see also, e.g., Livnat & Shamir, *supra* note 32 (focusing on benefits to governmental parties to BLAs).

BLAs are a relatively new phenomenon. They can be defined simply as "any agreement between two countries that is focused on regulating the flow of workers between those countries."[39] However, scholars have divided these agreements into six subsects—temporary contract, seasonal contract, exchange of interns and trainees, permanent migration, work during pleasure visits, and travel with worker-specific provisions.[40] Since the first of these agreements formed nearly a century ago, the number of BLAs has expanded to well over 1,200.[41]

The first officially recorded bilateral labor agreement arose between Germany and Poland in 1927 in the context of Poland exporting agricultural workers to Germany.[42] This agreement was extremely expansive, providing terms for migration, insurance benefits, healthcare, housing, taxation, and venue for protection of rights, along with other terms.[43] Most relevant to this Article is that it clearly defined what laws governed the protection of workers' rights—German law—and where an aggrieved worker could sue their employer—German courts.[44]

However, this treaty was formed not with the intention of making migration easier; rather, it was intended to restrict the total amount of migration into Germany following the rise of xenophobia and nationalism that followed the end of World War I and the rise of the Nazi party.[45] The German borders were reworked during the negotiations surrounding the Treaty of Versailles, which resulted in the then-blossoming Franco-Polish alliance, especially considering that France helped establish the Polish military.[46] France and Poland thereafter signed a treaty which ensured France would defend Poland in the event of German or Soviet attack.[47] With the economic and militaristic support of the French, Poland was able to secure its eastern border from Soviet invasion.[48] As Germany then saw Poland as a permanent state, Germany decided to restrict Polish immigration, for which it had two options—grant migration without allowing the migrants rights or allow temporary migration with rights but a requirement that the Poles returned to Poland during the off-seasons.[49]

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[39] Chilton & Woda, *supra* note 29, at 8.

[40] *Id*. at 8-9.

[41] *Id*. at 3.

[42] *See* Convention on Polish Agricultural Workers, Ger-Pol., Nov. 24, 1927, Nr 44, poz. 366 (1929) (first modern BLA); *see also* Chilton & Woda, *supra* note 29 (providing statistical data on formation of BLA); *see also* Chilton & Posner, *supra* note 27 (providing statistical data on formation of BLA).

[43] *See generally* Convention on Polish Agricultural Workers, *supra* note 42 (describing terms of agreement).

[44] *Id.*

[45] Małgorzata Radomska, *The Political Origins of the Social Protection of Polish Migrant Workers in the German Interwar Labor Market*, 124 ANNALES DE DÉMOGRAPHIE HISTORIQUE 105, 118-26 (2012).

[46] *See* Stanislaw Żerko, *The Polish-French Alliance of 1921*, 18 INSTYTUT ZACHODNI 1 (2020), (explaining Polish-French relationship after World War One).

[47] Political Agreement Between France and Poland, Fr.-Pol., art. 1, Feb. 19, 1921, 18 L.N.T.S. 13.

[48] *See* Radomska, *supra* note 45, at 111 (France was responsible for securing Polish Independence after Soviet and German invasion during World War One).

[49] *See id.* at 125-27 (explaining why both states agreed to terms of treaty). Note that Germany could not fully deny migration for two reasons—Germany was going through an industrial revolution and required Polish farm workers to provide enough food to feed the state and Poland's nationals had a large number of ethnic Germans which Germany would not be able to permit back if it created a blanket denial of all Poles.

Germany ultimately revoked this treaty in 1932,[50] the same year that the Nazi party, and by extension Adolph Hitler, won their first parliamentary election.[51]

Although initially created to restrict migration, the number of BLAs skyrocketed at the close of World War II as a means to regulate safe migration between countries that would otherwise rarely interact.[52] From 1945 to 1960, approximately 186 BLAs were signed, with around a hundred more every decade thereafter;[53] the most prolific period for the formation of BLAs was the post-Soviet Union era.[54] For some states, these agreements aided in creating an increased workforce that allowed the state to economically compete with more connected and developed nations.[55] For others, these treaties were almost exclusively a sign of capitalistic goodwill after the fall of communism.[56] Regardless, as was the case with Poland-Germany in 1927, the intent of the forming parties does not matter as much as the result of the treaty. Much like the case of international trade— where the trade itself is regulated while the end products are not[57]—BLAs result in the regulation of the migration of workers, but not the labor itself.

III. DEFINING THE PROBLEM

a. How Labor Differs from Other Economic Agreements

Why do BLAs need oversight in their formations? Other economic treaties, such as bilateral investment treaties (BIT), function as intended and without notable collateral damage while also being formed without oversight.[58] Where BLAs and BITs differ is in the direct impact on people. However, both can be analyzed in a similar manner as both encourage less developed nations to act against their own long-term self interest in exchange for short-term benefits.[59]

Much like BLAs, BITs usage drastically increased after World War II.[60] As the Cold War created a system of economic allegiances with the capitalist United States and

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[50] *Id.* at 127.

[51] *See* Jerome G. Kerwin, *The German Reichstag Elections of July 31, 1932*, 26 AM. POL. SCI. REV. 921 (1932), for a summary of the 1932 German election.

[52] *See* Chilton & Woda, *supra* note 29, at 5 (establishing history and scope of BLA post WWII).

[53] *See id.* (providing statistical data on formation of BLA); *see also* Chilton & Posner, *supra* note 27 (providing statistical data on formation of BLA). Note that the 1980s saw a drastic change in BLA formations, accounting for a total of 57 in the ten-year span.

[54] Chilton & Posner, *supra* note 27, at S49.

[55] *Id.* at S49.

[56] *Id.* at S49.

[57] *See* Trang (Mae) Nguyen, *Hidden Power in Global Supply Chains*, 61 HARV. INT'L. L. J. 35, 54 (2023) (highlighting textiles as an industry in which the trade is highly regulated despite the fact that the product is relatively unregulated).

[58] BITs, much like BLAs, have had their own history of being criticized for being a "race to the bottom" and negatively impacting the economies of the less developed state in the agreement. *See* Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998) for a discussion on the negative economic impacts of unregulated BITS. However, arguing for or against the need for BIT oversight is beyond the scope of this Article.

[59] *See id.* at 660-74.

[60] *See* Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights*, 39 DENVER J. INT'L L. & POL'Y 483, 484-87 (2011).

communist Soviet Union, the first series of BITs were signed.[61] In the American context, these treaties rose in popularity as a means to encourage investment into less developed nations by ensuring economic protections to the investors.[62]

It is in this protection for impacted individuals that these two types of treaties most differ. By way of example, the United States's BITs are almost always identical to each other.[63] Because of this, the U.S. has established something of an international investment hegemony and regime in which all other parties to the U.S. BITs must comply with its desired rules in order to obtain investment, and thus participate in the international economic playing field.[64] BITs are formed similarly because investment is frequently viewed as being similar to a regime in the sense that investors and investing states share "principles, norms, rules, and decision-making procedures around which [investor's] expectations converge[.]"[65]

However, migratory labor is frequently seen neither as an investment nor as a requirement to develop a domestic economy. Typically, migration is far more restricted and subject to far less international coordination.[66] Further, trade law is more typically governed by international agreements whereas labor is almost exclusively regulated through domestic law, although it is unclear whether this is because of, or in spite of, international agreements.[67] States often, albeit incorrectly, view immigration as having less overall economic benefits than importation, partially because where trade is a one-for-one singular deal, migratory labor requires consistent continuous payment, housing, feeding, and healthcare.[68]

In assessing why migratory laborers receive fewer protections than direct investments, it is necessary to address the impacts of historical biases, xenophobia, and systemic racism. It is unclear how many BLAs are designated to provide laborers in different economic sectors.[69] However, ILO data has shown that, in terms of total distribution of migrant workers, approximately 66% of workers are in the service industry (primarily focusing on domestic house care service), 27% are in industrial work, and 7% are in agriculture.[70] Interestingly, these industries are already considered "vulnerable employment"—jobs which are insecure, low paid, have irregular hours, more likely to result in unfair dismissal, and

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[61] *See* Guzman, *supra* note 58, at 652 (explaining that over 400 BITs were signed between 1959 and 1991).

[62] *Id.* at 653.

[63] The Office of the United States Trade Representative has published multiple Model BITs, most recently in 2012. Typically, the U.S. forms these agreements by filling in state names and maintaining the same terms, with little or no adjustment to the needs of the individual states. *2012 U.S. Model Bilateral Investment Treaty*, U.S. Trade Representative (2012).

[64] *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L. J. 427, 444-48.

[65] STEPHEN D. KRASNER, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* POWER, THE STATE, AND SOVEREIGNTY: ESSAYS ON INTERNATIONAL RELATIONS 113, 113 (2009).

[66] Gordon, *supra* note 35, at 1113.

[67] *See id.* at 1128-29 (comparing protections provided by BITs and BLAs).

[68] *See id.* at 1137 (explaining that trade is reciprocal, migratory labor requires more costs to the receiving nation).

[69] *See* Chilton & Woda, *supra* note 29 (providing statistical data on formation of BLA); *see also* Chilton & Posner,

supra note 27 (providing statistical data on formation of BLA).

[70] ILO Dep't. Stat., ILO Global Estimates on International Migrant Workers (June 30, 2021), www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_808939.pdf.

generally have fewer human rights protections.[71] Because the industries that migratory workers are employed in offer less powerful protections, and the BLAs themselves only provide protections that would be granted to nationals, if any workers' rights are contemplated at all, workers employed internationally through a BLA are more likely to be impacted by employers' discriminatory conduct than are domestic workers.[72]

Unlike other economically-focused treaties, BLAs are unique in that they more directly impact individuals, rather than major corporations or national economies as a whole. Overall, migratory workers make up approximately 5% of the global labor market, with migrants making up over 40% of all laborers in Arab states.[73] Despite making up such a large portion of the workforce, migrants in the Middle East are typically not granted any conventional workers rights namely because 79% of states in this region restrict access to courts for their laborers.[74] As the rights granted by these agreements may be non-binding, especially when they are conducted in the form of memoranda of understanding, states importing laborers can freely abuse their workers, deny them access to justice, and extrajudicially kill them, without any international repercussions.[75]

b. Impact of Unregulated BLAs

Without clear workforce protections, migratory workers can easily be "reduced to a slave-like status."[76] This can clearly be seen in the aforementioned Israeli-Thai agreement which the U.S has classified as "forced labor[.]"[77]Contrary to expectations, exporting states are well aware of these problems, but see strong benefits regardless.[78] One such benefit is that BLAs establish a definitive return date for laborers.[79] Further, it is theorized that exporting nations choose not to protect their nationals because failing to protect workers' rights abroad encourages laborers to behave, cultivating a synthetic "branding" of workers who work hard and follow all rules.[80]

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[71] Hannah Lewis et al., *Hyper-Precarious Lives: Migrants, Work and Forced Labour in the Global North*, 39 PROGRESS IN HUM. GEOGRAPHY 580, 583–84 (2015).

[72] *See, e.g.*, Jenna Hennebry & Hari KC, *Quarantined! Xenophobia and Migrant Workers During the COVID-19 Pandemic*, IOM (2020) (explaining disparate impact of COVID-19 Pandemic on migratory workers when compared to domestic workers because of racism); *see also, e.g.*, Adrian A. Smith, *Racialized in Justice: The Legal and Extra-Legal Struggles of Migrant Agricultural Workers in Canada*, 31 WINDSOR Y.B. ACCESS TO JUST. 15 (2013) (explaining legal struggles faced by foreign workers seeking justice in domestic courts).

[73] ILO Global Estimates, *supra* note 70 at 4.

[74] Executive Summary, I.T.U.C. GLOB. RTS INDEX 16-17 (Sharan Burrow ed. 2022).

[75] *See generally, e.g.*, *"Bad Dreams" Exploitation and Abuse of Migrant Workers in Saudi Arabia*, 16 HUM. RTS. WATCH No. 5(E), (2004), (noting abuses faced by migratory workers in the Middle East and lack of international consequences faced by Saudi Arabia).

[76] Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical perspective 1*, 44 LAB. HIST. 69, 71 (2003).

[77] U.S. Dep't of State, *supra* note 18.

[78] *See* Yuval Livnat & Hila Shamir, *Gaining Control? Bilateral Labor Agreements and the Shared Interest of Sending and Receiving Countries to Control Migrant Workers and the Illicit Migration Industry*, 23 THEORETICAL INQUIRIES L. 65, 72-75 (2023) (explaining benefits for exporting nations).

[79] *Id*. at 78-80.

[80] *Id*. at 81.

Ultimately, whether intentional or not, BLAs lead to a "race to the bottom" in which individual laborers pay the price so that exporting nations obtain quick funds.[81] This "race to the bottom" ideology is caused because a requirement for greater rights must be paired with higher costs, and in an open market, higher labor costs will lead to nations not selecting those workers. As noted by Yuval Livnat and Hila Shamir, professors of law at Tel Aviv University, "at times some sending countries sometimes agree to 'sacrifice' these rights to some degree for the sake of what they perceive as 'the bigger picture[.]'"[82] BLAS are a powerful tool to prevent human trafficking,[83] increase the overall market of skilled laborer in the exporting state,[84] and increase a state's revenue,[85] but failure to provide oversight for these agreements can lead to a state ignoring their nationals to the point of neglect.[86]

1) *Failure to Pay*

Wage theft is far too commonly faced by migratory laborers.[87] When funds are not paid, many laborers refuse to file claims, even if they are provided access to courts, out of fear of retaliatory termination or deportation.[88] Even when claims are filed, and subsequently successful, the consequences for non-compliance with these court orders are often less damaging than actually paying the lost wages.[89] In some cases, this wage theft is not a direct failure to pay, but is seen in employers denying work to laborers, thus keeping them in the host country for months on end without a wage.[90]

Wage theft is even more ubiquitous in the most common export-import nexus—Southeast Asian laborers working in Middle Eastern host states.[91] As these interregional dyads become more prevalent, devaluation of human rights follows.[92] Generally, Southeast Asian states agree to the terms of BLAs with Middle Eastern states in spite of this because the individual income provided to the workers—which is frequently transferred from host states into bank accounts in the exporting state[93]—can be as much as eight times higher than

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[81] *See generally id.* (exporting states gain vast amounts of control over which of their nationals can migrate, and to where, thus using this control allows for increased economic power at the cost of contractual and legal protections).

[82] *Id.* at 83.

[83] *Id.* at 89-91.

[84] *Id.* at 91.

[85] *Id.* at 91-93.

[86] *See id.* at 72-73 (using Malaysia as a case study as it abused migratory workers from Indonesia, Indonesia withdrew from the agreement, and Malaysia rapidly replaced Indonesia with Cambodia).

[87] *See generally* Laurie Berg & Bassina Farbenblum, *Ending Impunity for Wage Theft Against Migratory Workers: Here's How,* INST. FOR HUM. RTS. & BUS. (Dec. 19, 2021) (explaining why wage theft is so common).

[88] *Id.*

[89] *Id.*

[90] *See Qatar: Six Months Post-World Cup, Migrant Workers Suffer*, HUM. RTS. WATCH (June 16, 2023, 10:30 AM), https://www.hrw.org/news/2023/06/16/qatar-six-months-post-world-cup-migrant-workers-suffer, (highlighting unpaid wages of migrant workers).

[91] Chilton & Woda, *supra* note 29, at 18.

[92] *See* I.T.U.C., *supra* note 74, at 16-17 (Middle East has fewest rights protections of all global regions).

[93] *2020 Snapshot*, *supra* note 8.

what the workers could earn domestically.[94] For many, the increased income is worth the inhumane treatment.[95]

But rule-following hard workers still need support from their governments to receive the funds to which they are entitled. Take, for example, Owat Suriyasri, a Thai farmer who was taken hostage by Hamas in the early days of the Israel-Palestine war.[96] Israel has a legislation which allows, in relevant part, legal aliens to recover from "enemy-inflicted injury" through either a state pension or suit against the liable party.[97] The Victims of Hostile Actions (Pensions) Law provides a route to recover for medical treatment, disability, rehabilitation, and dependents benefits, so long as the injury is the result of hostile actions to Israel.[98] However, it is unclear if Owat Suriyasri has access to Israeli courts to sue Hamas, because he has opted to be compensated by the State—being entitled to at least $10,200 over six months—but Israel has not yet paid Owat Suriyasri, and Thailand has not tried to encourage Israel to do so.[99]

2) *Restrictions of Rights*

Israel-Thailand is not the only unsafe bilateral labor agreement. Another such negative agreement is that between Lebanon and Ethiopia. Although unpublished, many of the terms are known because a draft agreement was leaked and authenticated by the Middle East Eye and Human Rights Watch.[100] This agreement allows Ethiopian workers to work in varying industries within Lebanon, but prioritizes domestic workers.[101] Although it restricts the ability of Lebanese employers to subject Ethiopian workers to forced labor, this agreement does not recognize any minimum wage rights.[102]

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[94] Jintiamas Saksornchai, *Thai Workers Face Dilemma: Stay and Endure War, or Flee but Lose Vital Wages*, TIMES ISR. (Nov. 3, 2023, 1:17 AM), https://www.timesofisrael.com/thai-workers-face-dilemma-stay-and.

[95] *See* Poramet Tangsathaporn, *Israel Wants Thai Workers Back but 'Can't Wait Forever'*, BANGKOK POST (Mar. 30, 2024, 7:15), https://www.bangkokpost.com/thailand/general/2767788/israel-wants-thai-workers-back-but-cant- wait-forever (indicating many Thai workers are returning to Israel despite Thai government warnings of danger during war).

[96] Julian Küng, *Thailand: Farmers Caught Between Poverty, Israel-Hamas War*, DW (Jan. 22, 2024), https://www.dw.com/en/thailand-farmers-caught-between-poverty-israel-hamas-war/a-68056575#:~:text=Nearly%2010%2C000%20Thai%20farm%20workers,now%20returning%20to%20escape%20poverty.&text=Bowon%20Nonthasi%20is%20already%20feeling,he%20packs%20his%20travel%20bags.

[97] Victims of Hostile Actions (Pensions) Law, 5721-1960, LSI 15 101 (1960-61); *See* Ruth Levush, *Foreign Law Brief: Compensation for Victims of Terrorist Actions: Israel as a Case Study*, Library of Congress (2002) (providing a summary on the Victims of Hostile Actions (Pensions) Law).

[98] Bituach Leumi, *Victims of Hostile Action*, *in* NAT'L INST. OF ISR.: ANN. REP. 2012 1-12(2013), www.btl.gov.il/English%20Homepage/Publications/AnnualSurvey/2012/Documents/Victims%20of%20Hostile.pdf.

[99] Küng, *supra* note 96.

[100] Zacharias Zelalem, *Ethiopia-Lebanon Labour Agreement Contains Little Protection for Domestic Workers*, MIDDLE EAST EYE (June 19, 2023, 2:37 PM), https://www.middleeasteye.net/news/ethiopia-lebanon-agreement- no-protection-domestic-workers.

[101] Agreement Between the Government of the Republic of Lebanon and the Government of the Federal Democratic Republic of Ethiopia on the Employment of Ethiopian Workers in Lebanon, Eth.-Leb., Apr. 11, 2023, https://www.middleeasteye.net/news/ethiopia-lebanon-agreement-no-protection-domestic-workers.

[102] *Id.* at art. 8.

Interestingly, although this agreement was formed in private and without international oversight, it provides specific terms on how disputes between employers and employees should be resolved.[103] However, any dispute would be theatrical at best as the employer can individually write the terms of any employment contract, to which laborers must stipulate should they desire to work, and these contracts may ignore the terms of the agreement.[104] The employer-written contract allows the employer to decide the length of employment, where the employee will work, what they will do, and the monthly salary of the employee.[105] Further, the terms of the contract and treaty are deliberately vague enough to allow for the "lawful" confiscation of Ethiopian passports, an act Lebanon is known to do to its foreign workers.[106]

Some scholars have argued that a lack of judicial access may be to the benefit of the individual workers.[107] These scholars have stated that diplomatic remedies are often faster, more consistent, and less adversarial, although also more difficult to appeal.[108] However, because it is a host state's duty to provide access to any form of justice, many exporting states— and by extension the workers—are without the agency to choose if the diplomatic approach is what would most strongly benefit the individual.[109]

3) *Lack of Government Oversight*

Much like the Lebanon-Ethiopia agreement, the India-Bahrain agreement similarly provides too much power to individual employers. Although the agreement between these two parties provides that each employment contract must state the rights of the nations involved and the governing law,[110] it does not require any minimum wage or right to healthcare access.[111]

Bahrain is notorious for failing to protect migratory workers. In 2019, the International Domestic Workers Federation recognized that Bahrain was denying migratory domestic workers access to legal aid, welfare organizations, unions, and other human rights.[112] Many of these problems arose from Bahrain's inconsistencies in regulating labor: problems caused

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[103] *Id.* at art. 22 (any dispute resolved in Lebanese courts, with Ethiopian consulate participate allowed).

[104] *Id.* at art. 7.3 (contract stipulates rights of parties).

[105] *Id.* at Annex.

[106] Zelalem, *supra* note 100.

[107] *See* Livnat & Shamir, *supra* note 78, at 82 (highlighting bias against migratory workers often seen in domestic courts).

[108] *Id.*

[109] *See Migrants' Access to Justice: International Standards and How the Global Compact for Safe, Orderly and Regular Migration Helps Paving the Way*, INT'L MIGRATION L. UNIT (Mar. 23, 2022) (noting methods to increase migrant's access to justice).

[110] Memorandum of Understanding Between the Republic of India and the Kingdom of Bahrain on Labour and Manpower Development, Bah.-India, art. 6, June 17, 2009, www.mea.gov.in/images/pdf/mou-bahrain.pdf.

[111] *See generally*, *id.*

[112] Memorandum of Understanding between General Federation of Bahraini Trade Unions and International Domestic Workers Federations to Promote Migrant Domestic Workers' Rights and Welfare in Bahrain (June 15, 2019), https://idwfed.org/en/updates/ilc108-gfbtu-and-idwf-signed-mou-on-protection-of-domestic-workers-rights-in-bahrain/gfbtu_idwf_mou_signed_20190615.pdf

because Bahrain cannot control individual employers or inspect private homes in the context of domestic laborers.[113]

BLAs are not always bilateral, which may make labor more dangerous for the employees. The prime example of this is Italy, which published its 2023-2025 Flow Decree on October 3, 2023.[114] This law establishes with which states Italy will have migratory labor relationships, in which industries these workers may be employed, and how many workers Italy will accept.[115] One of the states which Italy has accepted a relationship with is Bangladesh.[116] Many Bangladeshis are harmed regardless of whether or not they are accepted to work in Italy because they must apply for a work visa before they can be considered for the position. The cost of an application for a work visa is anywhere between sixteen and 100 Euros, depending on if the Bangladeshi applicant utilized the Italian help desk.[117] However, for many, this money may be a sunk cost, as over 86,000 applicants applied for just 9,500 visas for domestic work.[118]

Unlike many BLAs, which typically include terms on how exporting nations will recruit and screen workers, Italy's Flow Decree establishes only quotas for how many workers may be imported and from which countries it will import. This has led to a large influx of "middlemen" who scam potential migrants by falsely guaranteeing jobs in Italy.[119] In other similar situations of unilateral labor request, such as in Romania, this has led to middlemen providing "workers" with false documents, resulting in potential deportation back to the employee's home nation at best or imprisonment at worst.[120]

IV. CURRENT GUIDANCE: ROLES OF THE INTERNATIONAL LABOR ORGANIZATION

No official international oversight exists for the formation of a BLA.[121] Because BLAs are formed between two parties, without any oversight by international organizations, and

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[113] *Id.*

[114] D.P.C.M 27 settembre 2023, n.20, G.U. Oct. 3, 2023, n.231 (It.) [Italian Flow Decree].

[115] *Id.*; *see also Entry Flows Italy: The Three-year Planning Decree for 2023-2025 is Published on the Official Gazzette*, ARLETTI & PARTNERS A (Oct. 5, 2023), https://arlettipartners.com/entry-flows-italy-three-year-planning-for-2023-2025/ (summarizing Italy's Decreto Flussi in English).

[116] Italian Flow Decree, *supra* note 114; *see also* MINISTRY OF FOREIGN AFFAIRS, BANGLADESH, BANGLADESH ECONOMIC ZONES AUTH., *Bilateral Relations with Italy*(posted Sept. 21, 2024, 9:31 PM), https://rome.mofa.gov.bd/en/site/page/bilateral-relation-italy---bangladesh (last visited May 1, 2024) .

[117] *Gov't Warns Italy-bound Bangladeshis Against Making Deals with Middlemen*, BUS. STANDARD (Nov. 18, 2020), https://www.tbsnews.net/bangladesh/migration/govt-warns-italy-bound-bangladeshis-against- making-deals-middlemen-159760.

[118] ANSA, *Italy: High Demand for Non-EU Domestic Workers Exceeds Quota*, INFOMIGRANTS (Dec. 8, 2023), https://www.infomigrants.net/en/post/53775/italy-high-demand-for-noneu-domestic-workers-exceeds-quota.

[119] *See* TBS Report, *supra* note 117 (Italy issued official warning to Bangladeshi workers to avoid middlemen).

[120] *See* Rashad Ahamad, *13 Bangladeshis Sent Back from Romania*, NEW AGE (posted May 26, 2023, 11:30 PM), https://www.newagebd.net/article/202649/13-bangladeshis-sent-back-from-romania (explaining impact of false visas granted by middlemen).

[121] Note that the ILO has published guidance on what should be included in a BLA. This guidance is vital and should be followed. However, because of the bilateral nature of these treaties, neither party is under any obligation to follow the guidance available. The scope of this paper is not to question the validity of this guidance but rather to argue that the ILO, or another organization, should oversee the formation of future BLA to ensure that the

because the number of BLAs increased drastically in a short timeframe, historically much of what was included in BLAs was unknown to non-party states.[122] As such, states entering into BLAs were without any guidance from the international community until the 92nd Session of the International Labour Conference General Discussion on Migrant Workers Resolution was passed in 2004.[123] This resolution called for the ILO to "play a central role in promoting policies to maximize the benefits and minimize the risks of work-based migration."[124] After years of expert debate, the ILO published its first "[n]on-binding principles and guidelines for a rights-based approach to labor migration" in 2006.[125]

The general guidelines established by the ILO are expansive but manageable, and can easily be adopted into any forthcoming agreement. First, all agreements should prioritize the human rights of laborers.[126] This should be done by guaranteeing equality, providing access to civil courts to ensure justice, minimizing abuse, allowing freedom of movement, allowing families to stay together, and protecting workers in case of loss of employment or emergency.[127] Second, the sending countries should ensure fair recruitment mechanisms.[128] Third, receiving nations should allow all workers access to information on their rights.[129]

Fourth, both parties should develop guidelines to monitor the status of logistical aspects of migration.[130] Receiving states need to next ensure that the workers have occupational safety and health standards met, including but not limited to workplace safety standards, mental health assistance and information, rehabilitation, preventative care, medical leave, and disease prevention that is at least "on a par with nationals[.]"[131]In developing these safety standards, host countries should also establish social protections for workers and their families.[132] These social safety nets should include wage protections.[133] To ensure workers are provided their human rights, both parties should create or designate an organization to enforce and govern the provisions of the agreements.[134]

As for the economic terms of these agreements, the ILO has established guidance on this as well. The exporting state should ensure that all laborers meet the qualifications established by the agreement.[135] Both states should allow for the transfer of earnings to the

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nations involved follow ILO guidance. U.N. Network on Migration Thematic Working Group 4 on BMLAs., *supra* note 30.

[122] *See* Chilton & Woda, *supra* note 29, at 5-7 (describing why so little information on BLAs are produced to the public).

[123] INT'L LAB. ORG., ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION; NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH, 1-2 (Int'l Lab. Off. ed., 2006).

[124] Int'l Lab. Org. Res. 92/6, Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy, at 1 (June 16, 2004).

[125] INT'L LAB. ORG., *supra* note 123, at vi.

[126] Popova et al., *supra* note 30, at 10.

[127] *Id.* at 10-13.

[128] *Id.* at 13-14.

[129] *Id.* at 14-15.

[130] *Id.* at 15.

[131] *Id.* at 16.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 17-18.

[135] *Id.* at 18-21.

home state.[136] The exporting state should allow for the safe return of their workers, recognizing the skills the workers gained while working internationally and providing emotional support to the worker and their family.[137] Should these terms be met, a BLA will be effective, safe, and economically beneficial to all party states.[138]

V. HOW TO REGULATE BLAS

Before oversight can be provided during the formation of a BLA, the international community must decide what mechanism will provide the oversight. Practically, there are two routes to ensure that any future BLA follows the ILO guidance—utilizing existing mechanisms, or allowing the labor market to continue to self-regulate. This Part will assess the viability of each of these options and elaborate on how each one could be used to promote human rights.

a. Existing Mechanisms

The ILO is the obvious first choice for a mechanism which should oversee the formation of BLAs. The ILO is one of the most wide-reaching UN bodies, with 179 member states.[139] Further, it is a body with a strong compass for issues of human rights, given it was formed with the purpose of ensuring "universal and lasting peace . . . based upon social justice" through "the protection of the interest of the workers when employed in countries other than their own[.]"[140] In pursuing this goal, the ILO has a governing office whose functions "include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labor[.]"[141]

Without changing any provisions of the ILO Constitution, the ILO may already be able to provide oversight.[142] However, this oversight is limited, and BLA party states must request and consent to assistance.[143] This will not necessarily be the case in the future, as the ILO governing body has the ability to assign assistance to states to enforce its guidance.[144] Indeed, should an ILO member state believe that another member has not followed rules that state has ratified, such as rules against forced labor, workplace violence, or wage theft, then any state may file a complaint against them.[145] This complaint may result in an investigation, but it is important to note that complaints may only be filed against a state for breach of treaty duties.[146] By way of example, Israel has not adopted the International Convention on the

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[136] *Id.* at 21.
[137] *Id.* at 21-22.
[138] *See id.* at 7 (explaining goals of creating guidance).
[139] *See Regions and Countries*, ILO, https://www.ilo.org/regions-and-countries (last visited May 2, 2024) (listing member states).
[140] Constitution of the International Labour Organization, preamble, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35.
[141] *Id.* at art. 10.
[142] *Id.*
[143] *Id.* at art. 10(2)(b).
[144] *Id.* at art. 10(3).
[145] *Id.* at art. 26.
[146] *Id.*

Protection of the Rights of All Migrant Workers and Members of their Families,[147] and thus no state may file a complaint against Israel for failing to protect migrant workers in violation of this convention. Because the ILO cannot enforce its own provisions without the consent of the states, it may not be the most viable route to provide oversight.

Despite the ILO providing the only existing guidance on how BLAs should be formed,[148] it is not the only, or even most viable, existing mechanism. Another possible mechanism is the UN International Organization for Migration (IOM). Comprised of 175 states,[149] the IOM is equally equipped to oversee BLAs as the ILO. Much like the ILO, the IOM was created, in relevant part, to ensure economic opportunities for, and the protection of, migratory workers.[150] However, the ILO and IOM differ in that the IOM was further designed to promote cooperation between host and home states of migrants.[151]

The IOM would not need to expand by much should it endeavor to oversee the formation of BLAs. The IOM already is a hub of policy advice for importing and exporting states.[152] Much like the ILO has guidance for the formation of BLAs, the IOM has a toolkit to ensure ethical worker recruitment and treatment. Further, it assists states, such as Thailand, in recruiting its workers.[153] The IOM has programs in 70 countries which are designed to work with local governments and employers to ensure that rights are being protected.[154] However, despite this valuable work by the IOM, BLAs still continually fail to protect workers after they enter the host state.[155]

Ultimately, neither the IOM nor the ILO can oversee such a massive endeavor alone. These two bodies are not independent entities, with one better suited to handle BLAs than the other; rather they are opposite sides of the same coin. The ILO is designed to protect the worker from the employer, ensuring human rights along the away.[156] In a similar vein, the IOM is designed to protect the migrant from the host state.[157] Neither can protect the worker alone, as the problems with BLAs stem both from the states party and the individual employers.[158] The two bodies should form a cooperative regulatory "unit," with the ILO doing more to oversee the ultimate treatment of the employees at the host state on a government level, ensuring compliance with the BLA formation guidelines, while the IOM utilizes its existing presence in many regions to ensure fair treatment of the migrants once they reach the host state.

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[147] *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, July 1, 2003, 2220 U.N.T.S. 3 (Israel has not ratified this convention).

[148] *See* Part IV discussion *supra* on the existing ILO Guidance.

[149] *Members and Observers*, IOM UN MIGRATION, https://www.iom.int/members-and-observers (last visited May 5, 2024).

[150] Constitution of the International Organization for Migration, preamble, Oct. 19, 1953, 1560 U.N.T.S. 440 (ensuring rights, favorable conditions, and integration into social structure of host nation should be required for temporary migration).

[151] *Id*.

[152] *See Labour Migration*, IOM UN MIGRATION, https://www.iom.int/labour-migration (last visited May 2, 2024) (explaining IOM actions in overseeing labor migration).

[153] *Id*.

[154] *Id.*

[155] *See* Part III discussion *supra* on workplace abuses to migratory workers.

[156] CONST. OF THE INT'L LAB. ORG., *supra* note 140, at 241-42.

[157] CONST. OF THE INT'L ORG. FOR MIGRATION, *supra* note 150, at 3-5.

[158] *See* Part III discussion *supra* on the problems with BLAs.

b. Market Self-Regulation

The question is not how to enforce oversight in a free market, but rather whether regulation should occur at all. To be clear, absent a major cultural shift in ethics, a failure to regulate BLAs will result in a continuation of the aforementioned problems. But is that so bad? BLAs provide economic benefits to both states, and the laborers are paid far better than they would in their home nation and are even at times treated more favorably when they are hosted by states that provide more workers' rights than the home state does.[159] However, normatively, BLAs still have room to develop into agreements that protect more human rights.

The relevant question on free market regulation as it pertains to this Article is simple—carrot or stick? The stick: economic powerhouse states with social interests in promoting human rights abroad, such as the United States, sanction or pull funding from states known to have BLAs that do not comply with the ILO guidance. The carrot: these same countries providing economic benefits such as financial aid to host or home states that form BLAs that protect human rights. Both have their benefits and drawbacks, but one would be far more impactful—the carrot.

The stick may be a decent method in the short term, but its long-term implications make it the less desirable choice.[160] When a state is sanctioned, it often shifts the burdens of said sanctions on to the most vulnerable segments of society.[161] Further, any sanction on the host state would necessarily impact the exporting state as the host would lack the financial assets to increase its imports, economically damaging both.[162] Ultimately, the only effective sanctions are the ones with modest, obtainable goals which are imposed by larger economies against smaller ones, with the two being economically friendly prior to the sanction.[163]

Conversely, the carrot method, also known as conditional assistance, would have states that desire foreign worker protections provide grants to either the host or home nations, conditional on the formation of BLAs protecting workers' rights.[164] Although imperfect, conditional assistance may be viable so long as it provides genuine incentives for a state to implement meaningful societal and economic change.[165] For an incentive to be genuine, the accepting state must see advantages to the assistance, the "moral hazard problem" must be addressed through law and law enforcement, and the domestic society of the accepting state

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[159] *See* Chilton & Posner, *supra* note 27, at 566-69 (explaining statistical results of BLA study).

[160] *See generally* Dursun Peksen, *Socio-Economic and Political Consequences of Economic Sanctions for Target and Third-Party Countries*, U.N. HUM. RTS. OFF. HIGH COMM'R (Jun. 17, 2014), www.ohchr.org/sites/default/files/Documents/Events/Seminars/CoercitiveMeasures/DursunPeksen.pdf (65-95% of all economic sanctions fail to achieve intended goal).

[161] *Id.* at 2-3.

[162] *Id.* at 3.

[163] *Evidence on the Costs and Benefits of Economic Sanctions: Speech Before the H.R. Subcomm. on Trade Comm. on Ways and Means*, 105th Cong. (1997) (statement of Kimberly Ann Elliott, Peterson Institute for International Economics (PIIE)).

[164] *See* Alex Mourmouras & Wolfgang Mayer, *The Political Economy of Conditional and Unconditional Foreign Assistance: Grants Versus Loan Rollovers*, 17-21 (2004 IMF Working Paper No. 38, 2004) (discussion on how to implement conditional assistance).

[165] Alex Mourmouras & Wolfgang Mayer, *On the Viability of Conditional Assistance Programs* 10 (2005 IMF Working Paper No. 121, 2005).

must be able to withstand a threat of foreign and international interference into that states domestic law or, if they cannot, the accepting state cannot be able to blame the international workers, or the international economy as a whole, for any political instability that may occur.[166] When implemented correctly, conditional aid is one of the most viable methods to implement institutional reform in a foreign state.[167]

VI. CONCLUSION

In the past one hundred years, BLAs have become all the more prevalent. As these agreements develop, states like Thailand are encouraged to participate in a "race to the bottom" as denying protections to their nationals allows them to brand their citizens as rule abiding hard workers. However, this branding can only be established by denying access to basic human rights. Host states frequently abuse workers, deny them payment, and strip them of their ability to sue their hostile employers. Without oversight, neither the exporting nor importing states will change how BLAs are formed as both benefit from the vague, and often completely unknown to the public, terms of BLAs. But this is not how things ought to be. BLAs can help all involved, from the employer to the governments of both states to the workers themselves. BLAs can benefit the employer by providing labor more cheaply than would be available without migration. They can help the governments by bolstering both economies through increased production in the host state and increased flows of income in the exporting state. Finally, they can benefit the workers by ensuring they are granted specific human rights. However, BLAs will not be changed unless the societies which create them do first. Absent major ideological shifts in the agreeing states to promote human rights, international institutional oversight or market manipulation by economically powerful states can easily provide meaningful oversight to ensure workers' rights are protected. BLAs are powerful tools to aid economies and domestic relationships, but simple oversight in their formation can make these tools far more efficient.

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[166] *Id.* at 10-11.

[167] *See* Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547, 577-83 (2017) (explaining benefits of conditional aid).


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DEMONSTRATING THE INDEPENDENT NORMATIVE PULL OF INTERNATIONAL GENDER NORMS THROUGH THE PUBLIC INTEREST LITIGATION PETITION IN INDIA

Shritha Vasudevan†

ABSTRACT

This Article argues that the international gender norm—comprising Article 2(f), Article 5(a), Article 16 and the Due Diligence Obligation (DDO)—to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) has been implicitly adjudicated by the Supreme Court of India in the Sabarimala and the Triple Talāq Judgments. These judgments emanating from public interest litigation (PIL) petitions dealt with banning entry to menstruating women between ages ten and fifty into the Hindu temple at Sabarimala and divorce by utterance of "talāq" thrice in Islamic practice in India. They mirror the conflict of rights frame under CEDAW. The conflict of rights frame deals with whether any practice of religion can prevail unequivocally over the right to gender-based equality (GBE). The international gender norm privileging the right to GBE has not been formally promulgated under CEDAW, and state practice of Reservations gives primacy to the right to freedom of religion, leading to an assumption that the international gender norm is epiphenomenal. This Article argues through the methodology of descriptive inference that the conflict of rights frame has been subject to implicit adjudication in India, thereby demonstrating that the international gender norm is not epiphenomenal to state interest.

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I. INTRODUCTION

One of the perennial debates between the disciplines of international law and international relations continues to be if norms are epiphenomenal to international life.[1] The question of whether nations comply with international law is also tied to this larger question of epiphenomenal norms.[2] This Article sets up its compliance puzzle by delineating an unresolved dilemma in the sphere of gendered international affairs—the conflict of rights frame under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). This conflict of rights is contained in Article 2(f), Article 5(a), Article 16, and the Due Diligence Obligation (DDO) to CEDAW. The DDO is an international legal principle under CEDAW that has not yet been formally promulgated so far but is only available as a General Recommendation (GR). All these provisions are based on a conflict of rights frame within CEDAW. This conflict of rights is the question of whether the right to freedom of religion prevails over the right to gender-based equality (GBE) even when the former causes gender-based violence (GBV). In other words, one unresolved question underlying CEDAW is the whether the right to freedom of religion should prevail over and above the right to GBE unilaterally and under all circumstances. The term "international gender norm" in this Article refers to Article 2, Article 5(a), Article 16, and the DDO collectively—all of which are provisions against which Reservations on the basis of the right to freedom of religion have been advanced.[3]

This Article presents the argument that the conflict of rights under CEDAW has been subject to *implicit adjudication* by the Supreme Court of India. In two recent Judgments—the *Sabarimala* Judgment (2018) and the *Triple Talāq* Judgment (2017)—the Supreme Court considered the conflict between the right to GBE and the right to freedom of religion under its domestic constitution. In both instances, the Court struck down gender discriminatory practices emanating from religion. The two norms—the right to freedom of religion and the right to GBE—were weighed against one another, and the Supreme Court held that the right to GBE prevailed decisively and conclusively over the right to freedom of religion.

CEDAW was not directly quoted, but the substance of the conflict of rights frame has been adjudicated under the Constitution of India. Since CEDAW was not directly quoted, a descriptive inference has been made under the canons of political science that the issues which confronted the Supreme Court in the two cases were similar to the conflict of rights under CEDAW. The CEDAW Committee would have indeed commended the Indian

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[1] Francis Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J.193, 193 (1980); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, PRINCETON L. & PUB. AFFS. PAPER, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=347260 (last visited Nov. 14, 2023).

[2] Carmen Chas, *EH Carr, Hans J. Morgenthau, and International Law*, E-INTERNATIONAL RELATIONS, (Feb. 27, 2024), https://www.e-ir.info/2024/02/27/e-h-carr-hans-j-morgenthau-and-international-law.

[3] The term "international gender norm" merely delineates the right to GBV vis-à-vis the right to freedom of religion as collectively stated by the provisions of the CEDAW and the CEDAW Committee for the purposes of the argument of this Article. It does not refer to all the corpus of norms under the CEDAW.

Supreme Court for such a move.[4] It is important to recognize and reiterate this issue so that an argument can be made that India is in material compliance with its CEDAW obligations. The non-quotation of CEDAW in the two judgments does not make this claim self-evident. It is the intention of this Article to bring out this unarticulated aspect of CEDAW compliance.

Further, this Article enters the larger debate about whether norms are epiphenomenal and argues that the ignoring of the mandate of CEDAW, by massive state Reservations on the conflict of rights frame privileging the right to freedom of religion, might initially make it epiphenomenal to state interest.[5] However, this Article counters this assumption by demonstrating that the implicit adjudication of this norm by the Supreme Court of India reflects the spirit of CEDAW.[6] Therefore, CEDAW is not epiphenomenal to state interest as it has *de facto* been adjudicated in a domestic context. This Article argues that what can be witnessed in action in the *Sabarimala* and Triple *Talāq* Judgments is an implicit adjudication of the conflict of rights frame which negates the assumption that Articles 2, 5(a), 16, and the DDO to CEDAW are epiphenomenal to the interests of the Indian state.

II. CENTRAL ARGUMENT

The non-promulgation of the conflict of rights frame as a formal principle of law has led to a status quo under CEDAW whereby the right to freedom of religion and the right against GBE are co-equal rights.[7] This is problematic when religious practices are gender discriminatory and cause GBV. The co-equal status of the two norms implies a lack of a normative hierarchy between the two norms.[8] States have seized this normative vacuum to advance Reservations and Declarations to implementing the right against gender-based violence (GBV) when it conflicts with the right to freedom of religion. States have prioritized the right to freedom of religion over the right against GBV under CEDAW as is evident in its Reservations.[9] CEDAW possesses the largest number of Reservations on this basis in the human rights treaty system.[10]

The obligation requiring states to promote the right against GBV over the right to freedom of religion has attracted the greatest opposition worldwide. While initially this obligation was embodied in the general principles of CEDAW, the DDO has expanded the

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[4] The CEDAW Committee has established under Article 17 of the Convention to oversee the implementation, examine state reports periodically, issue observations on compliance and general comments and recommendations. *See* G.A. Res. 34/180, art. 17-22, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979), https://www.refworld.org/legal/agreements/unga/1979/en/13757 (last visited May 21, 2024).

[5] The issue of Reservations is central to this Article and will be considered below.

[6] The term "implicit adjudication" will be explicated below.

[7] Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution,* 24 N.Y.U. J. INT'L L. & POL. 795, 796 (1992). A reservation is a unilateral statement made to a treaty modifying the obligations of the state with regard to either specific provisions or the raison d'etere of the treaty. A reservation which is incompatible with the object and purpose of the treaty is generally prohibited. *See* Marijke De Pauw, *Women's Rights: From Bad to Worse-Assessing the Evolution of Incompatible Reservations to the Cedaw Convention*, 29 MERKOURIOS-UTRECHT J. INT'L. EUR. L. 51 (2013).

[8] *Id*.

[9] Marsha A. Freeman, *Reservations to CEDAW: An Analysis for UNICEF*, 48 POL. & PRAC. 11 (2009).

[10] Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process,* 34 GEO. WASH. INT'L L. REV. 605 (2002).

normative obligations under the general principles in a specific direction. The DDO emphatically expands the normative obligations of states under Article 2, Article 5, and Article 16 *inter alia*.

This implies that public international law has left the determination of the hierarchy between the two norms under CEDAW—the right against GBV and the right to freedom of religion—to the sovereign will of states. States can determine the priority accorded to the right to freedom of religion even when it is part of a tradition causing GBV.

Transposed into the debate of whether international law is relevant to international life is the implication that the international gender norm is presumably epiphenomenal to national life. Since states are not upholding the international gender norm in their consideration of the right to freedom of religion, this scenario leads to an assumption that the international gender norm is indeed epiphenomenal. However, this Article enters this debate and theorizes that norms matter imminently to state interest by studying the trajectory of this international gender norm in India. It utilizes the experiences of gender-based oppression (GBO) in a non-Western context to speak to this debate.

This Article demonstrates that Article 2, Article 5(a), Article 16, and the DDO to CEDAW were implicitly adjudicated by the Supreme Court of India in 2017 and 2018 through the Public Interest Litigation (PIL) constitutional mechanism. In 2018, a PIL was filed to enforce the rights of women between the ages of ten and fifty who were formerly barred from entering one of the most ancient temples in India, the Sabarimala Temple.[11] The Supreme Court upheld the right of women to enter the temple. Similarly, in 2017, a PIL was filed against the arbitrary practice of triple *talāq* prevalent under Shari'a law in India.[12] Triple *Talāq* is a practice of GBV whereby a Muslim man could divorce his wife arbitrarily through the utterance of the word "*talāq*" thrice and has consistently resulted in great hardship and destitution to Muslim women across generations. The Court struck down triple *talāq* as violating the right against gender-based discrimination (GBD) of Indian women.

Both cases witnessed a legal conflict between the right to freedom of religion and the right against GBV under the Constitution of India. The issues in both cases referenced the same issue as the international gender norm to CEDAW. However, CEDAW was not directly quoted by the judgments. Therefore, this Article argues that a generalizable inference can be made that empirically the Supreme Court adjudicated on the conflict of rights frame under CEDAW and held in favour of the rights of women under the Constitution of India. This will be done using the methodology of descriptive inference under the discipline of political science. It will be established that in both these cases, the conflict of rights frame of CEDAW occurred empirically. The two cases are domestic instances of the international conflict of rights frame under CEDAW.

Therefore, the crux of the argument in this Article is that the conflict of rights frame of CEDAW can be witnessed in the issues that arose for resolution under the *Sabarimala* and

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[11] *The Sabarimala Case: The Supreme Court of India*, PRIME LEGAL (Nov. 25, 2022), https://primelegal.in2022/11/25/the-sabarimala-case-the-supreme-court-of-india/ (last visited May 2024).

[12] Shayara Bano v. Union of India, SUPREME COURT OBSERVER, https://www.scobserver.in/cases/shayara-bano-union-india-triple-talaq-case-background/ (last visited May 21, 2024).

Triple *Talāq* Judgments by the Supreme Court.[13] It will be argued that the two Judgments are in substantive compliance with CEDAW.

The following section briefly discusses the unresolved conflict of rights frame under CEDAW to contextualize the argument of this Article.

III. UNRESOLVED CONFLICT OF RIGHTS FRAME UNDER CEDAW

The conflict of rights frame under CEDAW is contained in four provisions to CEDAW: Article 2(f), Article 5(a), Article 16. and the DDO. All these will be briefly discussed.

Article 2(f) of CEDAW has issued a mandate to states "to modify or abolish…customs and practices" which are discriminatory against women.[14] Therefore, this provision identifies a conflict between customs and practices and the right to GBE embodied under itself. The CEDAW Committee comments on Article 2(f) in General Recommendation No. 21 of CEDAW (GR No. 21). The Committee firstly notes their "alarm" regarding the massive Reservations entered into vis-à-vis Article 2 on the basis that custom or tradition in national constitutions conflicts with the principles of the Convention.[15] The CEDAW Committee called upon states to revisit their statements reiterating the right to uphold gender discriminatory customs or traditions.[16] The Committee noted that states which had entered Reservations had discriminatory customs and traditions in their national life.[17] Further, it called upon states to delineate those instances where compliance was precluded because of conflict with custom, law, or tradition.[18] The Committee also called upon states to completely work towards complying with the provisions of the Convention irrespective of conflicting custom, tradition, or religious practice.[19]

Therefore, the emphasis of Article 2(f) is an obligation on states to abolish customs and practices which discriminate against women. This provision has attracted the largest number of Reservations from signatories to CEDAW on the ground that provisions in national constitutions conflict with the provisions of CEDAW. The CEDAW Committee, as mentioned above, has called upon states to remedy this conflict, but to no avail. Therefore, Article 2(f) embodies a conflict of rights between the right to GBE and the right to freedom of religion manifested in the state practice of Reservations.

Article 5(a) of CEDAW obligates states to "modify social and cultural patterns of conduct of men and women" with a view to eliminating customary prejudices and gendered

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[13] While the legal recommendation of the DDO talks at length about GBV and the obligation of states, the focus of the current Article is on the conflict of rights frame under the DDO.

[14] U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 1979, 1249 U.N.T.S. 13, 18 (hereinafter *CEDAW Gen. Recommendations*).

[15] U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 41, art. 15.

[16] U.N., Econ. & Soc. Council, Comm. on the Elimination of Discrimination against Women (CEDAW), General recommendations on the Convention on the Elimination of All Forms of Discrimination against Women, para. 44, U.N. Doc. CEDAW/C/GR/21 (1994).

[17] *Id.* at para. 46.

[18] *Id.* at para. 47(b).

[19] *Id.* at para. 50.

stereotypes.[20] Therefore, Article 5(a) discusses discriminatory customs and traditions and casts an obligation on states to modify such customs as well.[21]

Article 16 of CEDAW addresses equality in familial relations. GR No. 21 expanded the obligations of states under Article 16, stating that women are entitled to equality irrespective of any contrary religious system, custom, law, or tradition in the state party concerned.[22] GR No. 21 also states unequivocally that states cannot issue any justification for application of contrary laws or customs that result in unjust discrimination against women.[23] Therefore, the conflict between the right to freedom of religion and the right to GBE in the family can be witnessed in this provision.

Paragraph 11 of General Resolution No. 19 to CEDAW expanded the normative interpretation of Article 2(f) and Article 5 to state that discrimination based on traditional and cultural attitudes causes GBV.[24] Traditional attitudes of gender subordination results in gender stereotypes that cause GBV, which deprives women of their general rights under the Convention.[25] While the substance of this recommendation is directed against GBV, it crucially identifies the role of custom and tradition in causing GBD. The conflict between religious traditions and the right to GBE is implicit in the text.

General Resolution No. 35 updated GR No. 19 and deploys the term "gender-based violence" to describe the phenomenon of violence against women.[26] It identifies "tradition," "culture," and "religion" as the prime factors in causing GBV. A concept note of GR No. 41 (issued on 24th April 2024) identified gender stereotyping as based on notions of inferiority of women vis-à-vis men, which precludes full realization of their potential.[27] It states that Article 2(f) and Article 5 are integrally connected.[28]

Therefore, the corpus of obligations identified above under CEDAW emphasizes the role of traditional cultural attitudes in causing patriarchy and obligates states into taking appropriate measures. Contention currently exists as to the primacy of the right against GBV vis-à-vis the right to freedom of religion under CEDAW.[29] The main problem is Reservations advanced that invoke the right of states to implement CEDAW's obligations as they deem

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[20] U.N. Convention on the Elimination of Discrimination against Women (CEDAW), art. 5(a), Dec. 18, 1979, 1249 U.N.T.S 13.

[21] RIKKI HOLTMAAT, DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 73 (2009) (eBook).

[22] CEDAW Gen. Recommendations, *supra* note 14, para. 13.

[23] *Id*. at para. 12.

[24] *Id*. at para. 11.

[25] *Id*.

[26] This is a significant change from the previous stance of Violence Against Women. *Compare* U.N., Econ. & Soc. Council, Comm. on the Elimination of Discrimination against Women (CEDAW), General recommendation 19 on the Convention on the Elimination of All Forms of Discrimination against Women, para. 9, U.N. Doc. CEDAW/C/GR/21 (1994) *with*; U.N., Econ. & Soc. Council, Comm. on the Elimination of Discrimination against Women (CEDAW), General recommendation 35 on the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GR/21 (1994).

[27] U.N. Committee on the Elimination of Discrimination against Women, General Recommendation on Gender Stereotypes No. 41, Concept Note, para. 59 (Apr.23, 2024).

[28] *Id*. at para. 43.

[29] Sullivan, *supra* note 7, at 795.

fit.[30] This right of states is invoked to protect the right to freedom of religion while CEDAW mainly calls upon states to "condemn discrimination against women."[31] This creates a tension whereby the right to freedom of religion is pitted against the right to GBE. Reservations legitimize the act of states in limiting their obligation with respect to the right to GBE.[32] One of the early difficulties associated with implementation of CEDAW has thus been the issue of Reservations.[33] There does not exist any international human rights instrument that has effectively prioritized the contest between the two rights—the right to freedom of religion and the right to GBE—including CEDAW.[34]

A. Actual State Practice on the Right to Freedom of Religion

CEDAW does not address the right to equality of women to practice religion under the right to freedom of religion for women specifically.[35] Article 2(f), Article 5(a), and Article 16 of the CEDAW call for a modification of traditional customs and prejudices that lead to gendered stereotypes and GBD in society.[36] The issues referenced under CEDAW are the effect on women emanating from harmful customs and traditional practices. The convention does not explicitly deal with the right of women to practice religion equally, which was the ruling in the *Sabarimala* Judgment, as will be discussed below. But what can be witnessed under CEDAW is a conflict between the right to freedom of religion and the right to GBE, which is an unresolved conflict. Therefore, the *Sabarimala* Judgment has gone beyond CEDAW by adjudicating that the women of India possess the right to freely profess, propagate, and practice the Hindu faith. Nevertheless, the unresolved conflict for rights frame under CEDAW has been resolved partially in favour of the rights of women by the *Sabarimala* Judgment.

In the Netherlands, in a case involving whether the Dutch State was obligated to take action to reform the action of a political party which did not grant voting rights to women, CEDAW obligations were invoked to hold that it did.[37] There was a contest between the right against discrimination and the right to freedom of religion.[38] The tension manifested in Protestant women asserting their right to not exercise their franchise in accordance with the mandate of the political party *Staatkundig-Gereformeerde Partij* (SGP). The stance of the Protestant women mirrors the minority opinion of the *Sabarimala* Judgment, which held that

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[30] Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia* 12 J. L.& Religion 105, 106 (1995).

[31] *Id*.

[32] *Id*. at 109.

[33] Elizabeth Evatt, *Finding a Voice for Women's Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT'L L. REV. 515, 518 (2000).

[34] Anat Scolnicov, *Women and Religious Freedom: A Legal Solution to a Human Rights Conflict*, 25 NETH. Q. OF HUMAN RTS. 569, 569 (2007).

[35] *Id*. at 572.

[36] G.A. Res. 34/180, art. 5(a) (Dec. 18, 1979).

[37] Barbara Oomen et al., *CEDAW, the Bible and the State of the Netherlands: The Struggle Over Orthodox Women's Political Participation and Their Responses* 4 UTRECHT L. REV. 158, 158 (2010).

[38] *Id*.

women had the right to be restrained from the precincts of the Sabarimala Temple.[39] Therefore, this conflict between the right of women to profess and practice a religious faith needs to be reconciled with the right to freedom of religion.

Since 1992, Afghanistan has also been a test case for witnessing the conflict between the right to freedom of religion and the right to GBE. The Islamic State of Afghanistan violated many rights of women through practices like forcible enforcement of the hijab, polygamy, denial of educational opportunities, and war crimes under the guise of Islam.[40] Afghanistan acceded to CEDAW in 2003 without Reservations.[41] However, since 2021, there has been a backlash in the guarantee of women's rights in the country, and the unhindered right to freedom of religion has prevailed.[42] The prevalence of state power in enforcing the right to freedom of religion under the Shari'a when it openly and blatantly conflicts with the right to GBE demonstrates the difficulties associated with enforcing the international gender norm to CEDAW.

The above cases demonstrate the difficulties associated with upholding the right to freedom of religion in a relatively well-developed state and a developing state. They are entirely left to the will of the state. This brings the issue to the massive Reservations framed around the right to freedom of religion under CEDAW asserting the primacy of state practice.

IV. RESERVATIONS UNDER CEDAW

The Reservations to CEDAW demonstrate the main issue that has plagued the Convention since its inception.[43] The structure of CEDAW permits states to make unilateral Reservations. This allowance has plagued practical implementation of the Convention, with the CEDAW Committee limited to issuing general comments and general recommendations on the Reservations.[44] The major issue undergirding states' Reservations is that the Convention will not be implemented when its provisions conflict with national practices of religion, custom, or tradition, sometimes codified under the law.[45] These Reservations have been identified as militating against the "object and purpose" of CEDAW.[46] These Reservations have also been characterized as being "detrimental" to the effectuation of the treaty in actual practice.[47]

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[39] Justice Indu Malhotra, *Lone Dissenter in Sabrimala Case, Visits Temple*, INDIA TODAY, Jan.14, 2023, https://www.indiatoday.in/india/story/justice-indu-malhotra-lone-dissenter-in-sabrimala-case-visits-temple-2321511-2023-01-14 (accessed May 23, 2024).

[40] Ozair Ahmad Omarzada, *The Impact of CEDAW on the Rights of Women in Afghanistan*, 2 J. ASIAN & AFR. SOC. SCI. & HUMA. 81, 85 (2016).

[41] *Id.* at 87.

[42] Naheed Farid & Rangita de Silva de Alwis, *Afghanistan Under the Taliban: A State of "Gender Apartheid"?*, 5 https://spia.princeton.edu/sites/default/files/2023-02/SPIA_NaheedRangita_PolicyBrief_07.pdf.

[43] Andrew Byrnes, *Chapter 8. Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures*, UNIV. PA. PRESS (2012).

[44] Neil A. Englehart and Melissa K. Miller, *The CEDAW Effect: International Law's Impact on Women's Rights*, 13 J. HUM. RTS. 22, 23 (2014).

[45] Freeman, *supra* note 9, at 6.

[46] *Id.* at i.

[47] Marijke De Pauw, *Women's Rights: From Bad to Worse-Assessing the Evolution of Incompatible Reservations to the Cedaw*, 29 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 51, 52 (2013).

The International Court of Justice has noted in its advisory opinion on Reservations to the Genocide Convention that states had a common interest to protect when acceding to treaties.[48] This common interest vis-à-vis CEDAW is the commitment to GBE, which should technically trump harmful religious traditions on gender.

The CEDAW Committee has dealt with the issue of Reservations in General Resolutions Nos. 4 and 20. GR No. 4 stated that the Committee was highly concerned about the massive Reservations and expressed the view that states had to take the initiative to retract the Reservations.[49] Similarly, GR No. 20 urged state parties to reconsider the issue of Reservations as it was highly alarming.[50] GR No. 21 recognized Articles 2 and 16 to be core provisions of the Convention and noted *inter alia* that such Reservations were entered into on the grounds that implementing the provisions of the Convention might conflict with culture or religious beliefs of the respective states.[51]

In 1995, the CEDAW Committee on Reservations submitted a Report to the Fourth World Conference on Women.[52] This Report identified that many Reservations had been advanced against the core provisions of Article 2 and Article 16, and the Committee had no recourse to rejecting incompatible Reservations.[53] The recommendatory nature of the Committee vis-à-vis Reservations is indeed a challenge in implementing the Convention.

While Article 5(a) of CEDAW has not been quoted by the above reports, the Committee has substantively identified that Reservations based on culture, religion, and tradition are incompatible with the object and purpose of the Convention.[54] This Article argues that the conflict of rights is directly traceable to Article 2(f), Article 5(a), Article 16, and the DDO of CEDAW. The DDO to CEDAW specifies the role of custom and tradition in causing GBV.[55] Article 5(a) also calls for the elimination of traditional, customary practices that cause GBD.[56] There needs to be a separate General Recommendation identifying the roles of religion, custom, and tradition in causing GBD and GBV under Article 5(a). For the present purposes, it suffices to state that in general, one can identify that the crux of the obligations under CEDAW encompassing Article 2(f), Article 5(a), Article 16, and the DDO contain the conflict of rights frame.

Therefore, the issuance of Reservations and the unresolved conflict of rights frame discussed in the previous section demonstrate the difficulties associated with state practice

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[48] *Id.* at 53.

[49] U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 4:* 1987.

[50] U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 20: Reservations to the Convention* (1992).

[51] U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations* (1994).

[52] Report by the Committee on the Elimination of Discrimination Against Women, Progress Achieved in the Implementation of the Convention on the Elimination of all forms of Discrimination Against Women, Fourth World Conference on Women (Sept. 4-15,1995).

[53] *Id.* at para. 49

[54] The focus of this Article is on Article 5(a) and the DDO to the CEDAW. There needs to be a special General Recommendation on Article 5(a), the DDO and Reservations under the CEDAW.

[55] U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence Against Women* (1992), art. 5(a).

[56] *Id.*

of the Convention. This leads to an assumption that the international gender norm is epiphenomenal.

V. THE COMPLIANCE DEBATE AND THE INTERNATIONAL GENDER NORM

One of the earliest compliance debates within the field of international relations is whether international law matters to the interests of states.[57] This thesis derives from Hans Morgenthau's Politics Among Nations and argues that adherence to international law will doom states to self-destruction, as international law is incapable of protecting against Hobbesian anarchy that generally prevails in the international system.[58]

One of the standard assumptions about public international law by the discipline of international relations (IR) is that norms are epiphenomenal, meaning they hardly matter to international life.[59] This fundamental premise of IR continues to animate discussions about the influence of norms on state interest.[60] Deriving from Thucydides, this branch of IR believes that compliance with public international law can be summed up in the statement, "the strong do what they can and the weak suffer what they must."[61] The dominant and pervasive assumption within IR is a form of realism under which states are presumed to act as if in an anarchic state of world affairs in order to maximize their self-interest.[62] Therefore, IR fundamentally believes that compliance with norms is a function of national self-interest.

The international system in which states exist is "heterogeneous" on account of a "balance of power, worldwide revolutionary insurgency, destructive nuclear weapons systems, the relentless power of nationalistic fervour, division of the world into hostile ideological camps, uncurbed exponential population growth, and unremitting technological and industrial innovation."[63] These factors combine to make the international system fundamentally suited to the application of cogent rules of public international law.[64] Self-interest dictated the application and enforceability of the rules of public international law. This proposition is summarized in the statement of Goldsmith and Posner that "international law has no life of its own, no special normative authority, it is just the working out of relations among states."[65]

Realism is thus the theoretical position that disbelieves the utility of international law and morality to international life.[66] Proponents of the realist camp argue that states only

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[57] Boyle, *supra* note 1, at 193.

[58] *Id*, at 203; Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship Between International Law and International Politics*, EUR. J. INT'L L. 313, 313 (1994).

[59] Boyle, *supra* note 1, at 193.

[60] Anne-Marie S. Burley, I*nternational Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993).

[61] Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935, 1937-8 (2001).

[62] Richard H. Steinberg, *Overview: Realism in International Law Realism and Legalism*, 96 AM. SOC'Y INT'L L. PROC. 260, 260 (2002).

[63] Boyle, *supra* note 1, at 194.

[64] *Id*.; David J. Scheffer, *Introduction: The Great Debate of the 1980s*, *in* RIGHT V. MIGHT: INT'L LAW AND THE USE OF FORCE 1, 1-16 (Council on Foreign Relations, 1991).

[65] JACK L. GOLDSMITH AND & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (Oxford University Press, 2005).

[66] Boyle, *supra* note 1, at 193, 206.

comply with the norms that are in their material interest. According to realists, it is theoretically impracticable to speak of the causal effect of norms by themselves on state behaviour as such a thing does not exist. In the Hobbesian anarchic state of international affairs, public international law and norms acquire short shrift. The Restatement of American Foreign Relations Law argues that states comply with only those rules of public international law that are necessary or expedient.[67] States obey those rules when doing so is bound to bolster their material interests. Norms are relevant only when they match the self-interest of nation-states. Norms hardly constrain states' behaviour in the anarchic world of state affairs. Normative principles are but flimsy arrangements easily toppled by material self-interest.

In the context of the international gender norm under CEDAW, the existence of the massive Reservations thus translates into an implicit assumption that this norm is presumably epiphenomenal. This article refutes this assumption.

The discipline of international law has also been dichotomized away from the discipline of international relations.[68] However, there is an increasing convergence between the two disciplines. This Article draws upon this convergence in situating its argument. One approach that has been suggested in a rapprochement between the two is the structural approach wherein the influence of the international system as a structure is studied.[69] This Article uses the conflict of rights frame of CEDAW as a structural framework of reference to evaluate the two decisions of the Supreme Court. Another theoretical strain argues that the major contribution of IR theory is indeed the "generation of original hypotheses attempting to explain significant features of international politics."[70] In this vein, this Article develops a hypothesis to argue that a descriptive inference to CEDAW can be made from the two judgments—the *Sabarimala* and the *Triple Talāq* Judgments—to state that the Supreme Court has implicitly adjudicated on the conflict of rights frame under CEDAW.

Going back to the story of epiphenomenal norms, Myers McDougal calls upon scholars to "engage in a continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the over-arching goal."[71] This Article reprises the situation of the conflict of rights frame under CEDAW and combines it with a specific analysis of two similar judgments of the Supreme Court of India to come up with a solution to the problem of epiphenomenal norms.

Another famous scholar of international law, Louis Henkin, stated that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[72] In this vein, this Article argues that India has implicitly observed the phenomenon of international law manifested through CEDAW through its two judgments.

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[67] Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 490 (1997).

[68] Scott, *supra* note 58, at 313-14.

[69] Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*,14 YALE J. INT'L L. 335, 408 (1989).

[70] *Id.* at 410; Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POLITICS POL. 25, 25 (1985).

[71] Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 5 (1959).

[72] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979).

Richard Falk calls for an "interpretation of the transition process that international lawyers can use to analyse the main developments of international life" in propounding a role for international lawyers in the new world order back then.[73] This Article interprets these two developments in the Indian Supreme Court and juxtaposes it against CEDAW to develop an argument on India's compliance with international law.

It is submitted that in contradistinction to the argument that norms are usually epiphenomenal to state interest, the two Judgments by the Supreme Court have actually complied at some level with the injunction of CEDAW against traditional cultural attitudes. Some arguments on treaty compliance will be examined to contextualize this argument.

Compliance with international law has generally been identified at a very low level and poor when it comes to matters of national interest.[74] In this context this Article identifies that in India, a country with a very low level of compliance, the Supreme Court has in effect complied with the injunctions of CEDAW which is a novel jurisprudential development.[75]

In the structural context of a treaty as a central regulating component, Chayes and Chayes state that treaties alter the behavior of states according to the terms prescribed.[76] They dismiss arguments that non-compliance is generated because a treaty is not in the interests of states or that states violate treaties at will.[77] Treaty compliance is measured "in light of the interest and concerns the treaty is deigned to safeguard."[78] This Article demonstrates that signing on to CEDAW has generated an independent positive effect of Judgments in compliance with CEDAW. The fact that CEDAW was not quoted could likely be because counsel did not bring it to the attention of the Hon'ble Court; the fact the Judges did not quote it might be considered a judicial travesty. Therefore, the argument that there was an implicit adjudication of CEDAW's conflict of rights frame is presented to surmount the fact that CEDAW was not directly quoted by the Supreme Court of India in the two judgments.

Checkel presents a model of compliance which emphasizes social learning, argumentative persuasion, and a-instrumental processes through which compliance is enabled.[79] In contradistinction to Checkel, the theory advanced by this Article is not that there has been any social learning or persuasive argumentation but independent posturing from the international system. This has taken place in the absence of explicit argumentation or explicit social learning. Also, this Article argues that compliance with CEDAW has taken place through a non-instrumental process. There has been no Hobbesian sovereign breathing down the neck of the Supreme Court, so to speak, which has caused it to uphold the right to GBE vis-à-vis the right to freedom of religion. Yet the conflict of rights frame has been adjudicated in favor of the right to GBE.

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[73] Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969, 974 (1974).

[74] Max Sorensen, *Theory and Reality in International Law Theory and Reality in International Law*, 75 AM. SOC'Y INT'L L. PROC. 140, 141 (1981).

[75] The Indian Supreme Court has read the CEDAW into Part III (fundamental rights) of the Constitution of India. *See* Arpita Sengupta, *The Judgments that changed the Legal Structure in India*, 3 JUS CORPUS L.J. 576 (2022).

[76] Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT'L ORG. 175, 176 (1993).

[77] *Id.*

[78] *Id.*

[79] Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553, 553 (2001).

Some general principles on compliance will now be considered to contextualize the argument on India's compliance with CEDAW. There is a process of norm internalization that contributes to the general normative value of a norm to a state.[80] This Article argues that the precedence of the right to GBE under CEDAW has indeed been implicitly rationalized in the Indian state's consciousness reflected by the two Judgments that have considered the conflict between the right to freedom of religion and the right to GBE and upheld the latter.

Another main factor motivating compliance is the reputation of states in the international society of states.[81] States may fear loss of reputation for repeated and constant violations of their treaty commitments.[82] In a similar vein, the stature of India might be enhanced by a recognition that an implicit adjudication of the conflict of rights frame under CEDAW has taken place in a domestic context. Had the Supreme Court directly quoted CEDAW, the novel jurisprudential development would have been commended by the international community.

Therefore, the story of epiphenomenal norms has been used to set up a compliance puzzle whereby the massive Reservations initially make the international gender norm under CEDAW appear epiphenomenal. But this Article will demonstrate that substantive compliance has taken place through the two Judgments: the *Sabarimala* and the *Triple Talāq* Judgments of the Supreme Court.

VI. THE CONCEPT OF A PUBLIC INTEREST LITIGATION (PIL) IN INDIA

This section will explain the public interest litigation (PIL) process in India to undergird the subsequent discussion of the two Judgments. The PIL mechanism in India permits an individual to file a petition to secure the rights of a class of litigants.[83] It is a unique constitutional tool under which the traditional concept of standing, as understood in American constitutional jurisprudence, has been set aside by the Supreme Court.[84] As a result, socially minded individuals and NGOs representing social movements can file PIL petitions on behalf of a class of citizens.[85] This has enabled the enforcement of the principles of international law in domestic courts to protect human rights violations.[86] This has occurred even in the absence of domestic legislation.

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[80] Harold H. Koh, *Transnational Legal Process*, 184 (Routledge 2017), <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315202006-11/transnational-legal-process-harold-hongju-koh> (last visited May 13, 2024).

[81] Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379, 383 (2005).

[82] Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1862-63 (2002).

[83] Himangshu R. Nath, *PIL Strategy in Advancing the Rights of Have-Nots' in India: Issues and Challenges*, 5 J. JURID. & SOC. SCI. 1, 4 (2015).

[84] Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 495 (1989).

[85] Sheikh Mohammad Towhidul Karim, *Role of NGOs in Developing Public Interest Litigation: An Analytical Study*, 49 ENV'T. POL'Y & L. 145, 147 (2019).

[86] Leïla Choukroune, *From Without to Within: Indian International Law as Modernizer*, *in* EXPLORING INDIAN MODERNITIES 52, 52 (Leïla Choukroune & Paul Bhandari eds., 2018).

The PIL process was initiated by the Supreme Court out of a desire to make the high echelons of power accessible to the poor and marginalized people.[87] It is a social movement heralded by the highest court of the country. The Judges and courts of India have played an important role in the dissemination of this process in the Indian consciousness. Under this movement, the concept of a *locus standi*, or standing by an individual to petition the court, has been set aside.[88] Since socially deprived individuals are not in a position to approach the court to secure their rights personally, any socially-minded individual or organization has been permitted to file a petition to secure the constitutional rights of the oppressed or marginalized group.[89] The Supreme Court has interpreted this instance as the grievance of the entire community.[90] Hence, an individual who does not belong to the class of persons suffering the rights violation is permitted to petition the court through a PIL to enforce the rights of that class of citizens. This process was set into motion by the now famous case of *Hussainara Khatoon v. the State of Bihar* wherein the Supreme Court acted on its own by taking cognizance of the deplorable conditions of under-trial prisoners in the state of Bihar.[91] These under-trial prisoners had been incarcerated longer than the potential sentences for the crimes for which they had been accused.[92] They were too poor to afford bail and suffered from custodial violence and torture. The Supreme Court accepted a PIL petition on behalf of the under-trial prisoners incarcerated in Bihar to order that the process of detention was unreasonable under Article 21 of the Constitution of India.[93]

PILs can be filed by academics, scholars, or journalists to enforce rights on behalf of a class of petitioners. A unique concept of the PIL is that while a right is filed by one individual, the remedies are shared by a class of marginalized or oppressed groups.[94] In fact, in *S.P. Gupta v. the Union of India*, the Supreme Court has specifically held that when poverty or economic disadvantage precludes a petitioner from approaching the court, any socially minded individual can petition the court to secure this right.[95] The court has even accepted a postcard by a journalist as a PIL.[96] The court has actively propelled the legal aid process to the aid of the PIL petitioner.[97] The court appoints prominent lawyers as *amici* or *pro bono publico* counsel to conduct the PIL process. Commissions of inquiry to advise the government have been appointed. Adversarial processes like cross-examination have been set aside by the court to aid the PIL process. The PIL has also been the forum under which

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[87] Cassels, *supra* note 84, at 497.

[88] Ketki Dalvi, Public Interest Litigation: Tool for Protecting Human Rights in India, Kesari Mahratta Trust (May 15, 2024), <http://210.212.169.38/xmlui/handle/123456789/12342>; Adrita Dey, Relaxation on the Purview of Locus Standi and the Evolution of Public Interest Litigation, 2 Jus Corpus L.J. 131, 132 (2021).

[89] Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* 2 WORLD BANK POL'Y RSCH., Working Paper No. 5109, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503803> (last visited May 15, 2024).

[90] Orla Ni Chuilleanain, *Opening up the Courts to the Marginalised: The Uses and Usefulness of Public Interest Litigation in India*, 6 TRINITY C. L. REV. 18, 19 (2003).

[91] Hussainara Khatoon v. State of Bihar, 1979 AIR 1819; Chuilleanain *supra*, note 90.

[92] Hussainara Khatoon v. State of Bihar, 1979 AIR 1819.

[93] *Id*.

[94] Cassels, *supra* note 84, at 499.

[95] S.P. Gupta v. Union of India, (1982) 2 SCR 365.

[96] N. R. Madhava Menon, Public Interest Litigation: A Major Breakthrough in the Delivery of Social Justice (Dec. 26-28, 1981), *in* 9 J. BAR. COUNCIL INDIA 150, 158 (N. R. Madhava Menon ed., 1982).

[97] Cassels, *supra* note 84, at 501.

the traditional concept of negative rights under the Indian constitution were set aside. For instance, Article 21 of the Indian Constitution only guarantees that "no person shall be deprived of liberty."[98] Instead of according this right a positivist mechanistic interpretation, the Supreme Court has used the platform of the PIL to infuse life into this provision. A large number of rights, including the right against environmental pollution and the right of workers against a hazardous working environment, the right against slave labour, against inhumane and degrading prison conditions and a right to human dignity, have been read into Article 21. Through this process, the court has expanded the concept of negative liberty under Indian jurisprudence to recognize the social and economic rights of the people of India. The Court has also stepped in where there is an executive vacuum and has compelled public agencies to take appropriate measures to secure the socio-economic rights of the people of India.

The most famous explication of the PIL in the context of GBV occurred in 1997, when in the absence of domestic legislation on sexual harassment, the Supreme Court interpreted CEDAW into the Constitution. In *Vishaka v. the State of Rajasthan* the Supreme Court specifically stated that "International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein."[99] A right against sexual harassment was imputed from the international treaty to imply a similar right under domestic jurisprudence. Henceforth, all the women of India were entitled to a right against sexual harassment. While in *Vishaka* CEDAW was explicitly quoted, this Article argues that a descriptive inference to CEDAW can be made from the *Sabarimala* and *Triple Talāq* Judgments.

The PIL mechanism is a significant influence on the Indian state. On account of various international provisions being read into Article 21 of the Constitution, the Government of India has promulgated many polices as it is constitutionally mandated to so do. For instance, in *Vishaka*, the Supreme Court issued a set of guidelines against sexual harassment at the workplace.[100] This was subsequently incorporated into the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.*[101] Thus, the PIL has enabled a radical restructuring of state process. The PIL has permitted a legal voice to the disadvantaged sections of Indian society who are otherwise barred from articulating their grievances before a court of law.

In the context of the international gender norm, this Article theorizes that the PIL mechanism has permitted the Supreme Court to adjudicate on an unarticulated grievance of Indian women. The PIL mechanism has subject the international gender norm to adjudication even in the absence of a Hobbesian sovereign. There has been no international agency or organization breathing down the throat of the Indian democracy and compelling it to adjudicate on the conflict between the right to freedom of religion and the right against GBV. Yet, the following section demonstrates that this has taken place. The PIL process has permitted the independent adjudication of the conflict of rights frame under CEDAW without

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[98] India Const. art. 21.

[99] Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

[100] Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

[101] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, (April 22, 2013).

any explicit posturing from the international system. Thus, the PIL mechanism enables the observation that the international gender norm inherently matters to Indian constitutional jurisprudence and by implication the Indian state.

VII. HYPOTHESIS

The hypothesis being examined is that the central issues in the *Sabarimala* and *Triple Talāq* Judgments under the Constitution of India mirror the central issue of the conflict of rights frame under the international gender norm (comprising Article 2 (f), Article 5 (a), Article 16 and the DDO) under CEDAW. Thereby an implicit adjudication of the international gender norm of CEDAW has taken place in the two judgments.

VIII. METHODOLOGY

This Article uses the case study method under the discipline of political science to argue that an implicit adjudication of the international gender norm has taken place in the *Sabarimala* and *Triple Talāq* Judgments.[102] The methodology deployed is examination of the two cases as the explanatory variables to generalize to the conflict of rights frame under CEDAW.[103] The mechanism under study is the conflict of rights frame under the Indian Constitution and the international gender norm to CEDAW. The two cases under selection are crucial cases dealing with the conflict of rights frame, present under the Constitution of India and also under CEDAW, in line with the theoretical explanation.[104]

The methodology used in this Article to make its primary argument is descriptive inference. Descriptive inference involves making a systematic inference about unobservable facts from the facts at hand.[105] The hypothesis being examined is that the central issues in the *Sabarimala* and *Triple Talāq* Judgments mirror the central issue of the conflict of rights frame under the international gender norm to CEDAW. The conflict of rights frame under the Constitution of India is used as a measuring heuristic to describe the two Judgments. The phenomenon or the dependant variable under examination is the conflict of rights frame under CEDAW. The independent or explanatory variables are the two Judgments. The explanation is that mathematically when they are conceptualized as sets, the conflict of rights frame is an intersecting phenomenon between the two sets.[106]

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[102] *See also* Joachim Blatter, *Innovations in Case Study Methodology: Congruence Analysis and the Relevance of Crucial Cases* 11 (Annual Mtg of Swiss Pol. Sci. Assoc. 2012), https://www.unilu.ch/fileadmin/fakultaeten/ksf/institute/polsem/Dok/Projekte_Blatter/Case_Study_Methods_and_Qualitative_Comparative_Analysis__QCA_/blatter-congruence-analysis-and-crucial-cases-svpw-conference-2012.pdf> (last visited May 17, 2024).

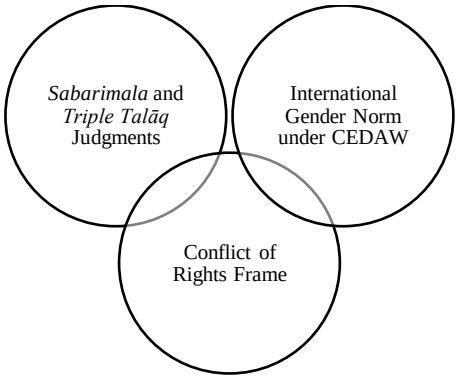
[103] *Id.* at 4.

[104] The theory of this Article is that the international gender norm has been subject to implicit adjudication by the Supreme Court of India.

[105] GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 34 (2d ed. 2021).

[106] Descriptive inference involves conceptualization and measurement. *See* John Gerring, *Mere Description*, 42 BRIT. J. POL. SCI. 721, 745 (2012).

Figure 1:



Therefore, an inference can be made from the conflict of rights frame under the Constitution of India to the conflict of rights frame under the international gender norm to CEDAW, as India is a signatory to CEDAW. This inference is that the international gender norm has been subject to implicit adjudication by the Supreme Court.

IX. EMPIRICAL EVIDENCE

A. The Sabarimala Judgment

In the 2018 *Sabarimala* Judgment, a PIL petition against a gender-discriminatory Hindu religious practice was adjudicated by the Supreme Court.[107] The entire case revolved around permitting women into the sacred Sabarimala Hindu Temple in the state of Kerala.[108] Under Hindu religious prescription, women between the ages of ten and fifty were barred from entering the temple.[109] This was based on prescriptions within the Hindu religion that restrain and control female sexuality. The reason behind this was based on the biological condition of menstruation. Menstruation within the Hindu religion is considered polluting and profane.[110] The presumable reason behind this denial of entry was that women who were menstruating were capable of being sexually active. The Sabarimala temple houses a sacred male Shrine known as Ayyappa.[111] The deity is in a sacred state of bachelorhood and could

[107] Brief for Petitioner, Indian Young Laws. Assoc. v. State of Kerala, (2018) 9 SCR 561.

[108] *Judgment in Plain English*, SUP. CT. OBSERVER (Sept. 28, 2018), https://www.scobserver.in/reports/sabarimala-temple-entry-indian-young-lawyers-association-kerala-judgment-in-plain-english/ (last visited May 20, 2024).

[109] Ayesha Jamal, *Sabarimala Verdict: A Watershed Moment in the History of Affirmative Action*, THE LEAFLET (Oct. 30, 2020), https://theleaflet.in/sabarimala-verdict-a-watershed-moment-in-the-history-of-affirmative-action/ (last visited May 20, 2024).

[110] Aru Bhartiya, *Menstruation, Religion and Society*, 3 INT'L J. SOC. SCI. & HUM. 523, 525 (2013).

[111] *Sabarimala Temple Entry: India Young Laws. Assoc. v. State of Kerala*, SUP. CT. OBSERVER, (posted Sept. 20, 2024, 10:16 PM), https://www.scobserver.in/cases/indian-young-lawyers-association-v-state-of-kerala-sabarimala-temple-entry-background/ (last visited May 20, 2024).

not be confronted with women presumed to be sexually active.[112] Therefore, women who were capable of sexual activity were precluded from entering the temple. Menstruation was considered polluting and was also seen as connoting sexually active women. Based on the biological condition of menstruation, women have been denied entry since time immemorial into the Sabarimala Temple.

In the *Sabarimala* Judgment, a PIL was filed under Article 32 of the Constitution of India against the State of Kerala, where the temple is located.[113] The questions up for consideration before the Court demonstrate a conflict between the right to freedom of religion and the right against GBD under the Constitution of India.[114]

The first question under the PIL that was adjudicated by the Supreme Court was whether the discrimination was based on a biological condition of women (menstruation). If it did this would violate Articles 14, 15 and 21 of the Constitution which provided for the right to GBE.[115] The Court was also called upon to adjudicate whether this practice was essential to Hinduism. The Indian Constitution provides for the right to freedom of religion under Article 25.[116] The proponents of this practice justified it under Article 25. Hence, a classic conflict between the right against GBE and the right to freedom of religion can be witnessed in this PIL.[117] This is the conflict of rights referenced by CEDAW. It has occurred empirically in this PIL.

The Supreme Court held that the right to practice religion under Article 25 of the Indian Constitution was subject to the fundamental right to equality under Article 14 and the right against discrimination on the basis of sex under Article 15.[118] The issue revolved between Article 14, the right to equality, and Article 25(1), the right to freely practice any religion in India.[119] Could the Temple ban women on the biological condition of menstruation under the right to freedom of religion or was this right subject to the equality jurisprudence of the Constitution of India?

The Court stated that the right to freedom of religion did not permit the imposition of restrictions based on the biological characteristics of women. The practice of excluding Hindu women from the Sabarimala Temple violated the right of women to freely profess, practice and propagate the Hindu religion guaranteed under Article 25.[120] Restricting women from entry cannot be interpreted as part of a common morality or a common conscience of the Hindu religion.[121] Further, this practice was not deemed to be an essential aspect of the faith of Hinduism. Article 25 only protected the essential elements of the faith of

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[112] Priyanka Jaiswal, *The Sabarimala Verdict: A Complete Analysis*, LEGAL SERV. INDIA, https://legalserviceindia.com/legal/article-5822-the-sabrimala-verdict-a-complete-analysis.html (last visited May 20, 2024).

[113] Brief for Petitioner, *supra* note 101, at 5.

[114] India Const. art. 15, cl. 1 (discussing rights against sex-based discrimination).

[115] *Id.* art. 14.

[116] *Id.* art. 25.

[117] Brief for Petitioner, *supra* note 101, at 9.

[118] Jamal, *supra* note 103.

[119] *The Sabarimala Case: The Supreme Court of India*, *supra* note 11.

[120] *Id.*

[121] *Id.*

Hinduism.[122] It did not accord protection to practices of GBD. Hence, the court stated that the practice of precluding Hindu women entry into this ancient shrine did not emanate from traditional Hindu custom and was not an essential aspect of the Hindu religious practice.

This judgment is indeed historic for striking down an ancient Hindu religious custom that has historically discriminated against women. It has clearly upheld the right against GBD over the right to freely profess, practice, and propagate the tenets of the Hindu religion which results in discriminatory practices. The Supreme Court relied on its interpretation of the Indian Constitution to make its case. Nevertheless, this also speaks to the international debate on the conflict of rights frame under CEDAW.

It can be seen that this discriminatory practice is also a clear violation of Article 2 (f), Article 5(a), and the DDO to CEDAW. Article 2 (f) mandates state parties to abolish customs and discriminatory traditions.[123] Article 5(a) requires state-parties to modify culturally discriminatory practices. Further, the DDO has interpreted the right against GBV to mean a right against the traditional, cultural practices emanating from religion.[124] The practice of denying women entry into the temple on the basis of the biological condition of menstruation has resulted in historical discrimination. Therefore, a clear violation of Article 2, Article 5(a), and the DDO of CEDAW has occurred on account of the Sabarimala Temple's practice.

This conflict between Articles 14 and 21 of the Constitution is similar to the conflict of rights frame under Article 2(f), Article 5(a), Article 16 and the DDO to CEDAW. Therefore, a reasonable inference can be made: that since the conflict of rights frame is similar to the domestic constitution as well as CEDAW there is a jurisprudential overlap between the two. Therefore, it can be stated that the conflict of rights frame under CEDAW has been implicitly adjudicated by the Supreme Court.[125]

CEDAW was not directly quoted in the judgment. Nevertheless, this Article argues that an implicit adjudication of the conflict of rights frame has taken place. The international gender norm calls upon states to take all measure to eliminate those customary practices that cause GBD. The decision of the Supreme Court in the *Sabarimala* case has clearly adjudicated this conflict in favor of the right against GBD. This is an effectuation of the compliance commitments of the Indian nation-state under CEDAW. This surely implies that the international gender norm can be empirically witnessed in action in this instance. This negates paradigmatically the idea that norms are epiphenomenal. The international gender norm is alive and a living law in the context of India. India's highest court has acted on the normative prescription of the international gender norm and resolved the conflict of rights frame in favor of the right against GBV. Surely, this is an unequivocal reiteration that CEDAW is not epiphenomenal to India. The right against GBV has been upheld by the

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[122] Explained Desk, *Sabarimala Order: What Is the "Essentiality" Test in Religious Practice?* INDIAN EXPRESS, (Nov. 14, 2019) https://indianexpress.com/article/explained/explained-supreme-courts-Sabarimala-order-and-the-essentiality-test-in-religious-practice-6119369/. *See also*, Elizabeth Seshadri, *The Sabarimala Judgment: Reformative and Disruptive* THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY (Oct. 5, 2018) https://www.thehinducentre.com/the-arena/current-issues/article25120778.ece (Criticizing the "essential practice test").

[123] G.A. Res. 34/180, art. 2(f), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Dec. 18, 1979).

[124] U.N. Econ. & Socc. Council, Comm. on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, U.N. Doc. CEDAW/C/GR/19 (1992).

[125] *See* Fig.1, supra.

Supreme Court. The lack of a normative hierarchy between the two norms, the right to freedom of religion and the right against GBV, at the international level has been resolved in favor of the rights of women.

B. Triple Talāq Judgment

In the case of *Shayara Bano v. the Union of India* a PIL filed in 2017 where the practice of triple *talāq* under the Mohammedan law in India was challenged as violating the provisions against GBD under the Indian Constitution.[126] The practice of triple *talāq* permits men to divorce their wives by arbitrarily pronouncing the word "*talāq*" three times.[127][128] In a patriarchal society characterized by intensive forms of GBV, husbands have historically invoked this religious privilege to arbitrarily divorce their wives. This has caused immense distress and destitution to Muslim women in India.[129]

Under this PIL, this practice of triple *talāq* was challenged as violating the right to equality under Article 14, the right against discrimination on the basis of sex under Article 15 and the right to life under Article 21 of the Constitution of India.[130] The petitioner petitioned the court to declare that the practice of arbitrary *talāq* or divorce was unconstitutional.

In this case, the petitioner was subject to intensive and severe forms of domestic violence. She was often beaten, subject to torture, and physically abused by the respondent-husband.[131] The respondent-husband also attempted to murder the petitioner by administering an over-dosage of prescription drugs.[132] The respondent further had also demanded a high dowry from the petitioner's parents.[133] Failing to get that, he executed a divorce petition and delivered it to the petitioner.[134] The respondent defended his rights under Shari'a law in India which permitted the right of arbitrary divorce to Muslim husbands.[135] The petitioner was assisted in court by socially minded non-governmental organizations.[136]

This PIL witnesses a classic conflict between the Qur'an and the right against GBV. The Supreme Court extensively considered the practice of triple *talāq* under the Qur'an.[137] The Government petitioned the court to abolish the arbitrary practice of triple *talāq* under CEDAW. The Attorney General stated that since the inception of CEDAW, India had played a key role in CEDAW's mandate to remove customary practices. Specifically, the Attorney

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[126] Shayara Bano v. Union of India, (2017) 9 S.C.R. 797.

[127] Sohail Nazim, *Criminalization of Triple Talaq in India: Impact and Challenges* 2 JUS CORPUS L. J. 610, 611 (2021).

[128] *Triple "talāq" and Uniform Civil Code Are Separate Issues*, Mint (Dec. 2, 2016), https://www.proquest.com/docview/1845211573/abstract/F72523B648A342EAPQ/1.

[129] Hasibur Rahaman Molla, *Triple Talaq: A Distress to Muslim Women in India*, 7 ASIAN J. RSCH. SOC. SCIENCES HUMANITIES, 244 (2017).

[130] *Triple Talaq*, *supra* note 12.

[131] Bano v. Union of India, 118 SC 2016, 7-8.

[132] *Id.*

[133] *Id.* at 8.

[134] Bano, *supra* note 125, at 9.

[135] *Id.* at 11.

[136] Triple Talaq, *supra* note 12.

[137] Bano, *supra* note 125, at 13-39.

General invoked the Preamble, Article 1, and Article 2(b) of the CEDAW, which calls upon states to take legislative and other measures to eliminate GBD.[138] The International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights, were also invoked by the Government of India in its arguments.[139] The Attorney General did not, however, reference any international gender norm.

The Supreme Court held that the practice of triple *talāq* violated the constitutional rights of Muslim women as it was arbitrary and unfair and not conducive to gender equality.[140] It did not adjudicate on the question of whether this practice was essential to Islam as was done under the *Sabarimala* Judgment. It directed the Government to consider suitable legislation to this effect.[141] The Government complied and passed the *Muslim Women (Protection of Rights on Marriage) Bill, 2017*, which criminalizes the practice of triple *talāq*.[142] This has been recently codified.[143]

It is submitted that triple *talāq* is a discriminatory custom violating Article 2(f), Article 5(a), and the DDO to CEDAW. A direct inference can be made that the conflict between the right to equality and freedom of religion under the Indian Constitution has occurred and is similar to the conflict of rights frame under the international gender norm. Therefore, there is an implicit overlap between this Judgment and CEDAW.[144] While the relevant provisions of CEDAW have not been quoted, its substance has been adjudicated.

X. THEORETICAL DISCUSSION

This Article argues that viewed from an international perspective, an adjudication of the conflict of rights frame under CEDAW has taken place in a domestic context. Article 2(f), Article 5(a), Article 16, and the DDO are based on a conflict of rights frame: the right to freedom of religion versus the right against GBV. As stated above, the international system under CEDAW has not provided for a normative resolution of this conflict. To date, there exists no decision by a judicial organ or international agency that has stated under CEDAW that the right against GBV overrides the right to freedom of religion and that it is legally incompatible for states to argue that religious practices can override practices of GBV.[145] This issue has been subject to the arbitrary stance of states under the guise of Reservations. Further, the DDO expanding the normative obligations of state with regard to traditional

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[138] *Id.* at 130-131.

[139] *Id.*at 130.

[140] Vikram Bhalla, *On This Day, Supreme Court of India Deemed Triple Talaq Unconstitutional*, THE TIMES OF INDIA (August 22, 2023), https://timesofindia.indiatimes.com/india/on-this-day-supreme-court-of-india-deemed-triple-talaq-unconstitutional/articleshow/102936454.cms.

[141] Bano, *supra* note 125, at 280.

[142] The Muslim Women (Protection of Rights on Marriage) Ordinance, PRS INDIA (2018), https://prsindia.org/billtrack/the-muslim-women-protection-of-rights-on-marriage-ordinance-2018 (last visited May 21 2024).

[143] *Id.*

[144] For a pictorial conceptualization of this argument, refer to Fig. 1, supra.

[145] The CEDAW Committee can issue only non-binding general comments and general recommendations.

customary practices that result in GBD has not yet been recognized as a formal principle of public international law. It has only been adopted as a General Recommendation.[146]

In this context, this Article argues that the conflict of rights frame under CEDAW has been adjudicated by a domestic court. Since, the international system has not provided for a normative resolution of these two norms under CEDAW, the hierarchy between the right to freedom of religion and the right against GBV has not been conclusively established under CEDAW's jurisprudence. In this context, it is a supremely important development that a domestic court, here the Supreme Court, has adjudicated upon the conflict of rights frame. It is quite important to note that the international gender norm has not been directly quoted by the petitioners nor the judgments in both cases. More so, the Supreme Court might be itself unaware that it has adjudicated upon this international gender norm; had the Supreme Court quoted CEDAW, this development would have permitted the Court to speak back to the international community and state that it has emphatically resolved the unresolved international conflict between the right to freedom of religion and the right against GBV under CEDAW firmly in favor of the latter right. Further, the jurisprudence of the DDO is subject to a lot of contestations. The United Nation system has appointed many special Rapporteurs to expand upon the obligations of states with regards to the DDO.[147] Rather than enquiring whether the Supreme Court has come independently to the conclusion under domestic constitutional jurisprudence that the right against GBV overrides the right to freedom of religion, the question that this Article is concerned about is the adjudication of the international conflict of rights frame in a domestic context.

The former has taken place in the Judgment. It is the latter that is unnoticed, and which is a novel and interesting finding. This Article argues that a reasonable inference can be made in terms of political science that the international conflict of rights frame of CEDAW has been subject to adjudication by a domestic court. That is why this Article uses the terms "implicit" adjudication rather than "explicit" adjudication. A descriptive inference can be made that the issue is also pertinent under CEDAW.

Therefore, the theory advanced by this Article is that the PIL mechanism in India through which the two Judgments resulted, offers the ability to measure and comment decisively on the independent normative impact of CEDAW in Indian jurisprudence. The decisions rendered implicitly adjudicating the CEDAW were done without any explicit posturing from the international system. Theoretically, even in the absence of a Hobbesian sovereign, the PIL mechanism will permit the enforcement of international gender norms in domestic contexts. This implies that norms are not epiphenomenal. Public international law exerts an independent normative pull in favour of the right against GBV.

This adjudication by the Supreme Court emphatically indicates that the international gender norm is not epiphenomenal. It has been upheld in one significant domestic instance by a signatory to CEDAW. Therefore, the unresolved conflict of rights frame has been resolved in favor of the international gender norm and it is no longer open to the presumption

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[146] U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against women, (1992).

[147] United Nations Hum. Rights, Off. of the High Comm'n **Special Rapporteur on Violence against Women and Girls,** *UN Staff, Including Eight OHCHR Colleagues, Detained in Yemen* (posted Sept. 22, 2024, 6:40 PM), https://www.ohchr.org/en/special-procedures/sr-violence-against-women.

that this norm is epiphenomenal given the massive Reservations against this principle now on record.

Compliance here is taken to mean the "degree to which state behavior conforms to what an agreement prescribes or proscribes."[148] Compliance is also defined "as a state of conformity or identity between an actor's behaviour and a specified rule."[149] This Article has demonstrated that the Supreme Court has issued two judgments, the conclusions of which were in material conformity with CEDAW. Further, when there is a convergence between an international commitment and domestic state practice, "compliance is automatic."[150] There exists a convergence between the international gender norm under CEDAW and the issuance of the two Judgments by the Supreme Court. It is to be noted that a decision rendered under Part III of the Constitution is automatically binding on the Executive branch. Both the *Sabarimala* and *Triple Talāq* Judgments were issued under Part III. So, there is some measure of "automatic" compliance discerned through the two Judgments in as much as the conflict of rights frame was adjudicated under the domestic Constitution and automatically binds the Executive.[151] Therefore, the conflict of rights frame under CEDAW has been subject to implicit adjudication by the Supreme Court.

XI. CONCLUSION

In conclusion, this Article refutes the argument that compliance with the international gender norm is precluded because it is presumably epiphenomenal. In two empirical instances quite recently, the Supreme Court of India has adjudicated on the conflict of rights frame. CEDAW has been effectuated in local contexts without any explicit posturing from the international system. In both these instances, the respective issue has been resolved in favor of the normative right to GBE of Indian women. The theoretical proposition that the international gender norm is epiphenomenal stands negated in as much as the PIL has permitted the conflict of rights frame of the CEDAW to be implicitly adjudicated in India. Gender norms impute a pull on national normative consciousness that defies the argumentation that norms are epiphenomenal. Gender then demonstrates a completely different theoretical conclusion on the abstract assumption of IR. Norms do inherently matter.

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[148] ORAN R. YOUNG, COMPLIANCE & PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (Oran R. Young, ed 2013); Jana Von Stein, Compliance with International Law, OXFORD COMMUNITY PRESS at 2, https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-55.

[149] Raustiala & Slaughter, *supra* note 1, at 539.

[150] *Id.*

[151] The question of measuring Executive state compliance is outside the scope of this Article.

INTERNATIONAL SPACE REGULATION: THE F.C.C.'S LIMITATION ON POST-MISSION SATELLITE ORBIT

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I. BACKGROUND

The launch of Sputnik 1 in October, 1957, left the world in a state of shock.[1] An important notch in history and a devastating blow to the United States' confidence during the Cold War, this launch, and the launch of the Explorer by the U.S. in January of 1958, are a source of humanity's pride and technological advancement. With the space race in full throttle, scientists around the world pushed themselves to greater heights. Beginning with fruit flies in 1947, scientists began conducting research with various species to gain an understanding of the survivability of space.[2] Great minds theorized and calculated until April 1961 when Yuri Gagarin, a Soviet Cosmonaut, became the first human to enter space and orbit Earth.[3] Since then, humanity's research has continued; from monkeys, to dogs, jellyfish, and other living creatures, animals are commonly used for scientific discovery in relation to space.[4]

In less than a century, space has welcomed far more than just the United States and what is now the Russian Federation, with representatives from twenty-two countries visiting the International Space Station (ISS) alone.[5] Treaties, technologies, and excitement have been shared by all those who live under the light of the stars as we explore and expand our capabilities using the vastness of space to inspire creativity and propel scientific discovery.[6] In less than a century, however, Earth's atmosphere has been introduced to what humanity thrives at creating: garbage. "Detritus and debris," commonly referred to as litter and junk, has begun to fill the atmosphere around the Earth. In March of 2024, there were as many as 9,618 objects being tracked in space.[7] Of those objects, 9,027 are satellites spread across four

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[1] *The Launch of Sputnik, 1957*, U.S. DEP'T OF STATE ARCHIVE, https://2001-2009.state.gov/r/pa/ho/time/lw/103729.htm#:~:text=On%20October%204%2C%201957%2C%20the,accomplish%20this%20scientific%20advancement%20first [https://perma.cc/GYW9-374T].

[2] *What was the first animal sent into space?*, ROYAL MUSEUMS GREENWICH, https://www.rmg.co.uk/stories/topics/what-was-first-animal-space#:~:text=Animals%20that%20went%20to%20space,monkeys%20have%20flown%20in%20space [https://perma.cc/C4KZ-KBYH] (fruit flies were the first living creatures intentionally sent to space in 1947, ten years before Sputnik 1 made its big debut); Irina V. Ogneva et al., *Sperm of Fruit Fly Drosophila melanogaster under Space Flight*, 23 INT'L J. MOLECULAR SCI., July 2022; Elaine Yu, The Advancements and Limitations of Human Space Travel (Feb. 2024) (B.S. thesis, University of Aberdeen) [hereinafter *Advancements and Limitations*].

[3] *Advancements and Limitations*, *supra* note 2 , at 18-19.

[4] *Id.* at 10-17; *see* Dorothy B. Spangenberg et al., Development studies of Aurelia (Jellyfish) ephyrae which developed during the SLS-1 mission, 14 ADVANCES IN SPACE RSCH., 239, 239-47 (1994) (discussing the research process and results on the impacts of microgravity on the development of jellyfish)

[5] *Station Visitors*, NASA, https://www.nasa.gov/international-space-station/space-station-visitors-by-country/ [https://perma.cc/P7ET-VMWQ] (despite the growing number of countries that have entered or have a presence in space, it remains a vastly unknown entity).

[6] *See* G.A. Res. 2222 (XXI) (Dec. 19, 1966) [hereinafter *Outer Space Treaty*]; *see also Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html [https://perma.cc/N8Y7-5NVA].

[7] ORBITING NOW, https://orbit.ing-now.com/ [https://perma.cc/7DQW-DNLM?type=standard] (last visited Mar. 22, 2024).

different Earth orbits.[8] While satellites are not considered debris or detritus while commissioned, any parts that separate from them, or satellites left in orbit after completing their mission, attain that status.[9]

II. INTRODUCTION TO SPACE DEBRIS

One of the greatest issues with space exploration is that humans leave garbage wherever we go. Space objects range from satellites, active and decommissioned, to flakes of paint or screws and are mostly found in Low Earth Orbit (LEO) – below 2,000 kilometers in altitude.[10] Among the satellites and other objects tracked in LEO there is estimated to be more than 130 million untracked and uncatalogued space debris objects from one millimeter to ten centimeters in orbit.[11] Moving at approximately 7.8 km/s—17,000 mph—objects in LEO circle the Earth in roughly ninety minutes, turning even a fleck of paint into a high-speed projectile capable of causing severe destruction.[12] Solutions to the continual cluttering of space with human-produced garbage are being theorized and tested continually in the twenty-first century. In 2023, the National Aeronautics and Space Administration (NASA) even went as far as to seek innovative solutions from across the globe by hosting their "Detect, Track, and Remediate: The Challenge of Small Space Debris" competition.[13]

As scientists work toward processes to identify and clean up the smaller space debris, plans are already underway to improve large debris removal; in addition to the United States Space Surveillance Network, a tracking system for large debris, the Japanese Aerospace Exploration Agency (JAXA) deployed the world's first use of Rendezvous and Proximity Operations (RPO) in February, 2024.[14] This technology is designed to safely approach, characterize, and remove large space objects.[15] Their spacecraft, the Active Debris Removal

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[8] *Id.* (the four orbits referenced here are Low Earth Orbit, Medium Earth Orbit, High Earth Orbit, and Geostationary Orbit); *see* Starlink, ORBITING NOW, https://orbit.ing-now.com/starlink/ (last visited Mar. 22, 2024) (one of the greatest contributors to objects in space is Starlink, a satellite-based internet project employed by SpaceX. Starlink, alone, accounts for 5,782 space objects and has plans to increase that number).

[9] *See* Inter-Agency Space Debris Coordination Comm. [IADC], *Key Definitions of the Inter-Agency Space Debris Coordination Committee (IADC)*, IADC Doc. 13-02 (April 2013) (defining space debris as "all man-made objects, including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional.").

[10] *About Space Debris*, EUR. SPACE AGENCY, https://www.esa.int/Space_Safety/Space_Debris/About_space_debris [https://perma.cc/BBA6-57AZ].

[11] *Space Environment Statistics*, EUR. SPACE AGENCY (Dec. 6, 2023), https://sdup.esoc.esa.int/discosweb/statistics/ [https://perma.cc/ZC9U-ZC49].

[12] STEVE MIRMINA & CARYN SCHENEWERK, AN INTRODUCTION TO INTERNATIONAL SPACE LAW AND SPACE LAW OF THE UNITED STATES 244 (1st prtg. 2023); *Low Earth Orbit*, EUR. SPACE AGENCY (Mar. 3, 2020), https://www.esa.int/ESA_Multimedia/Images/2020/03/Low_Earth_orbit [https://perma.cc/N3NN-7YMK].

[13] Sarah Douglas, *NASA Seeks Solutions to Detect, Track, Clean Up Small Space Debris*, NASA (Sept. 25, 2023), https://www.nasa.gov/directorates/stmd/stmd-prizes-challenges-crowdsourcing-program/center-of-excellence-for-collaborative-innovation-coeci/coeci-news/nasa-seeks-solutions-to-detect-track-clean-up-small-space-debris/ [https://perma.cc/5CJT-S7C9] (as proof that great ideas are not limited to select individuals or organizations, NASA opened up to the public a challenge that encouraged creative thinking and the use of technologies and processes that may be less explored but have the potential for significant impact).

[14] *ADRAS-J*, ASTROSCALE, https://astroscale.com/missions/adras-j/ [https://perma.cc/5J9G-937G].

[15] *Id.*

by Astroscale – Japan (ADRAS-J), intends to revolutionize the physical removal of large debris in LEO by obtaining and delivering images and data back to scientists on Earth.[16]

III. NEW POLICIES TO REGULATE SPACE

As technology strides forward and aspires to a cleaner orbital atmosphere, policies to ensure that debris is reduced are attempting to keep pace. Seventeen years ago, the Inter-Agency Space Debris Coordination Committee (IADC) adopted the twenty-five-year orbital lifetime guideline for space objects in LEO.[17] This regulation was accepted by the Committee on the Peaceful Uses of Outer Space (COPUOS) and endorsed by the United Nations.[18] While this regulation was a step in the right direction, it allowed decommissioned and post-mission satellites up to two and a half decades to float in space, potentially fragmenting or causing accidental collisions.[19] The Federal Communications Commission (FCC) has now taken the baton and continued to advance policy on the maintenance of space, particularly LEO.

In September, 2022, the FCC adopted a new rule for the orbital lifetime of non-geostationary satellites.[20] This new regulation slashes the twenty-five-year guideline to a fifth of its size, mandating that satellites ending their mission in or passing through LEO deorbit as soon as practicable but no later than five years after mission completion.[21] With the implementation of the FCC's new regulation, technology and policy are bound to each other more than ever. JAXA's ADRAS-J is one of the first displays of technology implemented for the purpose of speedy categorization and recovery of larger space debris in LEO.[22] As the deadline for the transition period granted by the FCC nears closing, this demonstration of Astroscale's spacecraft will indicate to modern scientists whether or not the five-year deorbit regulation is one that can be easily adapted to.[23]

The FCC's new regulation, while another step in the marathon towards cleaning up space, may not be as far reaching as it appears. Being a United States agency, the FCC has power to limit only what falls within its jurisdiction. The United States is attempting to caveat this limitation by requiring adherence from any country seeking to use U.S. markets.[24]

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[16] *Id*.

[17] SMALL SPACECRAFT SYSTEMS VIRTUAL INSTITUTE, NAT'L AERONAUTICS AND SPACE ADMIN., STATE-OF-THE-ART OF SMALL SPACECRAFT TECHNOLOGY 371 (Sasha Weston ed., 2023) [hereinafter *SOA Report 2023*].

[18] *Id*.

[19] FCC Rcd. 02-80 ¶¶ 12,52 (2002) (notice of proposed rulemaking); FCC Rcd. 02-772 ¶ 20 (2002) (order and authorization).

[20] FCC Rcd. 22-74, ¶ 22 (adopted 2022); FCC Rcd. 24-6 (adopted 2024) (satellite orbit duration is under the domain of the FCC because of space communication complications that can arise out of the risk of object collisions.).

[21] *See* FCC Rcd. 22-74, *supra* note 20; Will Wiquist, *FCC ADOPTS NEW '5-YEAR RULE' FOR DEORBITING SATELLITES TO ADDRESS GROWING RISK OF ORBITAL DEBRIS*, FCC NEWS (Sept. 29, 2022), https://docs.fcc.gov/public/attachments/DOC-387720A1.txt [https://perma.cc/5X74-9GYC] (the FCC has allowed a grace period of 2 years for satellite companies to transition to this new regulation, so although it has been implemented, its application or impact will not be fully seen until September, 2024 at the earliest).

[22] ASTROSCALE, *supra* note 14.

[23] FCC Rcd. 22-74, *supra* note 20 ¶ 22.

[24] *Id*. ("We require that both domestic licensees, and foreign operators granted access to the United States market, responsibly dispose of satellites that have served their purpose."), statement of Commissioner Nathan

Domestically, the United States is not free from limitations, either; for instance, NASA has been recognized as falling mostly outside the parameters of the five-year deorbit regulation.[25] It is estimated that only a small percentage of NASA satellites are licensed by the FCC; discussions at the agency and federal level are ongoing to determine the final policies in regard to NASA.[26]

IV. INTERNATIONAL IMPLICATIONS

Space, being outside the jurisdiction of any particular nation, is an inherently international commodity.[27] Regulated mostly by the United Nations, space and its celestial bodies are the centerpiece and focus of the Outer Space Treaty (OST), the Moon Agreement, and COPUOS.[28] The OST and the Moon Agreement, adopted in 1967 and 1979, respectively, use language that solidifies the moon and outer space as the province of all mankind and that exploration and use of them be carried out for the benefit and in the interest of all countries.[29] The language of these two documents is nearly identical when referencing the equality in which space and its stars, moons, and materials are shared by all nations of Earth.[30]

The ISS is at the forefront of international cooperation and regulation in the arena of space policy. Since its assembly began in 1998—the combined effort of five countries' space agencies—the ISS has been occupied by several countries' scientists and astronauts on a continual basis beginning in the year 2000.[31] The Crew Code of Conduct demands that ISS crewmembers maintain a harmonious and cohesive relationship among themselves and an appropriate level of mutual confidence and respect through an interactive, participative, and relationship-oriented approach which duly takes into account the international and multicultural nature of the crew and mission.[32]

The crew is required to work in stride with the other countries' representatives and show respect towards their nature, but there is no shedding of national ownership over items brought into space. Registration, jurisdiction, and control are heavily regulated and determined before launch. The Intergovernmental Agreement that dictates the rights and procedures of the Space Station Partners States[33] determines that each Partner State shall retain jurisdiction and control over the elements it registers and over personnel in or on the

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Simington; *see* SMALL SPACECRAFT SYSTEMS VIRTUAL INSTITUTE, NAT'L AERONAUTICS AND SPACE ADMIN., STATE-OF-THE-ART OF SMALL SPACECRAFT TECHNOLOGY 346 (Sasha Weston ed., 2022) [hereinafter *SOA Report 2022*].

[25] *SOA Report 2002*, *supra* note 24 at 346.

[26] *Id.*; *SOA Report 2023*, *supra* note 17 at 391.

[27] MIRMINA & SCHENEWERK, *supra* note 12 at 17.

[28] *See* G.A. Res. 34/68 (adopted Dec. 5, 1979) (commonly referred to as "The Moon Agreement"); *see also Outer Space Treaty*, *supra* note 6.

[29] *See* G.A. Res 34/68, *supra* note 28; *see also Outer Space Treaty*, *supra* note 6.

[30] *Id.*

[31] *Station Facts*, NASA, https://www.nasa.gov/international-space-station/space-station-facts-and-figures/ [https://perma.cc/LUM2-5F28] (The five agencies are NASA, Roscosmos, ESA (European Space Agency), JAXA (Japan Aerospace Exploration Agency), and CSA (Canadian Space Agency)).

[32] 14 C.F.R. § 1214.403 (Code of Conduct for the International Space Station Crew) (2023).

[33] United States, Russia, Europe, Japan, and Canada

ISS that are its nationals.[34] The shared nature of space is met with the manifest challenge of nationalism and property law and is influenced by the policies and laws of Partner States.

As demonstrated by the banning of Anti-Satellite (ASAT) Missile Testing,[35] countries and launching states look to one another when considering the regulations of the future. In 2022, the United States ushered into the arena of space policy a new era of action and responsibility by pledging to stop testing destructive direct-ascent ASAT missiles.[36] Just a month later, Canada issued its own national pledge of moratorium,[37] and within eighteen months, a total of thirty-seven countries stood together against the harmful procedure.[38] It took less than a year for the United Nations General Assembly to adopt a resolution in support of a destructive direct-ascent ASAT testing moratorium by a majority vote of 155 to 9.[39] The speed with which the resolution was adopted offers insight into the process of international space oversight. Although a regulation may be active in the minds of countries, a catalyst—here, a major country with a strong presence in outer space exploration and scientific advancement—is often needed to encourage and institute substantial change.

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[34] Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, art. 5, Jan. 29, 1998, 80 Stat. 271 (this article directly references Article VIII of the OST and Article II of the Registration Convention as guidelines to its reasoning and procedure. The OST and the Registration Convention make clear that it is the responsibility of the launching state to register the object being launched and that the launching state maintains its jurisdiction over the object, its component parts, and even objects constructed on a celestial body. Where multiple launching states are involved, they must jointly decide which of them shall register and retain jurisdiction over the objects.); *see Outer Space Treaty*, *supra* note 6, art. VIII; *see also* G.A. Res. 3235 (XXIX), art. II (Nov. 12, 1974).

[35] *Anti-Satellite Weapons: Threatening the Sustainability of Space Activities* (illustration), *in* SECURE WORLD FOUNDATION (2022), https://swfound.org/media/207392/swf-asat-testing-infographic-may2022.pdf (The purpose of ASAT weapons is to deceive, disrupt, or destroy objects in space. This is done in one of two ways: (1) co-orbital or (2) direct-ascent. Co-orbital consists of objects placed in orbit that maneuver close to their target and cause destruction through impacts, robotic arms, and fragmentation; direct-ascent are missiles launched from the Earth's surface or atmosphere to destroy an object in orbit in the exosphere. There have been 80 ASAT tests since 1959 by four countries—United States, Russia/USSR, China, and India—with the United States and Russian/USSR being responsible for the majority. Each ASAT test adds millions of pieces of debris to space and increases the risk of object collision and debris crowding).

[36] *Direct-Ascent Anti-Satellite Missile Tests: State Positions on the Moratorium, UNGA Resolution, and Lessons for the Future*, SECURE WORLD FOUNDATION (Oct. 24, 2023), https://swfound.org/news/all-news/2023/10/direct-ascent-anti-satellite-missile-tests-state-positions-on-the-moratorium-unga-resolution-and-lessons-for-the-future/ [https://perma.cc/3M9P-5CP9]; CHING WEI SOOI, DIRECT-ASCENT ANTI-SATELLITE MISSILE TESTS: STATE POSITIONS ON THE MORATORIUM, UNGA RESOLUTION, AND LESSONS FOR THE FUTURE 1 (2023).

[37] *See* General Exchange of Views, Report on the Seventy-Fifth Session, U.N. OEWG, UN Doc. A/AC.294/2022/WP.7, ¶ 11 (May 2022); *see also* Canadian Statement, Open-Ended Working Group on Reducing Space Threats, First Session, Agenda Item 5, General Exchange of Views on All Matters (May 2022).

[38] *See* Submission by the European Union, Consideration of Issues Contained in Paragraph 5 of G.A. Res. A/RES/76/231, U.N. OEWG, UN Doc. A/AC.294/2023/WP.18 ¶ 7 (June 2023); *see also* WEI SOOI, *supra* note 36 (between April 2022 and April 2023, the United States of America, Canada, New Zealand, Japan, Germany, the United Kingdom, the People's Republic of Korea, Switzerland, Australia, France, the Netherlands, Austria, and Italy made pledges to ban ASAT missile testing. In June of 2023 the remaining members of the European Union joined in making this pledge.).

[39] WEI SOOI, *supra* note 36; *see* G.A. Res A/RES/77/41 (adopted Dec. 7, 2022) (the vote was 155 in favor, 9 against, and 9 abstentions).

The ban on ASAT missile testing was a direct response to concerns over debris threatening the space environment, but even without direct kinetic impacts debris is still a prevalent threat.[40] Leaving decommissioned or mission-complete satellites in the atmosphere for a long period of time increases the chance of debris fragmenting or colliding, resulting in unnecessary hazardous material in orbit.[41] The process of a satellite deorbiting and gradually lowering its altitude, known as decay, is not guaranteed in a twenty-five-year period when orbiting at an altitude of 500 km or greater.[42] The FCC's new five-year regulation is the United States' push for space safety and maintenance and seeks to force governmental involvement in preventing excess and unnecessary debris creation.[43] Similar to the lasting impacts of ASAT testing, idle satellites in orbit around the Earth present a problem caused by individual countries but felt universally by space scientists, explorers, and an increasing population of private companies.[44] If the initiative of the United States here spurs the same reaction with the United Nations as it did with ASAT testing, this FCC regulation could be the foundation for immense change to satellite treatment and upper-atmosphere clean-up.

In 2016, IADC weighed the effectiveness of prevention activities for space debris.[45] Within this list, the only 'highly effective' prevention method was the limitation of accidental collision, followed by the minimization of potential post-mission fragments, rated at 'medium' effectiveness.[46] The FCC's new five-year regulation seeks to address both these heavy-hitting prevention measures directly. By limiting the time satellites remain in orbit without purpose, there may be a reduction in accidental collisions, simply by nature of having fewer objects idling in space, and less fragmentation during the process of a prolonged and natural decay. A challenge that the United States and its scientists will face is measuring the effectiveness of this regulation against the increase, decrease, or stagnation of debris production and quantity in the atmosphere. In the near future, scientists may be forced to find satisfaction in viewing trends as a whole, rather than exact influence based on individual country contribution.

Although it is possible that the United Nations will follow suit in the FCC's five-year regulation for deorbiting decommissioned satellites, there is no guarantee that its members and representatives will respond as they did to the direct-ascent ASAT moratorium. If countries, rather than the United Nations, choose to stand with the United States and enact their own regulations to decrease post-mission orbit time, the lack of universal agreement would not prevent outlier countries from leaving satellites in the upper atmosphere, risking accidental collisions and increasing the creation of debris fragments. Even with the backing of the United Nations, there is no true guarantee that countries would abide by the standard.

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[40] *See* G.A. Res A/RES/77/41, *supra* note 39

[41] *See SOA Report 2023*, *supra* note 17, at 106; *see also Statement of Commissioner Geoffrey Starks in* FCC Rcd. 22-74, *supra* note 20, at 11841.

[42] *See SOA Report 2023*, *supra* note 17, at 372.

[43] *See* FCC Rcd. 22-74, *supra* note 20

[44] *See* Roxana Bardan, *Seven US Companies Collaborate with NASA to Advance Space Capabilities*, NASA (June 15, 2023), https://www.nasa.gov/news-release/seven-us-companies-collaborate-with-nasa-to-advance-space-capabilities/ [https://perma.cc/5JD7-9TND].

[45] Habimana Sylvestre & V R Ramakrishna Parama, *Space debris: Reasons, types, impacts, and management*, 46 U. RWANDA INDIAN J. OF RADIO & SPACE PHYSICS 20, 24 (2017).

[46] *Id.*

With some exception,[47] resolutions of the United Nations are not binding law, but carry the weight of world opinion and the moral authority of the world community.[48] As this is the case, even the ASAT moratorium is a resolution of moral alignment rather than legal authority at this time.[49]

One of the greatest difficulties of regulating space is that, while the United Nations may stand together and vote on the best courses of action, not all countries are technologically equal. As of December 2022, most countries have not shown that they possess the technology to conduct direct-ascent ASAT testing.[50] Although the United States, one of the greatest contributors to direct-ascent ASAT testing, voted in favor of the resolution, their restriction and alignment reduce only their own contribution to space debris.[51] Of the nine countries that opposed the resolution, China and the Russian Federation stood among them, two of the four countries that have demonstrated the ability to conduct such tests.[52] Given their technological ability and the non-binding nature of United Nations resolutions, less progress in reducing the creation of space debris may be made than the resolution suggests. This is not a reality, but stands as a potential issue moving forward with international space policy. The same issue, except with greater concern as there is no United Nations support as of yet, exists when considering the intention of the FCC's five-year deorbiting regulation.

V. CONCLUSION

The Federal Communications Commission's implementation of a new five-year regulation on deorbiting post-mission and decommissioned Satellites at an altitude of 2,000 km or lower is an attempt to improve the safety of space exploration, scientific advancement, and reduce the production of orbital debris.[53] Space is the province of all mankind, and as such it is the burden of humanity to maintain it as a collective. Although there are more powerful and technologically advanced nations which use space more freely than others, as well as an increasing presence of private industry—still represented by and under the jurisdiction of their launching state—it is the responsibility of each country, regardless of space presence, to push for a well-maintained celestial environment.

Humanity has proven its ability to work together in international agreement for the overall goal of scientific discovery, as is seen in the ISS's creation and continual occupation and the backing of the 2022 direct-ascent ASAT moratorium. As technology continues to advance and opportunities to reduce the orbital debris field in our atmosphere develop and become more effective, policy must also keep stride to ensure that those technologies are

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[47] LUIS ACOSTA, THE LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH DIRECTORATE, LRA-D-PUB-000467, LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS UNDER INTERNATIONAL AND DOMESTIC LAW 3-6 (2015) (the only resolutions guaranteed to be legally binding are those adopted by the United Nations Security Counsil).

[48] *See id.*; *Resolutions and Decisions Adopted by the General Assembly*, UN-ILIBRARY, https://www.un-ilibrary.org/content/periodicals/24120898 [https://perma.cc/KW29-AW2A].

[49] *See* A/RES/77/41, *supra* note 39.

[50] *See* WEI SOOI, *supra* note 36, at iii, 1; *see also* SECURE WORLD FOUNDATION, *supra* note 35.

[51] *See* SECURE WORLD FOUNDATION, *supra* note 35.

[52] *See* WEI SOOI, *supra* note 36, at 1.

[53] FCC Rcd. 22-74, *supra* note 20; Wiquist, *supra* note 21.

being applied properly. The 2022 FCC regulation is one of many steps towards a cleaner and debris-free orbital atmosphere. In the coming years, the United States will see the impact that its regulation has caused and which countries, if any, follow suit in their commitment to increasing the safety and cleanliness of space.