TEL AVIV UNIVERSITY
THE BUCHMANN FACULTY OF LAW
ANNY AND PAUL YANOWICZ CHAIR
IN HUMAN RIGHTS
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אוניברסיטת תל-אביב
הפקולטה למשפטים ע"ש בוכמן
הקתדרה לזכויות האדם
על שם אני ופול ינוביץ'
פרופסור איל בנבנישתי

GLOBALTRUST RESEARCH PROJECT

GlobalTrust Working Paper Series 11/2014

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Daphna Hacker

The GlobalTrust Working Paper Series can be found at
http://globaltrust.tau.ac.il/publications

ISSN 2309-7248

Cite as: Daphna Hacker, Divorced Israeli Men's Abuse of Transnational Human Rights Law
GlobalTrust Working Paper 11/2014
http://globaltrust.tau.ac.il/publications

Divorced Israeli Men's Abuse of Transnational Human Rights Law

Daphna Hacker*

Abstract

This paper discusses an innovative transnational legal strategy, employed by a group of divorced Israeli men, as part of their battle over child custody. These men submit lawsuits to courts in the United States, under laws intended to offer aliens the opportunity to seek damages caused by severe human rights violations, or by the phenomena of global organized crime. In these lawsuits, the litigants seek damages and restitution from Israeli ministers, judges, social workers, as well as from charitable funds that support Israel, for sums of millions of dollars. While the claims are groundless, and are eventually dismissed by the judges, the paper points to the actual and potential harms that can be caused by such abuse of transnational human rights litigation, and suggests legal mechanisms that can be used to minimize these harms. By this, the paper not only strives to contribute to the discussion concerning the abusive strategies employed by some men's groups, but also to the evolving debate concerning the needed conditions for a responsible transnational law, operating for the benefit of humanity.

I. Introduction

In many countries, men's groups are enjoying increasing legitimacy and influence, becoming a significant force behind reforms related to family law.[1] In a recent paper,[2]

* Senior Lecturer, Buchman Faculty of Law and NCJW Women and Gender Studies Program, Tel Aviv University; dafna@post.tau.ac.il. This research was supported by GlobalTrust Project (ERC Advanced Grant No. 323323). I thank Lisa Sferrazza for her indispensable research assistance. I am also grateful to Doreen Lustig, Issachar Rosen-Zvi, Natalie R. Davidson, Sharon Shakargy, and Eyal Gross, and to the participants of the Men's Groups: Challenging Feminism Workshop, for their useful and insights comments.

I mapped the different strategies used by men's groups in Israel, that enable them to follow the success of similar groups in other countries: Over the last decade, these organizations have doubled in number, created networks and coalitions, used the Internet in a variety of effective ways, lobbied legislators, initiated media coverage, petitioned the Israeli Supreme Court on several occasions, and have threatened and intimidated whoever they perceive as an obstacle to their objectives.[3]

Through these strategies, activists from men's groups in Israel have managed to transform themselves from an irrelevance, understood by many as violent, deviant, or simply weird, to becoming the representatives of a legitimate movement, invited to participate in parliamentary discussions about family issues. Members of the Israeli Parliament,[4] journalists,[5] and lawyers[6] can be named among those who have adopted

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[1] Richard Collier & Sally Sheldon, eds, *Fathers' Rights Activism and Legal Reform in Comparative Perspective* (Oxford: Hart Publications, 2006); Carol Smart and Selma Sevenhuijsen, eds, *Child Custody and the Politics of Gender* (Routledge, 1989); Ray Graycar, "Family Law Reform in Australia, or Frozen Chooks Revisited Again?" (2012) 13:1 Til. J. 241.

[2] Daphna Hacker, "Men's Groups as a New Challenge to the Israeli Feminist Movement: Lessons from the Ongoing Gender War over the Tender Years Presumption" (2013) 18:3 Israel Studies 29. The paper did not discuss the more recent strategy of petitioning the Israeli Supreme Court. See, e.g., *a minor v. Moshe Kachlon, Israel Minister of Welfare and Social Services* (Supreme Court of the State of Israel 2111/11) (petitioners sought to declare the alleged policy of automatic referrals of fathers to a supervised "contact center" unconstitutional); *"J," "S," v. Simona Steinmetz, Ministry of Social Affairs, and Ministry of Finance* (Supreme Court of the State of Israel 6819/12) (petitioners brought suit to stop governmental funding for supervised "contact centers"); *"N," "Y" v. Tzipi Livni and Meir Cohen* (Supreme Court of the State of Israel 4744/44) (petitioners sought to end the use of parental competence tests in divorce proceedings). Men's groups have also petitioned other kind of courts, as part of an ongoing campaign against child custody laws, see, e.g., *Shamir v. The Bar et al.* AA (Tel Aviv Administrative Court) 5078-06-13 (2013) (order to refrain from holding an academic conference at which Prof. Jennifer McIntosh presented, via video, her findings related to shared child custody).

[3] I am proud to be one the many victims of their attempted intimidation. See, for example, a letter to my university's Rector demanding that he summon me to an ethical hearing due to my academic and public activities related to gender and to family law, online: http://horimisrael.wordpress.com/2014/03/28/%D7%AA%D7%9C%D7%95%D7%A0%D7%94-%D7%9C%D7%A8%D7%A7%D7%98%D7%95%D7%A8-%D7%90%D7%95%D7%A0-%D7%AA%D7%90-%D7%90%D7%94%D7%A8%D7%95%D7%9F-%D7%A9%D7%99-%D7%A0%D7%92%D7%93-%D7%93%D7%A4%D7%A0%D7%94-%D7%94/ [all Israeli legal and media sources, not submitted to the U.N or to the U.S., are in Hebrew]; and
a blog post in which I am "ranked" as one of the five most hated women in Israel, online: http://horimisrael.wordpress.com/2013/03/01/%D7%94%D7%A0%D7%A9%D7%99%D7%9D-%D7%94%D7%A9%D7%A0%D7%95%D7%90%D7%95%D7%AA-%D7%91%D7%99%D7%95%D7%AA%D7%A8-%D7%91%D7%99%D7%A9%D7%A8%D7%90%D7%9C/.

[4] For example, the men's groups' activists campaigned in 2012 for the appointment of Member of the Knesset Yulia Shmalov-Berkovich as the Minster of Welfare, as she was acknowledged to be the

the movement's main – and demonstrably false[7] – message, that divorced Israeli men are routinely victimized by their ex-wives and systematically discriminated against by the Israeli welfare and legal systems.

Interestingly, men's groups in Israel have adopted two innovative strategies that, to my knowledge, have not yet been used by men's groups in other countries: first, petitioning the United Nations through "reports" which detail the alleged outrageious discrimination divorced fathers suffer from at the hands of Israeli authorities and officials, including judges and social workers, who act maliciously to separate fathers from their children[8]; and second, filing lawsuits in United States courts against government ministers, judges, and other official and private defendants, by individual – yet coordinated – divorced men, in which the plaintiffs seek damages for the alleged gross violation of their human rights, torture, and the egregious gender discrimination they suffer as divorced fathers.

The most successful example of the first strategy, from the men's groups' perspective, was a shadow report submitted to the United Nations Committee on

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greatest supporter of the men's organizations in the Knesset, and was known for her anti-feminist and homophobic views. Petition for the appointment of Yulia Shmalov-Berkovich, online: <http://israblog.nana10.co.il/blogread.asp?blog=808367&blogcode= 13256269>.

[5] For example, Dana Spector, "Men in Trap," Ma'ariv, 27 January 2012.

[6] In a case before the Israeli Supreme Court against the Minister of Welfare and Social Services, *a minor v. Moshe Kachlon,* (*supra,* note 2), the petitioner was represented by Chaim Arbel of Tel Aviv and Tamar Tesler of Haifa. The latter attorney posted on her website that she was helping to "fight social worker's *jihad* in Family Courts," online: <http://www.tesler-law.co.il/Israeli-Fathers-Fighting-Social-workers-Jihad-in-Family-Courts.1.htm>

[7] See *infra* note 11.

[8] Examples of other such reports, which will not be discussed here, include a report submitted by the Coalition for the Children & Family (Israel) to Frank La Rue, the UN special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression in December 2011, arguing that Israeli authorities invade the privacy of divorced fathers and restrict their freedom of expression. Online: Coalition for the Children and Family <http://ccfisrael.org/wp-content/uploads/2011/12/CCF-Report-on-the-freedom-of-speech-2.pdf>; and a petition to The Hague Special Committee on the Practical Operation of the Child Abduction Convention, submitted by the same Coalition in January 2012, arguing that Israel fails to obey the convention when the abducting parent is the mother. Online: Coalition for the Children and Family <http://ccfisrael.org/wp-content/uploads/2012/01/CCFIsrael-report-to-Hague-Child-Abduction-Convention-2012.pdf>

Economic, Social and Cultural Rights, in 2011[9]. In Israel, according to the report: "Bias against men in the Judiciary, Administrative and enforcement arms of the Government has created the most distorted, cruel and unconscionable family law system in the Western World. Men are ignored, ridiculed, impoverished, jailed and disengaged from their children on a daily basis." Included amongst the "factual" arguments in the report were the following statements: That 200 Israeli men commit suicide each year due to the discrimination they experience in divorce procedures; that Israeli law grants automatic custody to mothers; that "all fathers are sent to social workers who act as criminal probation officers and cancel visitations at whim"; and that social workers "entice women to file false domestic violence complaints, to expel men from their own homes", and produce reports that are "pure character assassination of men". Furthermore, Family Court judges are accused by the report of silencing fathers' attorneys and of ruling on the sums of child support without considering the income of the child's mother, and for sums four times higher than in the United States. Finally, it is stated, as a fact, that one-half of all divorced fathers are only permitted to see their children in contact centers, supervised by social workers.[10]

The UN committee allowed itself to be impressed by these claims quite easily, even though the eight page shadow report was not supported by references or reliable sources. A simple investigation would have revealed that all the above accusations were false,[11] and that in fact, the "report" was a fraudulent and irresponsible biased

[9] The report was submitted to the Committee's 47th session, held on November 2011, in which Israel was one of the countries reviewed. It was prepared by the same Coalition mentioned above, of eight Israeli men's organizations. Report of the Israeli NGOs for Fathers' Rights by the Coalition for the Children and Family to the 47th Session of the Committee on Economic, Social, and Cultural Rights (Held on Nov. 14-Dec. 2, 2011), online: Coalition for the Children and Family <http://ccfisrael.org/wp-content/uploads/2011/07/CCFISRAEL-REPORT-TO-UN-7-7-2011.pdf>

[10] *Ibid*.

[11] Hacker, *supra* note 2; Daphna Hacker & Ruth Halperin-Kaddari, "The Ruling Rules in Custody Disputers – On the Dangers of the Parental Sameness Illusion in a Gendered Reality" (2013) 15 Mishpat and Mimshal 91. [Hebrew].

manifesto. However, no such investigation took place. Instead, in the Committee's official response, it made statements of concern in connection to access rights granted to divorced fathers in Israel, their freedom of movement and their financial circumstances. The Committee recommended that Israeli law be amended so as to ensure that custody of children under the age of six was not awarded to a mother as of right, and that child support awards do not result in straitened financial resources and standards of living for the fathers responsible for paying them.[12] Subsequently, the State of Israel submitted its response to the concerns and recommendations outlined in the Committee's report, noting its disappointment at the Committee's reliance on a "problematic report" that "included wildly inaccurate and dangerous claims".[13] But this was too little and too late; the websites of the men's groups trumpeted the support received from the UN,[14] and have ever since encouraged the use of UN committees and special Rapporteurs as a platform for their activism.[15]

Notwithstanding the need for awareness – perhaps even alarm – at the success achieved by misogynist groups at the UN, I will not elaborate further on this first strategy for two reasons. First, the importance of the strategy of submitting shadow reports, from a feminist perspective, is such that the misuse of this strategy by men's

[12] Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights, E/C.12/ISR/CO/3, Dec. 16, 2011, article 22.

[13] Letter to Mr. Ariranga G. Pillay, Chairman, Committee on Economic, Social and Cultural Rights, June 2012 (on file with author).

[14] See, e.g., "The Situation of Divorced Men is Hellish," online: Coalition for the Children and Family <http://ccfisrael.org/un/un-icescr-ctee-to-israel-situation-of-divorced-men-is-hellish>

[15] See, e.g. "Movement for the Future of Our Children," online: <https://yeladeinu.wordpress.com/tag/%D7%90%D7%95%D7%9D/> (describes the various ways men's groups have petitioned the UN) [Hebrew]. It is worth noting that the UN committee's recommendations issued based on the men's group's outrageously invalid "report" was cited in support of the legal struggles these groups initiated in the U.S., discussed in this paper, see *Ben Issaschar v. ELI American Friends of the Israel Association for Child Protection, Inc. et al.* (E.D. Pa.) Civil Case no.13-2415. Plaintiff's Opposition to Motion to Dismiss of Israeli Defendants. Filed Nov. 26, 2013.

groups cannot undermine it.[16] Second, the uncritical and problematic reliance by UN committees on NGOs reports – and possible solutions – has already been discussed in the literature.[17] Rather, in this paper I shall focus on the second strategy, that of divorced Israeli fathers approaching U.S. courts on the basis of laws that allow aliens to sue, in the U.S., for compensation for harm suffered as a result of the violation of their basic human rights in their home country, or of harm suffered as a result of organized global crime. While the possibility of such transnational litigation – underpinned by unilateral legislation for the advancement of global human rights – is receiving growing attention in academic circles, potential abuse by litigants, as demonstrated by the case study presented in this paper, is yet to gain sufficient attention, including within feminist jurisprudential discourse. Hence, this paper not only strives to contribute to the discussion concerning the abusive strategies employed by some men's groups, but also to contribute to the evolving debate concerning the necessary conditions for a responsible transnational law, operating for the benefit humanity.

Part I of the paper describes the five lawsuits submitted – so far – by divorced Israeli men to U.S. courts, against ministers and official representatives of the State of Israel, professionals, and funds. Part II, points to the harms that these lawsuits potentially or actually cause. In part III, I briefly present the theoretical framework that should, in my opinion, guide us in relation to considering the legitimacy of unilateral human rights legislation that allows for lawsuits of this nature to be filed in U.S. courts. Indeed, *prima facie*, feminists should belong to the camp supporting

[16] See, e.g., Statement by the Committee on the Elimination of Discrimination against Women on its relationship with non-governmental organizations. Office of the High Commissioner for Human Rights. 45th Session. Online: <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/NGO.pdf>

[17] For a literature review, see Ayelet Levin, "The Israeli Reporting Cycle to UN Human Rights Treaty Bodied: Creating a Dialogue between the State and Israeli NGOs" (work in progress).

transnational intervention, which permits the citizens of one country to sue their governments and fellow citizens for severe human rights violations in the courts of another country. However, the abuse of this invitation by Israeli men's groups highlights the risks embodied in such unilateral intervention. Hence, Part IV of the paper will propose several legal mechanisms designed to minimize these risks and to enhance a responsible and un-abusive transnational human rights law.

II. The Lawsuits

Between September 2010 and April 2013, five lawsuits were initiated by nine fathers of children resident in Israel,[18] who were unhappy about the outcome of their respective custody disputes.[19] While the plaintiffs were individual fathers, the repetition of defendants, procedures and arguments in the lawsuits, as well as the membership of several of the petitioners with fathers' organizations in Israel,[20] demonstrate that these were not individual and sporadic initiatives, but rather a well-coordinated and organized operation. This operation was aimed not only at securing vengeance against the specific judges and social workers involved in the plaintiffs' divorce procedures, but was also employed as an active intimidating strategy,

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[18] From the information provided in the claims, the litigants were all Israeli citizens; some held, additionally, American, Canadian or French citizenship.

[19] The five cases referenced throughout this paper are:

(1) *Weisskopf v. United Jewish Appeal – Fed'n of Jewish Philanthropies of N.Y., Inc*., F. Supp. 2d, 2012 WL 3686692 (S.D. Tex.) (*hereinafter*: *Weisskopf v. UJA Federation);*

(2) *Weisskopf et al. v. Jewish Agency for Israel, Inc., et al.*, 12-cv-6844 (S.D.N.Y.) (*hereinafter*: *Weisskopf v. JAFI);*

(3) *Weisskopf v. Neeman, et al.*, (W.D. Wis. 2013) - Case No. 11-cv-665-slc (*hereinafter: Weisskopf v. Neeman);*

(4) *Ben Haim et al. v. Neeman, et al.*, No. 12-cv-351 (D. NJ) and appealed to the 3rd Cir. (*hereinafter*: *Ben Haim v. Neeman (D. NJ)/Ben Haim v. Neeman (3rd. Cir.))*

(5) *Ben Issaschar v. ELI American Friends of the Israel Association for Child Protection, Inc., et al.*, E.D. Pa. (*hereinafter: Ben Issaschar v. ELI).*

[20] For example, Yaacov Ben Issaschar is the head of the "Organization for Our Children," which repeats the same baseless accusations as those appearing in the suits in the US, in the disguise of a children defense NGO. Online: <http://israelsocial.wordpress.com/2012/08/01/%D7%99%D7%95%D7%A8-%D7%94%D7%AA%D7%A0%D7%95%D7%A2%D7%94-%D7%9C%D7%9E%D7%A2%D7%9F-%D7%A2%D7%AA%D7%99%D7%93-%D7%99%D7%9C%D7%93%D7%99%D7%A0%D7%95-%D7%94%D7%91%D7%99%D7%90-%D7%9C%D7%A1%D7%92%D7%99/>

intended to alter the current gender power relations in divorce, for the benefit of divorcing and divorced Israeli fathers in general.

The defendants in these suits include two government ministers (Justice and Welfare), five judges (one Supreme Court Judge, three Family Court Judges, and one Rabbinical Court judge),[21] six public-sector social workers,[22] one psychiatrist,[23] the legal advisor of the Israel Ministry of Welfare, six charitable Funds and the Funds' personnel,[24] and two commercial companies.[25] While some of the defendants were only sued once, others, including the two Ministers and the Directors of the Court Appointed Social Workers Service, were sued three times. Excluding a number of the Funds and their personnel, and the two commercial companies, and the alleged actions ascribed to them, all the defendants were Israeli, and all the alleged actions and infringements took place in Israel.

The five lawsuits were filed under laws that allow – or that allowed until recently – aliens to approach the US judicial system. The first four lawsuits relied on the Alien Tort Statute (ATS),[26] and the Torture Victims Protection Act (TVPA),[27]

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[21] Israel still maintains the personal status system (millet) that it inherited from the Ottoman Empire under which the courts of fourteen ethno-religious communities are granted exclusive jurisdiction over matters of marriage and divorce and concurrent jurisdiction with the civil courts in regard to such matters as maintenance and inheritance. The Rabbinic courts have jurisdiction over Jewish divorces, and in certain cases, custody and child support arrangements. See Yüksel Sezgin, "The Israeli *Millet* System: Examining Legal Pluralism through Lenses of Nation-Building and Human Rights" (2010) 43:631 Israel Law Rev. 631.

[22] Social workers employed by the municipalities participate in divorce procedures by presenting professional reports to the court, including recommendations related to custodial arrangements post-divorce. See Daphna Hacker, *A Legal Field in Action: The Case of Divorce Arrangements in Israel*, 4(1) INTERNATIONAL JOURNAL OF LAW IN CONTEXT 1 (2008).

[23] The involvement of psychiatrists in divorce procedures is rare, and they are usually summoned by the judge to submit their opinion only when there is the suspicious of mental disorder with one or more of the family members involved.

[24] The plaintiffs sued six charitable entities, contending that they provide funds and lobby for policies that promote discrimination against fathers in by Israeli legal system.

[25] The plaintiffs sued Kinder Morgan Inc. and El Paso E&P Company, claiming that they support one of the charitable entities sued.

[26] The Alien Tort Statute (ATS) is a section of the U.S. Code which reads "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States", see, 28 U.S.C. § 1350. Until recently it was used as the

claiming violations of the plaintiffs' basic human rights and their torture by the defendants. Probably following the US Supreme Court's decision that the ATS does not apply to actions that took place extraterritorially – that is, completely outside the United States[28] – the plaintiff in the fifth lawsuit based his claim on Racketeer Influenced and Corrupt Organizations Act (RICO),[29] for damages allegedly suffered due to activities constituting – according to in the plaintiff's claim – organized crime, by an NGO working to protect Israeli children at risk of suffering harms from their parents.[30]

The lawsuits claimed, among other things, that there exists an "institutionalized discriminatory policy of disengaging and separating fathers from their minor children resulting in physical and mental torture of fathers" in Israel;[31] that the actions of the defendants "constitute crimes against humanity, violations of civil and human rights, torture of plaintiffs, their children and all other individuals similarly situated";[32] and that the Funds were "soliciting donations under false pretenses in the United States to finance morally shocking, repugnant and horrendous activities of imprisonment of children against their parents' will, alienation of children

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legal basis for foreign citizens claiming severe violations of their human rights occurring outside the U.S. See, e.g. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). For a literature review of the discussions over the ATS, which by and large is hailed it "as a model that should inspire other countries to recognize universal jurisdiction in tort litigation", see Natalie R. Davidson, "Discussing Torture in the Shadow of Human Rights Litigation: Interpretations of Filártiga v. Peña-Irala in Paraguay under Stroessner", unpublished manuscript on file with author, at 4.

[27] The Torture Victims Protection Act (TVPA) is a statute that allows for the filing of civil suits in the U.S. against individuals who committed torture or extrajudicial killing while acting in an official capacity for a foreign country. The statute requires a plaintiff to demonstrate the exhaustion of all local remedies in the location of the crime, to the extent that such remedies are "adequate and available." Plaintiffs may be citizens or non-citizens of the US. See, Ekaterina Apostolova, "The Relationship between the Alien Tort Statute and the Torture Victim Protection Act," (2010) 28:640 Berkeley J. Int'l Law at 641.

[28] See, *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

[29] Private parties can sue under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S. Code, Chapter 96, §1961-68. A "person damaged in his business or property" can sue one or more "racketeers" after proving the existence of an "enterprise."

[30] The organization sued is ELI American Friends of the Israel Organization for Child Protection, see its activities online: http://www.eli-usa.org/.

[31] See *Weisskopf v. Neeman, supra* note 19.

[32] *Ben Haim v. Neeman (D. N.J.), supra* note 19.

from a parent, subjecting children to regime of terror"[33]. The complaints also include false "statistics": For example, that the suicide rate of divorced fathers in Israel is 1 in 72; that divorced fathers in Israel are three times more likely to die from the defendants' social welfare strategy than from terrorist attacks; and that the risk for fathers in Israel of dying as an outcome of their divorce procedure is 14 times higher than for those getting addicted to cocaine in New York.[34]

In all of the lawsuits, the plaintiffs sued each defendant for illusionary and exorbitant sums – $26 million in two of the cases[35] – and sought, additionally, a range of preventative orders, such as an order preventing the defendant "from ever again engaging in the financing of terrorism in violation of the law of the nations."[36]

It is a natural consequence of custody battles that some fathers (and mothers) will be dissatisfied with the way a social worker or a judge handled their case, or with the legal outcome. Similarly, it is obvious that fathers (and mothers) who are forced to see their children in a supervised facility because the authorities are convinced that the child is at risk are very likely to be angry;[37] likewise, a parent whose child remains in the country to which it was abducted by the other parent because the court concluded it is in the child's best interest,[38] is bounded to be furious. Even so, the five suits presented no convincing claims that connect the individual plaintiffs'

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[33] *Ben Issaschar v. ELI*, *supra* note 19.
[34] *Weisskopf v. JAFI*, *supra* note 19 at 22.
[35] *Ibid*.; *Ben Haim v. Neeman (D. N.J.)*, *supra* note 19.
[36] *Weisskopf v. JAFI*, *supra* note 19.
[37] This is the case, for example, of David Weisskopf. His anger is apparent in his numerous YouTube videos:
<https://www.youtube.com/watch?v=XBX4CR9aniA&list=PLE0A0484FCB5E6857&index=1>,
<https://www.youtube.com/watch?v=CZsZY343KvM&index=2&list=PLE0A0484FCB5E6857>
<https://www.youtube.com/watch?v=kS_54I5dG4s&list=PLE0A0484FCB5E6857&index=3>
[38] This is the case, for example, of Sharon Ben-Haim, one of the plaintiffs in the fourth lawsuit. The Supreme Court of Israel, in its application of the Hague Convention Act (Returning of Abductees Children 1991), held that sometimes returning the child to his habitual residence might harm him or her, so it is not in the child's best interest. In the case, the Supreme Court overruled the regional court's decision and allowed the child to remain in Israel with her mother. See *Anonymous v. Anonymous* (Supreme Court of the State of Israel, 741/11).

circumstances with the victimhood associated with severe human rights violations, or torture, or global organized crime. Moreover, the lawsuits presented no evidence to demonstrate that Israeli authorities discriminate against fathers as a group, deliberately separating them from their children; this is because there is no such evidence.[39]

Indeed, the judges in the United States who heard these cases concluded that they should be dismissed for lack of subject-matter, or of personal jurisdiction, or for the failure to state a claim upon which relief could be granted.[40] The judicial decisions include such observations as that the complaints "failed to allege any facts from which the District Court could plausibly have inferred that the appellants were subjected to severe physical or mental pain"[41]; that the allegations made by the plaintiff were "far too attenuated" from the purpose of the laws the claims were based on[42]; and that the Israeli fathers invoke these laws "solely for the purpose of obtaining this Court's jurisdiction."[43] Moreover, the judges understand the plaintiffs' claims as "far-fetched"[44] and "frivolous,"[45] and in three of the cases dismissed them with prejudice.[46]

III. The Harm

One could argue that the cases detailed in Part II are stories with a happy and satisfying ending – angry divorced Israeli fathers, willing to abuse transnational law

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[39] Hacker & Halperin-Kaddari, *supra,* note 11. On the contrary, women are those harmed by the Israeli legal rules governing divorce, as they are based on patriarchal religious law. See Ruth Halperin-Kaddari, *Women in Israel: A State of Their Own* (University of Pennsylvania Press: 2004).

[40] *Ben Haim v. Neeman* (D. NJ) was dismissed with prejudice and then appealed to the Third Circuit Court of Appeals, which affirmed the dismissal by the lower court and dismissed the amended complaint.

[41] *Ben Haim v. Neeman* (3rd. Cir.), *supra* note 19 at 7.

[42] *Ben Issaschar v. ELI*, *supra* note 19, at 10-11.

[43] *Ben Haim v. Neeman* (D. NJ), *supra* note 19 at 6.

[44] *Ben Issaschar v. ELI*, *supra* note 19 at 10-11.

[45] *Weisskopf v. Neeman*, *supra* note 19 at 19.

[46] *Ben Haim v. Neeman* (D. NJ), *Ben Issaschar v. ELI,* and *Weisskopf v. Neeman* were each dismissed with prejudice.

and spread lies as part of a private and public child-custody related campaign, are stopped by rational and responsible judges in the United States. I would argue, however, that the potential and actual harm caused by these lawsuits to the defendants, to the U.S. legal system, to actual victims of severe human rights violations and organized crime, and to Israeli mothers and children, renders this ending insufficient. Much more should be done to deter men unhappy with the outcome of family law proceedings in country A from suing ministers, judges, social workers and others in country B, under laws aimed at combating severe human rights violations or global illegal trade. Indeed, it is the unilateral legal invitation of one national jurisdiction, offered to citizens of another national jurisdiction, which creates special risks, greater than those created by vexatious litigants in the internal national context. In this part, I will present the actual and potential harm caused by the lawsuits, while in Part V, I will present measures that could and should be taken to prevent this abuse of transnational legislation, in light of the theoretical framework established in Part IV.

When considering the harm caused by lawsuits filed by divorced Israeli fathers in the US, the most evident damages are those inflicted upon the defendants. These lawsuits, with claims for damages totaling millions of dollars, forced the named defendants to spend tens of thousands of dollars in attorney fees to defend themselves. While the plaintiffs showed up in court *in propria persona* (though it is clear that they were aided in preparing the statements of claims and other legal documents submitted to the court), the Israeli government could not leave ministers, judges and civil servants unrepresented; indeed, the services of a prestigious Washington D.C. firm

were retained – at the expense of the State of Israel – to litigate on their behalf.[47] Likewise, the Funds and the companies sued were obliged to retain expensive legal representation to defend themselves and the named individuals connected to them.[48]

Moreover, informal conversations with some of the defendants indicate their distress at being sued, for millions of dollars, in a foreign country.[49] On average, it took a year and a half for each lawsuit to be dismissed, during which time the defendants worried about the legal proceedings taking place in a remote and unfamiliar jurisdiction that, if successful, would bankrupt them.[50]

In addition, the submission of such defamatory suits in itself – even if the claims were to be dismissed at the end of legal proceedings – has the potential to harm the defendants' good reputation and jeopardize their careers or fund raising potential. Indeed, in one of the cases, the plaintiff took pride in the damage he inflicted upon three Israeli Family Court judges by his lawsuit, even before the case had been decided:

> "So far, Judge Nachmani has been forced to resign. Judge Sivan 'retired' three years early without the usual retirement ceremonies, and Judge Shaked has recused itself [sic] from yet another case where he brutally separated between

[47] The primary law firm retained for the Israeli government ministers, judges, and civil servants is Arnold & Porter, a top 100 firm with over 800 lawyers in the U.S. and Europe.

[48] The organizations and companies chose a variety of top law firms to represent them, including Kelly Drye & Warren, LLP, Sullivan & Worcester, LLP, Skadden Arps, Buchanan Ingersoll & Rooney, and Drinker Biddle & Reath, LLP.

[49] Likewise, I have heard Rabbi Yechiel Eckstein, the president of the International Fellowship of Christians and Jews, one of the organizations sued in *Ben Haim v. Neeman (D. NJ)/Ben Haim v. Neeman (3rd. Cir.)*, acknowledge in public the anxiety he and his organization suffered because of the multi-million dollar suit, and how relieved he was that after almost two years the suit was dismissed. See Rabbi Eckstein's public address in Women's Spirit Annual Fund Raising Event, December 29, 2013.

[50] While the ministers, judges and public servants probably should have not worried, because although sued personally, would have been covered by the state if the cases would have been successful, being sued personally still raises anxiety even among these defendants. Needless to say that the level of anxiety is much higher among the private professionals and freelance fundraisers, as well as among Funds and companies sued.

father and son. So it appears that this case has already brought some sort of justice just from the fact that it started."[51]

Even if this plaintiff's statement is untrue or misleading – like so many of the statements in these suits – it does prove that the plaintiffs hope and strive to harm the capacity of the respective defendants to function professionally, and understand that the mere submission of a defamatory multi-million dollar lawsuit in the U.S. against them, might achieve this goal regardless of the judicial ruling.

A second kind of harm caused by the lawsuits filed by divorced Israeli fathers is that which has an effect on the U.S. legal system. These cases waste the resources of the State and Federal judicial systems, founded as they are on baseless claims.[52] Moreover, since court filing fees in the U.S. are comparatively very low[53] (in at least two cases, the same plaintiff managed to exempt himself from all fees, due to his low income[54]), the U.S. legal system is not compensated in any way for the resources spent on these fraudulent cases. Finally, by being misused as a tool for harassment in the hands of a misogynist social movement from another country, the U.S. legal system undermines its own reputation, in particular as a reliable and responsible transnational defender of human rights.

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[51] See *Ben Issaschar v. ELI,* Plaintiff's Opposition to Motion to Dismiss of Israeli Defendants. Filed Nov. 26, 2013.

[52] The average length of time for a civil case in district court in the United States is 8.5 months, from filing to disposition. See "Judicial Business of the United States Courts – Annual Report of the Director," (2013). U.S. District Courts, Civil Filings. Online: <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> The dismissal of the five lawsuits discussed took, on average, 17.4 months (not including the one appeal), suggesting that the handling of transnational cases is even more resource-consuming for the hosting legal system than national cases.

[53] See discussion *infra* pp. 28-31.

[54] The standard for determining whether the plaintiff qualifies for indigent status in the Western District of Wisconsin, where Weisskopf filed, is the following: From plaintiff's annual gross income, the court subtracted $3,700 for each dependent excluding the plaintiff. If the balance is less than $16,000, the plaintiff may proceed without any prepayment of fees and costs. If the balance is greater than $16,000 but less than $32,000, the plaintiff must prepay half the fees and costs. If the balance is greater than $32,000, the plaintiff must prepay all fees and costs. Substantial assets or debts require individual consideration. See *Weisskopf v. Neeman.* See also *Weisskopf, "L," "N," and "M" v. Yanbekova et al.* (W.D. Wis.) Order 11-cv-368-slc. Online: <http://www.wiwd.uscourts.gov/opinions/pdfs/11-C-368-C-09-20-11.PDF>

The third kind of harm caused by the abuse of transnational laws aimed at protecting victims of severe human rights violations, torture and organized crime by divorced Israeli fathers, is the potential harm to the real victims of such atrocities. An increasing number of baseless claims could lead to the reluctance of the U.S. legislature in the future to allow access to justice for aliens, and to suspicion on the part of U.S. judges when dealing with cases brought by aliens based on laws such as the TVPA. As mentioned above, the U.S. Supreme Court has already dramatically narrowed the range of possible circumstances that may lead to transnational suits, and such abuse may play into the hands of the supporters of this restrictive policy.[55] Other countries who offer, or who are considering offering access to justice to aliens who are victims of severe violations of their basic human rights in their home countries,[56] might be deterred as well.

Finally, these lawsuits might harm mothers and children in Israel. Hopefully, these and similar lawsuits in the future[57] will not pressure the Israeli legislature into changing laws for the protection of children and mothers, such as those related to parental and spousal violence.[58] However, these lawsuits can intimidate both

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[55] For a detailed and critical discussion of the *Kioble* case, see Jordan Paust, "Human Rights through ATS after Kioble: Partial Extraterritoriality, Misconceptions, and Illusive and Problematic Judicially-Created Criteria", Online: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1047&context=dflsc (2014).

[56] According to an *Amicus Curiae* brief filed by Yale Law School in the case of *Kiobel v. Royal Dutch Petroleum, Co.*, many states have exercised their sovereign authority to pass extraterritorial criminal jurisdiction statutes to enforce international law. Supplemental Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in support of petitioners in *Kiobel v. Royal Dutch Petroleum, Co.* Online: http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/10-1491-tsacsb-Yale-Law-School-Center-for-Global-Legal-Challenges.pdf. However, inviting aliens to sue for civil damages caused by extraterritorial human rights violation is, for now, unique to the United States.

[57] At the end of 2013, a letter was sent by David Weisskopf, who was a sole or joint litigator in three out of the five suits described in Part II, to tens of recipients, including Israeli and American governmental and non-governmental organizations, in which he threatens to submit a new suit under RICO, with similar allegations to those presented in the previous suits, see letter re: Your Racketeering Violations, December 26, 2013 (on file with author). As far as I know, this threat has not yet been executed.

[58] See, e.g., Israel's Prevention of Family Violence Law, 5751-1991, online: <https://www.knesset.gov.il/review/data/eng/law/kns12_familyviolence_eng.pdf> These lawsuits might in fact cause the unintended consequences, as far as the men's groups are concerned, of making

defendants and other judges, social workers, and Funds to such a degree that they – consciously or unconsciously – alter their professional decisions and opinions, or their financial support for projects like shelters for battered women, or bordering schools for children at risk. Indeed, it is hard to understand this new strategy by men's groups as anything other than a means to embarrass, harass, and threaten Israel as a state and Israeli officials and professionals in the field governing family law. Sadly, these divorced fathers have learned that intimidating and threatening Israeli judges, social workers, and other professionals does work to their advantage: some frightened professionals have already reacted, by trying to appease the demands of enraged divorced fathers, or by withdrawing from public discourse concerning the legal rules related to custody and child support, leaving the discussion dominated by the men's movement.[59]

In his seminal work on transnational litigation in the U.S., Harold Honghu Koh argues: "In the end, like all litigation, transnational public law litigation is a development whose success should be measured not by favorable judgments, but by practical results: the norms declared, the political pressure generated, the illegal government practices abated, and the innocent lives saved."[60] The four kinds of harms described above demonstrate the possibility that human rights transnational litigation, aimed at empowering addressing the victims of abusive governments, will actually be

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the Israeli authorities realize that these groups cause national and professional damages. The authorities were already approached, in mid-2012, by Israeli Family Courts judges who have appealed to the Director of Courts to find ways to stop the wave of incitement they are exposed to by these groups. See Tomer Zarhin, "Family Court Judges complain about Increasing Threats on behalf of Parents," *Ha'aretz*, 29 August 2012, 1, 6. Online: <http://www.haaretz.com/news/national/family-court-judges-seek-protection-from-violent-parents-1.461273>

[59]See, Hacker, *supra*, note 2 at 35 (a judge admitting that his decisions are altered by fear of the men's groups); Hacker and Halperin-Kaddari, supra note 11 at 287 (social worker's invention of 'symbolic joint custody' to address father's ego, social workers term and recommend "joint custody" even if the arrangements are such the children spend most time at their mothers', so they create a false impression of equality). We have also found it difficult in recent years to find professionals willing to state their opinion against joint physical custody in public, and it is almost impossible to locate divorced mothers who are not afraid to take part in public discourse related to custody and child support.

[60] Harold Hongju Koh, *Transnational Litigation in United States Courts* (Foundation Press, 2008) 26.

used by abusive political groups and individuals to harass their law abiding governments and their fellow citizens. The discussion above show that it is not only that transnational litigation is exposed, like national litigation, to abuse by vexatious litigants, but that it is the transnational context which increases the price of this legal abuse. In addition to the relatively higher financial and emotional costs caused to individual defendants by oversees litigation, such litigation is relatively costly to the hosting country, and might lead to general costs to the true victims of human rights violations, and to the citizens of the foreigner litigants' nation as a whole.

Notwithstanding, I will argue, based on the theoretical framework presented in the next part, that these possible harmful outcomes should not lead to surrendering the benefits of transnational human rights law altogether. Hence, as will be discussed in the last part, the challenge is to prevent the abuse of transnational human rights laws, such as the TVPA, by malicious and vexatious plaintiffs, while allowing victims of severe human rights violation and global organized crime the opportunity to sue their abusers oversees.

IV. Unilateral Juristic Human Rights Intervention and Its Legitimate Boundaries

Prima facie, the laws of country A, that allow citizens of country B to sue in country A against human rights violations carried out in country B and by country B's officials and citizens, create an unresolvable tension with the concept of sovereignty, which underpin the relationship between nations in the present age. The principle of sovereignty, i.e., the exclusive authority of B's jurisdiction within its national borders,

based on the right and freedom of B's citizens to shape the laws that govern them,[61] demands that damages and prevention orders related to such violations will be claimed in B's courts, and according to B's laws. Hence, one might argue that through laws such as the TVPA and RICO, powerful countries[62] like the US, are illegitimately unilaterally intervene in the affairs of other countries and consequently undermine their sovereignty.

However, Eyal Benvenisti argues that in our global era, the concept of sovereignty should be modified to allow, perhaps even oblige, states to take the interests of foreigners into account. He argues that rather than a "solipsistic" notion of sovereignty – one centered on the concept of full overlap between the nation state, the people it affects and its authority – one should adopt a global perception of sovereignty, stemming from the understanding that in our era, states are embedded in a global order, affecting and affected by actions taking place in other states. This global order, which allows collectives to be organized as sovereign nation states, simultaneously obliges each nation state to take into account the stakeholders that it affects – even if they are not its citizens – and to contribute to the protection of all the world's citizens through the overarching canopy of universal basic human rights, recognized in international law.

According to Benvenisti, while nation states are primarily and rightfully committed to their own citizens, they are, at the same time, "trustees of humanity", and as such have a responsibility towards all human beings. In particular, powerful sovereign states, whom enjoy an exclusive part of the earth's resources, have a duty to

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[61] On this concept of sovereignty, which Benvenisti calls "solipsistic," see Eyal Benvenisti, "Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?" 2013, GlobalTrust Working Paper Series, 02/2013, 4-5. Online: <http://globaltrust.tau.ac.il/publications/>

[62] *Ibid*. As Benvenisti notes, only states that can sustain the heavy burdens created by regulating the public good unitarily, can successfully initiate such legislation.

use these resources to address global concerns. These duties are not in tension with each nation's sovereignty, but are a part of it, and are based on the same rationales that justify national sovereignty: self-determination, the equal moral worth of all, and the right to exclude portions of the global resources.[63]

To my understanding, according to Benvenisti's theory, transnational laws that are intended to combat severe human rights violations and global organized crime, and to assist the victims of these phenomena – such as the TVPA and RICO – should be applauded as manifestations of legitimate legislation for humanity.[64] I agree with Benvenisti's contention that this should be so, at least until a robust global constitutional system "that ensures an equal and effective voice for all stakeholders" is established.[65]

Furthermore, I would argue that such plaudits are also, especially, expected from those who hold a feminist worldview. While feminist theorists, jurists and activists are at the forefront of the development of international human rights law,[66] they are also among those who are the most painfully aware of its limitations. Particularly alarming, from women's perceptive, is the "gross inadequacy of international law enforcement mechanisms".[67] As women rank among the weaker members of their nation states, in many countries they find themselves helpless in

[63] Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders," (2013) 107:2 Am. J. of Int. L., 295.
[64] Benvenisti, *supra* note 62 at 11.
[65] Benvenisti, *supra* note 64 at 327.
[66] See, e.g., Berta Esperanze Hermandez-Truyol, "Human Rights through a Gendered Lens: Emergence, Evolution, Revolution" in Kelly Askin & Dorean Koening, eds, *Women and International Human Rights Law* (Ardsley, NY: Transnational Publishers, 1999), pp. 3-39; Hilary Charlesworth, "Martha Nussbaum's Feminist Internationalism" (2000) 111:1 Ethics 64.
[67] Beth Stephens, "Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Court", in Kelly Askin & Dorean Koening, eds, *Women and International Human Rights Law* (Ardsley, NY: Transnational Publishers, 1999), pp. 119-139, at 120.

face of their government's reservations concerning,[68] and abuse of,[69] girls' and women's basic human rights. For women whom have experienced abuse in their countries, a legal forum in another country, one which invites aliens to sue their abusers, might be the only forum in which they can tell their story, gain legal recognition and receive effective legal remedies, against the abusers and for themselves.[70]

Notwithstanding the importance and legitimacy of transnational human rights law – including unilateral intervention of country A in actions taking place in country B, through laws that allow aliens to sue for the gross violation of their human rights – Benvenisti reminds us that unilateral law-making, as a "trustee of humanity", must be constrained by the duty to "give due respect to foreign stakeholders both procedurally and substantially".[71] As he and many others, including participants in feminist jurisprudential discourse, have observed, using the legal power to unilaterally intervene irresponsibly can become another form of imperialism, in disguise, and may cause more damage than good.[72]

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[68] While the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is ratified by almost all nations on earth, it is also limited by an extraordinary number of reservations, formally submitted by many ratifying counties. See Charlesworth, *supra* note 67 at 66-67.

[69] Stephens, *supra* note 68 at 121.

[70] Id. The most famous case of women using the transnational law option thus far is *Kadic v. Karadzic*. In this case, Bosnian and Croatian women filed a suit under the ATS and the TVPA against Radovan Karadzic, leader of the Bosnian Serbs, for committing the genocide in collaboration with the Milosevic regime during the Yugoslavia War. Catharine MacKinnon, who represented the women, explain why they were willing to testify in the US court and not in the International Criminal Tribunal for the former Yugoslavia (ICTY): "A forum in which survivors choose their own lawyer, shape their own claims, and direct their own case leaves the process of justice substantially in their own hands. […] The ICTY is not accountable to survivors by design or in practice. Survivors have no decisive voice in it." See, Catharine A. MacKinnon, "Remedies for War Crimes at the National Level" (1998) 6:1 J. of the Intl Inst. 3.

[71] Benvenisti, *supra* note 62 at 12.

[72] Benvenisti, *supra* note 64 at 328. See also Daphna Hacker, "Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law" 28 Harvard Hum. Rights J. (*forthcoming*) (noting that critics suggest that a uniform solution, imposed by superpowers such as the United States, on all foreign countries, is not sensitive enough to specific national socio-economic and cultural characteristics, and consequently is liable to cause harm to those it allegedly seeks to rescue.)

I would argue that the duty to responsibly take into account all the interests of foreign stakeholders should be respected by courts as well as by legislators; and that this should include the realization of the possibility of aliens taking advantage of unilateral law-making for the benefit of humanity to abuse others in their home countries. Indeed, I would propose classifying the lawsuits filed by divorced Israeli fathers as "transnational male legal violence"; and treating them as a case study demonstrating that the foreign stakeholders that should be respected by country A, and by its courts, are not just the party who claim the gross violation of one's human rights, but also the defendants from country B, and the public in country B in general. If Israeli ministers, judges, social workers, mothers and children are harassed, threatened, and harmed by the access granted divorced Israeli fathers to the U.S. judicial system, than something is very wrong in the way the U.S., and its courts, are implementing their duty to act as trustees of humanity. Any legislator taking upon the responsibilities of such a trustee must equip the judges of its national courts with the legal mechanisms that will minimize the potential harm caused by the misuse of the invitation of aliens to sue under laws such as the TVPA and RICO. Likewise, the judges must use these mechanisms while taking the interests of all the relevant foreign stakeholders into account, including the defendants, as well as the citizens of the nation of the foreign litigants as a whole. I will end this paper with suggestions for such mechanisms.

V. Minimizing the Risks of Abuse of Unilateral Legislation for Humanity

Vexatious, frivolous and vindictive litigators are a known and discussed phenomenon on the national level. Different legal systems have developed a variety of legal mechanisms to address and minimize the impact of this phenomenon. These legal

mechanisms are aimed at deterring abusive litigators, and their lawyers, from initiating ungrounded lawsuits, and at compensating the legal system and the defendants for damages incurred as a result of such lawsuits.[73]

I would argue that such mechanisms are of particular importance at the transnational level, and must be adapted and adopted to serve this evolving legal sphere. As can be concluded from Part III, the harm caused by the abuse of transnational human rights laws (THRL) are broader, and more profound, than those caused by groundless lawsuits brought by litigators against their fellow citizens in their shared home country. The need to deter such abuse in the former is more acute, as it might harm not just the defendants and the hosting legal system, but also members of the public in the country of origin and the true victims of human rights violations all over the world. Moreover, the damage caused to the defendants will be greater, as being sued in another country will cost more money to defend and will be more troublesome than in the national context. Hence, the greater importance of developing legal mechanisms that can compensate for the possibility of damage in this context. Such compensatory mechanisms will also contribute to the deterrence effort.

Of course, the challenge is to create such mechanisms, but without sabotaging unilateral law-making for the benefit of humanity, and the equality of access for justice that it strives to promote. Of particular concern is the fear that any legal-economic mechanism – such as high court fees – might deter the impoverished

[73] Edmund R. Manwell, "The Vexatious Litigant" (1996) 54:4 Cal. L. Rev. 1769; Eric Schiller & Jeffrey Wertkin, "Frivolous Filing and Vexatious Litigation" (2001) 14 Geo. J. Legal Ethic 909; Avishai Adad, "Abuse of Legal Process," Part I, Part II (2011; 2013)[Hebrew]. Vexatious litigants also appear in Canada. See, e.g., *Meads v. Meads* 2012 ABQB 571 (also referred to as the "vexatious litigant" case, the judge wrote a 155-page divorce judgment railing against those who undertake frequent court challenges, who are usually self-represented, assert aggressive claims to be above the law, create courtroom filibusters and present convoluted legal motions that waste valuable time and cause immense frustration to court officials).

victims of severe human rights violations, who are very often indeed very poor, from approaching the inviting country's legal system. Hence, all the suggested mechanisms should encourage the use of transnational human rights laws, such as the TVPA and RICO, by genuine victims, while deterring and compensating for their misuse by fraudulent and legally abusive litigators. I will suggest several such mechanisms, centered on the speed, finality, and costs of the relevant procedures.

V.I. Speed and Finality

An average of eighteen months before the dismissal of a groundless lawsuit brought under THRL – as was the case with the lawsuits filed by divorced Israeli fathers – is too long. A country that invites foreigners to sue for actions that took place in another country owes the defendants, and the public in the country of origin, speedy relief if the lawsuits are groundless. Hence, a court receiving both a lawsuit under such laws, and a motion to dismiss it, must expedite proceedings, to determine whether the motion to dismiss is justified. Hence, a country inviting transnational human rights litigation must be ready to give the foreign litigants priority over its own citizens and accessibility to immediate judicial time, at least until the court can conclude that the case has merit.

Moreover, this case study focusing on divorced Israeli fathers demonstrates the troubling ability of an organized movement to submit the same suit, with minor changes concerning the litigants and defendants, repeatedly, to different courts in different states, or countries. Even before the first lawsuit by a divorced Israeli father was dismissed in the Court of the Southern District of New York, very similar lawsuits were filed in Wisconsin, Texas, and New Jersey. Obviously, a transnational legal invitation requires both federal and transnational procedural coordination,

including through known national doctrines such as "abatement,"[74] "exclusive jurisdiction,"[75] and *res judicata*,[76] and through international doctrines such as "natural forum"[77] and "comity".[78,79] But, I would urge countries that invite aliens to sue under THRL to develop special and additional legal mechanisms that will guarantee defendants speedy and final dismissal in cases of groundless and abusive suits. For example, dismissal with prejudice – which was granted in three of the cases – will only be a useful legal deterrence mechanism if the scope of the claim and the parties or persons in privity are interpreted broadly by judges facing a multitude of similar

[74] Courts allow abatement on the grounds of another action pending in order to protect the party from having to defend several actions at the same time, if they are based on the same basic cause of action. The doctrine of abatement allows the court to prevent unnecessary expenditures of judicial time and resources. At the same time, abatement protects the defendant from lawsuits which have been instituted simply for the purpose of harassment. In the United States., a second action may be abated based on a prior, pending action if: Both actions are between the same parties; the rights of the parties are already being adjudged or have been determined in the prior action; the actions involve the same cause of action and subject matter; both actions are filed in the same jurisdictional territory; and the second action has been filed in a court with competent jurisdiction. See Matthew Izzi, "Pending Actions and Abatement," Legal Match, online: <http://www.legalmatch.com/law-library/article/pending-actions-and-abatement.html>

[75] Exclusive jurisdiction refers to power of a court to adjudicate a case to the exclusion of all other courts. It is the sole forum for determination of a particular type of case. Exclusive jurisdiction is decided on the basis of the subject matter dealt with by a particular court. The jurisdiction is said to be concurrent when two or more different courts possess the authority to hear and decide on the same matter within the same territory. See Definitions Section, US Legal. Online: <http://definitions.uslegal.com/e/exclusive-jurisdiction/>

[76] Literally "a matter judged." *Res judicata* is the principle that a matter may not, generally, be relitigated once it has been judged on the merits. *Res judicata* encompasses limits on both the claims and the issues that may be raised in subsequent proceedings. Claim preclusion is the principle that once a cause of action has been litigated, it may not be relitigated. Issue preclusion (also known as collateral estoppel) means that once an issue of fact has been determined in a proceeding between two parties, the parties may not relitigate that issue even in a proceeding on a different cause of action. Cornell University Law School, Legal Information Institute. LII online: <http://www.law.cornell.edu/wex/res_judicata>

[77] The determination of the "natural forum" is generally the one that has the "most real and substantial connection" with the case. See *Spiliada Mar. Corp. v. Cansulex Ltd.*, 1 A.C. 460, 478 (H.L. 1987). (The House of Lords held that the court may decline to take a case where there is another jurisdiction that may be more suitable for the parties. However, the burden is on the claimant to establish that the foreign forum is clearly or distinctly better. Many factors can be considered to determine the "natural forum" including the availability of witnesses, the applicable law of the matter, the parties' residence or place of business, and the possibility for the plaintiff to obtain justice in the foreign jurisdiction).

[78] Comity is the legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other's judgments out of deference, mutuality, and respect. Online: Cornell University, Legal Information Institute <http://www.law.cornell.edu/wex/comity>

[79] For a detailed discussion of the procedural rules relevant to transnational litigation in the U.S., see KOH, supra note 61, ch. VII-IX.

lawsuits.[80] Likewise, if and as more and more countries come to offer THRL, an international "dismissal with prejudice" procedure should be developed, to be used as a signal to other jurisdictions that a renewed lawsuit should be dismissed peremptorily.

The development of another mechanism for speedy and final dismissal can be inspired by a recent Israeli Supreme Court decision. In this case, the Supreme Court faced a "serial litigator", who initiated multiple groundless and repetitive claims to the Court and to other Israeli courts, refusing to accept the "finality principle". The Chief Justice not only fined the petitioner, but also ordered the secretary of the court to decline any new petitions of this litigator related to already finalized procedures.[81] While it is doubtful that the Chief Justice had the authority to issue such an order to the court's secretary, this case highlights the possibility that THRL will provide

[80] Federal Rule of Civil Procedure 41(b) holds that dismissal with prejudice is considered a judgment on the merits, meaning that it constitutes an adjudication as fully and completely as if the order had been entered after trial. See FRCP 41(b) Dismissal of Actions, Involuntary Dismissal (Effect), Online: Cornell University, Legal Information Institute <http://www.law.cornell.edu/rules/frcp/rule_41> Thus, a dismissal with prejudice is *res judicata* as to the claims dismissed, and this defense can be raised in subsequent litigation. Restatement (Second) of Judgments, § 19 (1982) ("A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim."). However, two main questions must be answered before the defense of *res judicata* can be raised: First, whether the new complaint constitutes "the same claim," and second, who constitutes "the plaintiff." The Restatement (Second) of Judgments considers "a claim" to encompass all rights to relief "with respect to all or any part of the transaction, or series of transactions out of which the action arose." The drafters of this definition state that a transaction is "a natural grouping or common nucleus of operative facts. In addition, even if a second case involves the same claim as the one that has gone to judgment, claim preclusion requires that the parties to the two suits be the same or in "privity" with the litigant in the prior case. A non-party is bound by a judgment if s/he was "represented" by a party to another case, or if there is a substantive legal relationship between a litigant and the non-party. Finally, in most jurisdictions, both the first and second cases must be brought by the same claimant against the same defendant. More basically, the second suit must involve the same parties in the same configuration. See generally, Richard D. Freer & Wendy Collins Perdue, Chapter 11, pages 589-602, "The Preclusion Doctrine" in *Civil Procedure: Cases, Materials, and Questions* 5th Ed. (LexisNexis: 2000). Thus far, Israeli men's groups have been able to file multiple, similar suits by stating new claims for relief and by changing both the defendants and plaintiffs, although the allegations and "facts" presented remain substantially similar. This is another reason to conclude that the motivation is an orchestrated strategy of harassment, rather than any desired legal outcome.

[81] *Mike and Anne Cole v. State of Israel and Ministry of Justice* (Israeli High Court of Justice, 2118/14). Online: <http://elyon1.court.gov.il/files/14/680/006/s02/14006680.s02.htm> [Hebrew]. In this case, the Israeli Supreme Court ruled that the petitioner demonstrates "complete disregard for the principle of finality" and described the numerous requests of the court as "unusual" and "extraordinary" with "no basis in law." The Court said the petitioner was a "serial litigant" who "wastes the court's time" and ruled that the petitioner bear the expense of the proceedings (10,000 NIS), which shall be paid to the State Treasury.

national judges with a relatively wide discretion to expedite dismissals. The invitation to aliens to sue goes beyond the minimal obligations of sovereigns as trustees of humanity.[82] The duty of the sovereign to hear suits brought by aliens should not be as broad as the duty toward litigants who are citizens, and should be reserved for cases of severe human rights violations. Hence, national rules, such as those related to the circumstances allowing dismissal,[83] should be adapted to the transnational context, so suits that abuse THRL – by serial submissions of groundless claims, for example, or by obvious lies – be quickly dismissed.[84]

V.II. Costs

It seems that the five lawsuits brought up by the nine Israeli divorced fathers cost them, and the organizations they belong to, very little in financial terms. It is very likely that the professional legal counseling and drafting received by the plaintiffs were provided on a pro- or low-bono basis, as there is no mention of any lawyer involved in the lawsuits, and as the plaintiffs showed up in the courts *propria*

[82] See Benvenisti, *supra* note 62, pp. 23-38.

[83] In deciding a motion to dismiss pursuant to Rule 12(b)(6) (motion to dismiss for failure to state a claim on which relief can be granted), courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). After the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable of the alleged misconduct." *Id*. (citing *Twombly*, 550 U.S. at 556). This standard, which applies to all civil cases, "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. at 678. (All civil complaints must contain more than an unadorned the-defendant-unlawfully-harmed-me accusation.") Moreover, "the factual detail in a complaint [must not be] so undeveloped that it does not provide a defendant [with] the type of notice of claim which is contemplated by Rule 8 of the Federal Rules of Civil Procedure. *Villages v. Weinstein & Riley, P.s.*, 723 F. Supp. 2d 755, 756 (M.D. Pa. 2010) ((quoting *Phillips*, 515 F.3d at 232). Therefore, when approached with a motion to dismiss under FRCP 12(b)(6), the court must take all alleged facts as true but need not accept as true inferences unsupported by facts set out in the amended complaint or legal conclusions cast as factual allegations.

[84] Such adaptation can be inspired, for example, by anti-SLAPP laws, developed in several counties, including the U.S. and Canada, aimed at deterring suits initiated to intimidate and silence defendants, including the speedy dismissal of these lawsuits. See Kohn C. Barker "Common-Law and Statutory Solutions to the Problem of SLAPPs", 26 Loy. L. A. L. Rev. 395 (1992-1993), at 408-409.

persona.[85] In addition, court fees in the U.S. are relatively low, and as mentioned above, in two of the lawsuits, the plaintiff was exempt from court fees altogether, due to his financial circumstances. In particular – and unlike in some other legal systems, where a percentage of the plaintiff's claim is charged as a fee, that must be paid before the case is heard – the divorced Israeli fathers were able to file claims for tens of million of dollars, as they did, without the need to pay substantial court fees.[86] Moreover, the dismissal of the lawsuits were not accompanied by the imposition of any fines in favor of either the court or the defendants.[87] Finally, only one of the defendants, an NGO based in the US, actually sued the plaintiffs for damages incurred as a result of the groundless suit.[88]

Hence, while the private defendants – and the Israeli public who indirectly financed the legal representation of government defendants, through general taxation – had to spend tens of thousands of dollars to defend themselves from the

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[85] An additional possible explanation for the absence of an identified lawyer in these lawsuits – although it is obvious the plaintiffs were aided with lawyers familiar with U.S. laws and legal procedure – is a fear on the part of these lawyers of prosecution under Federal Rule of Civil Procedure 11, which allows judges to sanction lawyers for their involvement in groundless or abusive litigation. FRCP 11, Signing Pleadings, Motions, and other Papers; Representations to the Court; Sanctions, (b).

[86] Theodore Eisenberg, Talia Fisher, Issachar Rosen-Zvi, "Attorney Fees in a Loser Pays System" (2013) 13:95 Cornell Legal Stud. Research Paper, 8.

[87] There are a handful of mechanisms that allow such punitive measures without commencing a separate legal action. For example, when one party to the litigation has acted in extreme bad faith, the court has the inherent power order the bad faith party to pay its opponent's attorney's fees. See Jacob Singer, "Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?" (2011) 84:2 St. John's L. Rev. 693. In addition, Rule 11 of the Federal Rules of Civil Procedure gives courts the authority to impose sanctions on a party that has filed a pleading for an "improper purpose," such as to harass, cause unnecessary delay, or increase the cost of litigation. FRCP 11, *supra* note 86.

[88] In one case, *Ben Haim v. Neeman*, the International Fellowship of Christians and Jews (IFCJ), a defendant in the case, filed a motion for sanctions under Rule 11. The motion was filed while the action was still pending, and then renewed in December 2013, after the Third Circuit Court of Appeals affirmed the district court's decision to dismiss the case. In its complaint, IFCJ argues that "The Amended Complaint's factual allegations are conclusory in nature and have no evidentiary support – nor could they – because they are inflammatory and untrue." The complaint goes on to say that the "lack of factual or legal support for their action against IFCJ inevitably leads to the conclusion that Plaintiffs brought this litigation for an improper purpose – to further their political campaign against Israeli family laws and to harass IFCJ." The complaint states that contentions the plaintiffs made were "spurious and offensive. Plaintiffs should not be allowed to disparage IFCJ in this way." IFCJ pushed for attorney's fees, noting that the factual contentions plaintiffs made lacked evidentiary support and legal merit. See *Ben Haim et al., v Neeman, et al.*, Civil Action No. 12-351 (JLL/MAH) (D. NJ) Filed Dec. 16, 2013, "Memorandum of Law in Support of Defendant International Fellowship of Christians and Jews – Renewed Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11."

transnational legal violence of divorced Israeli fathers, the fathers and their organizations could, and still will be able to abuse THRL with little economic burden.

Allowing defendants to sue for damages caused by baseless and abusive litigation, even if possible according to the inviting country's legal system, is not enough in the transnational context. It is unlikely that an alien will sue in the inviting country for damages caused by an abusive lawsuit, as litigation from a remote location will inevitably cause more economic hardship which might not be compensated, especially if the plaintiffs in the initial suit are not wealthy.

In order to address the economic injustice that might be caused by lawsuits that abuse THRL – but without blocking the access to justice that it bestows upon impoverished alien litigants – legislators that offer THRL should integrate compensation mechanism into the THRL themselves, or alternatively make use of national laws that allow for sanctions against litigants,[89] and lawyers,[90] who participate in frivolous or abusive litigation. These legal mechanisms should allow for the compensation of the inviting legal system and the defendants, as part of the hearing of the initial lawsuit, and without the need for a separate procedure. The easiest such mechanism, which I would argue should be used in any case of abuse of

[89] For example, in the U.S., defendants embroiled in vexatious litigation can in turn file suit against the plaintiff for abuse of process (defined as "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, [and who] is subject to liability to the other for harm caused by the abuse of process." See Restatement of the Law, Second, Torts. 1977. The American Law Institute. Online: < http://theamazonpost.com/post-trial-brief-pdfs/brief/59b_Restatement-682.pdf>); "Malicious Use of Process" (otherwise known as "Wrongful Use of Civil Proceedings"); or under a variety of state laws enacted to compensate the defendant. Recoverable damages amount to the costs of defending the prior action, including reasonable attorneys' fees. Damages may also include compensation for injury to character and reputation, including injury to social or business standing in the community, and compensation for mental suffering and humiliation resulting from the initiation and prosecution of the prior action.

[90] For example, in the U.S., Federal Rule of Civil Procedure 11 allows for sanctions against attorneys and law firms. See FRCP 11, *supra* note 86.

THRL,[91] is that of attorney's fees shifting, by which the dismissed litigants will be obliged to compensate the defendants for their attorney's fees.[92] Moreover, the court should be able to address other expenses rising from the transnational context, such as travel costs of the defendants to the inviting country, and order the abusive plaintiffs to compensate for these as well. Finally, given that the execution of such compensatory decisions against vexatious alien litigants might be difficult, the home country of the plaintiffs should assist the defendants in recovering their loses, by respecting the decision of the inviting country and by allowing independent tort cases that will be presented to the home country's courts.

VI. Conclusion

Hopefully, the case of the abuse of transnational human rights law by divorced Israeli fathers will not become the first example of a common phenomenon, but will remain an intriguing yet anecdotal exception to future successful unilateral legislation for the benefit of all humanity. If this is the way that things will turn out, then possibly no major accommodation of THRL is necessary; we are well aware of the dangers created by translating hard cases into bad law. However, if this case study turns out to be but one example of the repeated cynical misuse of THRL by misogynists or other legally violent social movements and abusive litigants, than changes such as those suggested in Part V should be introduced, to promote the responsible enforcement of worthy unilateral human rights legislation.

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[91] As in the case of expedite dismissal, anti-SLAPP legislation and rationale can be a source of inspiration, see Barker, supra note 85, at 445-447.

[92] While in some legal systems, such as those of England and Israel, obliging the losing party to pay the winning party's attorney's fees is the rule, in the U.S. each party is expected to bear her own legal expenses, see Eisenberg, et al., *supra* note 85. This makes U.S. THRL especially vulnerable to abuse, and thus must be changed, at least in the transnational context. Notwithstanding, the U.S. had already recognized, by specific federal and state laws, exceptions to the non-shifting rule, see Issachar Rosen-Zvi, "Just Fee Shifting", 37(3) Florida State Uni. L. Rev 717, at 731-732.

In any case, I hope that men's groups in other countries will not be inspired by the international and transnational strategies employed by Israeli men’s groups, or encouraged by the current insufficient responses to these strategies by UN bodies, and the US legal system.