

**SUBSTANCE VERSUS PROCEDURE
IN THE CONFLICT OF LAWS:
ISRAEL AS A CASE STUDY**

YAAD ROTEM*

One of the most important and intriguing private international law (conflict of laws) doctrines is the substance-procedure distinction, which directs the forum court to refrain from applying foreign norms characterized as procedural even when the foreign law from which they originate should be the law applicable to the specific dispute and, instead, apply the law of the forum. However, while the rule itself is simple, drawing the distinction between substance and procedure is, at times, a complex endeavor. The purpose of this paper is to introduce the reader to the Israeli experience of recent years with employing the substance-procedure divide in the context of the conflict of laws. One who is interested in choice-of-law methodology can find in the Israeli context at least two remarkable developments that deserve attention. First, in Israel, the substance-procedure distinction gradually became a context that allowed courts to insert various policy considerations into the process of characterization, which was initially meant to be neutral and policy-free. Second, examining case law reveals a doctrinal “competition” undermining, to some extent, the relevance of the substance-procedure division. This development also highlights a methodological problem that I call “framing.” It is a problem that concerns the judicial search for the correct choice-of-law doctrine to be employed by the court when attempting to decide which law applies to a specific dispute. This paper discusses these two developments and their implications for choice-of-law methodology.

* Visiting Scholar, Center for the Study of Law & Society, University of California, Berkeley School of Law; Assistant Professor, Center of Law & Business, Ramat-Gan, Israel.

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I. INTRODUCTION

One of the most important and intriguing private international law (conflict of laws, in U.S. terms) doctrines is the substance-procedure distinction. Being the law of the land worldwide,¹ the doctrine directs the forum court to refrain from applying foreign norms characterized² as procedural even when the foreign law from which they originate is the law applicable to the specific dis-

1. See, e.g., J. Fawcett & J.M. Carruthers, *Cheshire, North and Fawcett Private International Law* (14th ed. 2008); Adrian Briggs, *The Conflict of Laws* 33-36 (2002); Restatement (Second) of Conflict of Laws § 122 (1971); Tolofson v. Jensen, [1994] 3 S.C.R. 1022 (Can.); *John Pfeiffer Pty Ltd. v. Rogerson* (2000) 203 CLR 503 (Austl.). See generally DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (Sir Lawrence Collins et al. eds., 14th ed. 2011). One should note, however, that in civil law systems, procedure is normally reserved to characterizing only issues pertaining to the actual process followed by the court. See COLLINS at 7-002; Martin Illmer, *Neutrality Matters—Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law*, 28 CIV. JUST. Q. 237, 238 (2009). A different model may also exist; for example, China has recently enacted a new conflict of laws statute that does not explicitly prescribe the substance-procedure distinction, with one exception concerning limitations. See Guangjian Tu, *China's New Conflicts Code: General Issues and Selected Topics*, 59 AM. J. COMP. L. 563, 571 (2011).

2. The paper envisions the “traditional” methodology rather than the “modern” methodology as the relevant choice-of-law method. The “traditional” choice-of-law methodology relies on a neutral process of choice of law, which begins with characterization (e.g., torts), moves to finding the related connecting factor (e.g., place of the wrong) and later localizes it to derive the applicable law (deciding that jurisdiction X was the location of the wrong, and, thus, its laws should apply). In this rather mechanical process, policy considerations cannot be employed in the face of the concrete litigated case and are restricted to the *ex-ante* formulation of a connecting factor. In contrast, the “modern” choice-of-law methodology (such as the theories of the Most Significant Relationship or Governmental Interest Analysis) relies on a more open judicial pursuit of various policy considerations. For a general discussion and analysis of the differences between the two methodologies, see generally DAVID P. CURRIE ET AL., *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* 2-311 (8th ed. 2010); SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006).

pute³ and, instead, apply the law of the forum (*lex fori*, in conflict of laws jargon).⁴ Employing the doctrine can be fairly simple, as long as the issue of characterization is resolved by the court. Here, of course, lies the problem, for making the distinction between substance and procedure is occasionally a complex endeavor,⁵ even when it is understood that the court's announcement of the correct characterization is made only within the particular legal context of the choice-of-law process.⁶ As in many other characterization set-

3. In the world of conflict of laws, a specific dispute is analogous to the atom in the physical world. In other words, it is the basic unit of "matter" to which all judicial action relates, e.g., characterization, application of a particular law, and so on. In a single litigation, parties may bring several specific disputes before the court to decide. For example, consider a hypothetical litigation in which three specific disputes arise: (1) whether a contract was executed between the parties; (2) whether that contract was breached by the defendant; and (3) the amount of compensation that the defendant must pay the plaintiff on account of the alleged breach of the contract. "Applying foreign law" means applying it to each specific dispute separately. Note, however, that in several contexts of characterization, such as the context of the substance-procedure distinction, the process of characterization often targets a norm, or a rule of law, rather than a specific dispute or a set of facts. See George Panagopoulos, *Substance and Procedure in Private International Law*, 1 J. PRIVATE INT'L L. 69, 74 (2005). When the court characterizes a specific dispute, rather than a norm, it demonstrates a partisan approach because an announcement of a procedure characterization will lead the court to immediately apply its own law while disregarding the contents of the foreign law. However, characterizing a norm, rather than a specific dispute, demonstrates a multi-sided approach because the foreign law is not ignored unless its norm is announced as "procedural." Moreover, note that another problem concerns the question of what should be characterized: a single rule or a "package" of rules. See Janeen M. Carruthers, *Damages in the Conflict of Laws - the Substance and Procedure Spectrum: Harding v. Wealands*, 1 J. PRIV. INT'L L. 323, 327 (2005) (discussing the problem as it manifests in *Harding v. Wealands*, [2004] All E.R. 280, and advocating an "unpacking" approach).

4. Phrased in this manner, the doctrine could be exposed as one of an "escape hatch" nature, which allows courts to avoid the application of foreign law even when such application is mandated *prima facie*. See CURRIE ET AL., *supra* note 2, at 39, 48-59 (describing the substance-procedure distinction as one of several "escape devices"); Adrian Briggs, *The Legal Significance of the Place of a Tort*, 2 OXFORD U. COMMONWEALTH L.J. 133, 136 (2002) (indicating the tendency of courts to manipulate the substance-procedure distinction in the absence of a formal legal exception to prevent the application of foreign law).

5. For recent observations of that effect, see Anthony Gray, *Loss Distribution Issues in Multinational Tort Claims: Giving Substance to Substance*, 4 J. PRIVATE INT'L L. 279, 280-81 (2008); Panagopoulos, *supra* note 3, at 74; Janeen M. Carruthers, *Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages*, 53 INT'L & COMP. L.Q. 691, 694 (2004). For an earlier observation, see HERBERT F. GOODRICH, *HANDBOOK ON THE CONFLICT OF LAWS* 158-60 (1927).

6. The distinction between substance and procedure prevails in other legal contexts as well (which are not discussed in the current paper). For example, under U.S. law, substance must be distinguished from procedure for the purpose of the Erie Doctrine, according to which federal courts exercising diversity jurisdiction must apply state substantive law and federal procedural law. See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Retroactive effect is normally extended only to statutes, administrative regulation or even court rulings that are "procedural" rather than "substantive." See, e.g., Tobias B. Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2104-05 (2008). Of course, referring to a norm as substantive or procedural in one legal context certainly does not mandate an identical characterization in the context of conflict of laws. See Walter W. Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 345-46 (1933); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."); COLLINS, *supra* note 1, at 158.

tings, parties to the adversarial proceeding tend to argue zealously before the court for a characterization that best serves their own personal interest in the case, making the court's characterization announcement greatly important and even, at times, the one judicial decision determining the entire case.

Two alternate problems undermine any effort to discover the correct characterization in the context of the substance-procedure distinction. Those who believe that characterization should be neutral⁷ and can actually be derived a priori, as mandated by the traditional choice-of-law process, face the problem of distinguishing “matter” or “right of action” (which call for a characterization announcement of substance and application of the relevant law (*lex causae*), which, in practice, would, of course, be a foreign law) from “manner” or “remedy” (which call for a characterization announcement of procedure and respective application of the law of the forum).⁸ Alternatively, those who accept the notion that characterization can almost never be announced a priori⁹ face the problem of deciding what the *rationale* driving the substance-procedure distinction should be and then, according to the rationale chosen, how to apply it to the circumstances of the litigated case. The methodological approach adopted in this latter alternate context is simple: characterization should be employed in a *functional* manner, allowing the court to announce “substance” or “procedure” depending on the way in which a particular characterization would better comport with the rationale in question. For example, if the chosen rationale is to prevent the possibility of foreign laws burdening or hampering the ongoing work of the forum court when this court executes a civil proceeding, then any complex foreign norms, or those that would become a burden to the

7. Neutrality is here defined as the attempt to refrain from any pre-existing inclination towards either the forum law or the foreign law during the choice-of-law process. It is a basic tenet of the traditional choice-of-law process, which envisions any legal relationship as having a connection to one territory and the laws of that territory.

8. See, e.g., *Harding v. Wealands*, [2006] UKHL 32, [sec. 83] (Lord Carswell); see also discussion and authorities in Gray, *supra* note 5, at 281-82 (discussing the context of a specific dispute on limitation period).

9. See, e.g., Cook, *supra* note 6, at 343-44 (noting that for the purpose of characterization, one should “admit that the ‘substantive’ shades off by imperceptible degrees into the ‘procedural’, and that the ‘line’ between them does not ‘exist’, to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose . . .”). Cook also notes that the question is not where one can find the objective line separating substance from procedure but where to draw the line. *Id.* at 335. Furthermore, even attempts to draw the line based on identifying the purpose of the norm—thus distinguishing between norms that regulate behavior during litigation versus behavior unrelated to litigation—are questions that cannot escape this difficulty, as some norms do both. Consider, for example, a statute of limitations, the purpose of which is both to allow defendants to free reserved resources they kept for reasons of possible exposure to liability (a substantive behavior) and to prevent defendants for having to defend themselves with out-of-date evidence (a procedural behavior).

forum court, should be characterized as procedural to assure that they do not apply, and local norms that do not burden the local court apply in their stead.¹⁰

Having nothing to contribute to the making of the substance-procedure characterization in an a priori fashion, joining those who favor a rationale-based characterization to distinguish substance from procedure in the conflict of laws context,¹¹ and exploring in particular a jurisdiction which, notwithstanding, adheres to the latter methodology, this paper aims to describe the Israeli experience of recent years with employing the substance-procedure distinction as a conflict of laws doctrine.¹² In this context, one interested in choice-of-law methodology can find at least two remarkable developments that should be noted by lawmakers and scholars contemplating the modern form that the substance-procedure doctrine should assume. These two developments have, as of late, manifested in Israeli case law concerned with a timely issue on which many courts worldwide currently dwell: the appropriate usage of local collective redress mechanisms—specifically, the class action and the derivate action mechanisms—when the case at hand is deeply entwined with foreign elements.¹³

The first important development concerns the gradual inclusion of various policy considerations in the process of characterization for the purpose of distinguishing substance from procedure. Indeed, in Israel, the substance-procedure distinction gradually became a context that allowed courts to insert various policy

10. For an elaboration, see the discussion *infra* Part II.A.

11. See, e.g., Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 325 (1990) (arguing that characterization of substance versus procedure should depend on a purposive analysis); Russell J. Weintraub, *Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse*, 42 TEX. INT'L L.J. 311, 312 (2007) (noting that “in deciding when to apply the ‘procedural’ label in the context of choice of law, the question is: what justifies a forum in insisting on applying its local rule when under the forum’s choice-of-law rule the law of another jurisdiction applies to all ‘substantive’ issues?”). Adopting a rationale-based characterization to distinguish substance from procedure also solves the problem of deciding what to characterize—a specific factual dispute or a rule of law. For a discussion of this problem, see Panagopoulos, *supra* note 3, at 74.

12. Building on an English common law platform, over the past sixty years, Israel has developed, albeit slowly and gradually, an independent conflict of laws jurisprudence. In recent years, however, Israel’s conflict of laws jurisprudence has evolved considerably, as more and more cases decided by the courts generate a more active discussion than ever before. Resorting to some unavoidable simplification, one could describe Israel as a jurisdiction formally upholding a “traditional”, rather than a “modern”, approach to choice of law. Still, Israel is also torn between its proclaimed commitment to the traditional approach and the very familiar appeal of modern approaches, such as Governmental Interest Analysis or the Most Significant Relationship theories, which endorse a more rational decision-making process. Thus, for example, while the Israeli Supreme Court has formally rejected the modern approaches in the context of torts, it has, nevertheless, employed these very techniques to decide subsequent cases. See CA 1432/03 Yionon Yitzur Ve’Shivuk Mozarei Mazon Ltd. v. Kara’an 59(1) PD 375-76 [2004] (Isr.); CA 4060/03 The Palestinian Authority v. Dayan [2007] (Isr.); and CA 3299/06 Yubiner v. Skaler [2009] (Isr.).

13. See *infra* Part III.

considerations into a process that was initially meant to be neutral and policy-free. Of course, when a forum court turns to the aid of policy considerations, it will naturally opt for those considerations with which it is most sympathetic. These considerations are likely to be those advocated by substantive forum law. The result is evident: the substance-procedure distinction becomes a back door through which the forum law may enter and be applied, even to specific disputes to which foreign law should apply.¹⁴

Against this backdrop, I will argue that while the decision regarding the characterization of substance versus procedure is perhaps not one-dimensional, the choice of regulation (i.e., the dilemma between applying forum law or foreign law) should, nevertheless, be limited to entertaining policy considerations of an *institutional* nature only. To be sure, such policy considerations should pertain to, for example, the forum court as an institution, the identity of the parties litigating, whether they are individuals or a class and their existing alternative fora. Other policy considerations, including those that concern issues of substantive law (e.g., deterrence) or the process of choice-of-law, should be excluded.

The second important development demonstrated in the Israeli context concerns doctrinal “competition” undermining, to some extent, the relevance of the substance-procedure distinction. Perhaps due to the intellectual hardship involved in making the substance-procedure characterization or perhaps due to other more mundane reasons, the substance-procedure distinction is sometimes “replaced” with other conflict-of-laws doctrines, such as the public policy doctrine or the presumption against extraterritoriality.¹⁵ In other words, when contemplating the application of forum or foreign law, courts may prefer to conduct the discussion in doctrinal contexts other than the substance-procedure distinction. This development also highlights a methodological problem that I call “framing.” It is a problem that concerns the search for the correct choice-of-law doctrine to be employed by the court when attempting to decide which law applies to a specific dispute.

The remainder of the paper is organized as follows: Part II introduces the quest for a rationale to mobilize the substance-procedure distinction. Part III discusses the doctrinal competition affecting the judicial use of the substance-procedure distinction.

14. Note, however, that the current paper does not concern any undisclosed disposition of courts to utilize the substance-procedure distinction as a sort of “escape device” to evade the application of foreign law. See also note 4, *supra*. Instead, the paper focuses only on professed judicial policy and the straightforward use of policy considerations made by courts to decide the substance-procedure distinction.

15. See *infra* Part II.

Both parts focus on a general, comparative analysis. The Israeli experience is mentioned only in as much as it offers a unique contribution. Part IV employs the Israeli context to outline several emerging themes with regard to the substance-procedure distinction and the suggested approach that ought to be taken.

II. THE QUEST FOR A RATIONALE

As mentioned above, the functional use of the substance-procedure distinction is ubiquitous, but for what end precisely? From examining comparative case law, one can easily identify several possible rationales to explain the existence of the substance-procedure distinction. However, it is not a simple task to trace a discussion of the legitimacy of each of the following rationales or of their interaction.

Consider the various rationales suggested as engines to mobilize the substance-procedure characterization.

A. Power

From a historic viewpoint, the substance-procedure distinction was likely formed to promote a rather narrow rationale. Like any other governmental agency, the court does not enjoy unlimited power. When asked by the plaintiff to impinge on the defendant's assets or rights, the court does not enjoy unlimited power. Thus, although the case before the court may be entwined with foreign elements, the forum court nevertheless lacks power to extend remedies that it is not authorized to issue by local law. In other words, the court's collection of remedies does not expand merely because the case before it is of an international nature. Thus, it has been noted that "[t]he *lex fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the *lex fori* must regulate remedies, because the court can only give its own remedies. . . ."¹⁶

16. See *Boys v. Chaplin*, [1971] A.C. 356, 394 (Lord Pearson).

B. Inconvenience

A more functional reason to explain the substance-procedure distinction is, again, a rather narrow rationale, protecting the local court from being unduly burdened and inconvenienced by the need to apply foreign law to specific disputes.¹⁷ Facing the need to apply foreign law in a particular litigation, the rationale echoes “an obvious practical necessity”¹⁸ and envisions situations in which the forum is called to apply foreign law even when application of such foreign law burdens the court immensely.

In this context, one can inexhaustibly depict several scenarios, which are addressed by the literature:

(1) The forum entertains a different procedure than the one that exists under the *lex causae*. A classic example would be the issue of trial management. Consider a defendant in a judicial system in which civil litigation takes place before a judge who argues that the complaint against him should be heard before a jury (suppose the defendant is of foreign domicile and the complaint was filed against him on account of a tort that occurred in the foreign jurisdiction, which bestows upon defendants the right to be adjudged by a jury of their peers). Obviously, from an institutional viewpoint, the courts at the forum are incapable—even physically—of conducting a trial in such manner, and thus, characterizing the issue or dispute regarding trial management as procedural brings with it the application of forum law and rejection of the defendant’s argument.¹⁹ It has been further argued in this context that when considering the doctrinal justification for entertaining the distinction between substance and procedure, one should keep in mind that certain procedural norms tend to be rather complicated to begin with and that interweaving such norms into the existing procedures of the forum would be too burdensome to the local court.²⁰

(2) The forum does not have any procedure, as the forum does not have a cause of action to which such a procedure would be attached. An example would be a case in which the plaintiff files a

17. See COLLINS, *supra* note 1, at 158; Cook, *supra* note 6, at 344 (“[O]ur problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?”). For a detailed history of the substance-procedure distinction, see Illmer, *supra* note 1, at 239-41; Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 804-11 (2009-2010).

18. See William E. Beckett, *The Question of Classification (“Qualification”) in Private International Law*, 15 BRIT. Y.B. OF INT’L L. 46, 66 (1934).

19. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122-44 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 594 (1934).

20. See Carruthers, *supra* note 5, at 692.

complaint to the court, building his case upon a cause of action unknown to the forum law and relying accordingly on a special procedure, which is, of course, also unknown to the forum.

(3) There is uncertainty as to the nature of procedure to be employed by the forum, particularly prior to the trial commencing and before the relevant *lex causae* has been chosen, pleaded, and proven. In such a case, one can only wonder which procedure the litigants should approach the court to begin with.

(4) Another situation that falls under this category of inconveniencing the forum court concerns the issue of *dépeçage*, i.e., the possible split and application of different laws to different specific disputes that arise during a single litigation.²¹ Once courts are willing to entertain such a split, a question arises as to which law would regulate the procedure in such litigation. Suppose, for example, that pertinent choice-of-law rules direct the UK forum to apply French law to one specific dispute in a particular litigation (e.g., a dispute regarding the question of capacity to enter a contract) and Japanese law to another specific dispute (e.g., a dispute over interpretation of the contract). In such a case, can either of these two foreign laws be chosen to regulate matters of procedure, such as trial management? Even if one would be willing to consider such an option, which calls for having the trial management norms of one jurisdiction apply alongside the substantive norms of a different jurisdiction, how should the forum court decide which of the two foreign laws to actually apply? Should the forum court prefer the trial management law of one of these jurisdictions to the trial management law of the other? The inevitable conclusion that solves this problem and makes sense is to resort to the forum law in regard to matters of procedure.²²

(5) A forum court, the caseload of which consists of many disputes that give rise to choice-of-law questions in general and to the application of foreign law in particular, cannot be expected to apply, for example, a French procedure in one litigation, a Japanese procedure in a second litigation, and a Canadian procedure in a third litigation.²³

Yet, despite the many possible scenarios, one could identify a change transpiring with regard to the scope of this rationale and the manner in which it is implemented. It has recently been commented in the literature that courts seem to have begun to realize that applying this rationale too widely would frustrate conflict of laws principles, particularly the two goals of deterring

21. See COLLINS, *supra* note 1, at 1211; CURRIE ET AL., *supra* note 2, at 244, for an explanation and discussion.

22. See Gray, *supra* note 5, at 284.

23. See Beckett, *supra* note 18, at 66.

forum shopping (with regard to selection of venues by plaintiffs) and neutrality (with regard to the choice-of-law methodology).²⁴ In other words, being too protective of the forum court in this context (which means that the “procedure” tag is attached too hastily) comes at a price—the forum’s own conflict of laws agenda is being increasingly frustrated. In accordance with this theme, adopting neutrality as a criterion for striking the substance-procedure characterization has been suggested.²⁵ Neutrality, it has been suggested, is to be “determined by the abstract nature of the matter in question, not by reference to the concrete case. . . .”²⁶ To illustrate, consider the issue of estoppel. Resorting to neutrality brings about the conclusion that while estoppel-by-record should be characterized as procedural and governed by forum law, as it aims to prevent contradictory judicial decisions, other forms of estoppel are concerned with the decision on the merits as they relate to the specific dispute and should thus be regarded as substantive.²⁷

C. *Expectations*

A rationale similar to the inconvenience rationale, yet different in principle, concerns the litigants’ expectations. It has been argued that the forum should apply its own law to specific disputes over procedure because such application comports to the litigants’ post-dispute expectations.²⁸ Such rationale particularly addresses the plaintiff, who chooses the forum court and thus must accept upon himself the forum court’s procedure.²⁹

D. *Efficiency*

Over the years, the rationale for employing the substance-procedure distinction has evolved in several directions. One of main directions can be summarized as enhancing efficient litigation. In our modern times, matters of procedure are hardly considered insignificant,³⁰ so one would find it difficult to argue that matters of procedure should be decided according to forum

24. See COLLINS, *supra* note 1, at 178; Gray, *supra* note 5, at 283 (n.22); Illmer, *supra* note 1, at 250.

25. Illmer, *supra* note 1, at 246-47.

26. *Id.* at 246.

27. *Id.* at 257.

28. See Carruthers, *supra* note 5, at 693-94 (identifying Wolff as endorsing this rationale).

29. *Id.*

30. See, e.g., Main, *supra* note 17 (generally emphasizing that “procedural” norms are powerful enough to undermine “substantive” rights).

law simply because they are unimportant. However, it is possible to argue that application of forum law in certain matters is justified as a means to save the time and costs associated with applying a foreign law in a civil litigation. Indeed, a good argument can be brought in support of refraining from applying foreign law to each minor and unimportant dispute that arises during the trial (e.g., regarding the type of paper on which the parties' arguments should be typed). In other words, the rationale calls for courts to economize on the costs associated with the application of foreign law.

Efficiency in this context means simplifying as much as possible the adjudication of the dispute and minimizing its costs. First, from the court's viewpoint, courts are normally unfamiliar with any foreign law whose application is considered and, when unnecessary, should not be forced to learn that law, its intricacies, its ideology, etc. Such a learning process entails a waste of precious judicial time. Moreover, regarding the efficiency rationale, the choice-of-law process itself may be considered quite expensive in terms of judicial time wasted, as many judges dislike this area of the law. Characterizing a norm or a specific dispute as procedural, rather than substantive, has, in practice, the immediate effect of applying forum law to it, without having to enter into the choice-of-law process.

Furthermore, also when viewed from a social perspective that concerns itself with the litigating parties' expenses, the costs of proving foreign law can be quite significant, particularly in those systems of law in which foreign law is an issue of fact rather than of law. In these legal systems, proving foreign law necessitates evidence—normally the testimony of witnesses who are experts on the foreign law in question—that is relatively expensive to obtain. Expert witnesses are required to submit written opinions and are later called into court to testify on such opinions and be cross-examined. The entire process becomes even more expensive if one of the parties to the litigation calls as his expert witness a foreign witness (e.g., a foreign law professor or lawyer). Undoubtedly, conventional treatment would include providing such a witness with airfare, proper hotel accommodations, and dining. Application of foreign law may mandate employing more than one expert witness, as litigants would like their expert to rebut the testimony of their opponent's expert. When two experts disagree on a matter of which the court has little understanding—in this case, the contents of a particular foreign law—one can expect that the court would react by appointing a third expert, this time on behalf of the court.

Whether the trial takes place in a system in which legal expenses cannot be shifted and parties to a civil litigation bear their own legal expenses or in a system in which legal expenses are borne by the loser at the trial, duplicate expert testimonies are, at minimum, socially wasteful. Indeed, assuming that the purpose of the litigation is, first and foremost, to find the truth and uphold a just result between the litigating parties, one wishes to achieve these goals as cheaply as possible.

Of course, a question arises as to how courts should guide themselves in promoting the efficiency rationale. In other words, the question is what criterion courts should employ to decide that a characterization of procedure is in order for reasons of efficiency. Obviously, some sort of cost-benefit analysis is necessary, but what type of analysis? An answer has yet to be found in either case law or the literature.

E. Tools

Perhaps the most intriguing and controversial direction in which the substance-procedure distinction has advanced in the conflict of laws context—mostly in systems retaining the traditional choice-of-law doctrine—is a direction that is normally only implicitly mentioned: a policy-oriented rationale. On several occasions, it has been posited that the substance-procedure distinction can be employed by the court executing the choice-of-law decision as a tool to allow various policy considerations to be inserted into the neutral and, thus, perhaps unsatisfying choice-of-law process.³¹

The idea underlying this rationale is to use the substance-procedure distinction in a functional manner to manipulate the choice-of-law process. The substance-procedure distinction, as is argued by advocates of this rationale, should be perceived merely as a tool the purpose of which is to enrich the choice-of-law process

31. One may, perhaps, find clues to the existence of such an approach even in English law. See *Roerig v. Valiant Trawler Ltd.*, [2002] 1 W.L.R. 2304, 2315 (“In my view the question whether deductions of benefits should be made is likely to be bound up both with policy considerations and with the way in which damages under the particular head are to be assessed overall . . .”) (Waller, L.J.); *Harding v. Wealands*, [2007] 2 A.C. 1, 8 (“A wide definition of what is procedural tends to defeat the purpose of the law of the country whose law is to be applied and encourages forum shopping, reduces comity and gives rise to anomalous and unjust results . . .”) (Lord Hoffman); Hakeem Seriki, *Harding v. Wealands—The Final Word on Assessment of Damages Under English Law?*, 26 CIV. JUST.Q. 28, 29 (2007) (arguing that “a better reason for classification [as procedure] is that an English court must retain control over the remedies it gives to a litigant in its jurisdiction, and one way of achieving this is by only giving remedies allowed under English law”). However, a more blatant articulation of this rationale appeared in an Israeli case: *CA 352/87 Greifin Corp. v. Kur Sa’har Ltd.* 44(3) PD 45, 76-77 [1990] (Isr.) (Netanyahu, J.).

with policy considerations. These policy considerations normally belong to one of two groups: substantive policy considerations or policy considerations that concern choice-of-law methodology.

Consider a rather extreme example to illustrate the importance of this rationale and the manner in which courts have applied it. Suppose a vessel documented in Panama is the subject of two types of claims filed before the forum court by creditors of the vessel's owners.³² Creditor *S*'s claim is a secured claim, as a ship mortgage has been recorded in his favor to guarantee that the underlying claim against the vessel's owner is paid. Creditor *U*'s claim is seemingly an unsecured claim, but Creditor *U* argues that the claim arose after providing the vessel with a service (e.g., supplying the food, towing, repairing the vessel), the result arguably being the creation of an (unrecorded) maritime lien³³ securing payment of his claim. The two creditors, whose claims against the vessel are mutually excluding because the total sum of the claims exceeds the vessel's net worth, are in dispute over two specific issues. First, is Creditor *U*'s claim indeed secured by a maritime lien? If Creditor *U*'s claim is not guaranteed with a maritime lien, it is merely an unsecured claim, which Creditor *S*'s claim obviously outranks in the order of priorities. Indeed, one can understand Creditor *U*'s position: the only way Creditor *U*'s claim can *perhaps* outrank Creditor *S*'s claim is if Creditor *U*'s claim is guaranteed with a maritime lien. Otherwise, Creditor *U*'s claim, as an unsecured claim, is to be paid only once Creditor *S*'s claim is paid in full (which in light of the limited worth of the vessel, is of course an impossibility). Second, if Creditor *U*'s claim is indeed secured with a maritime lien, which of the mutually-exclusive secured claims should prevail? Does creditor *S*'s claim outrank Creditor *U*'s claim or vice versa? Which of two claims ranks higher on the order of priorities?

Issues of choice of law arise as it becomes clear that, with regard to each of these specific disputes, each creditor holds a different position as to the law that applies. Creditor *U* argues that the forum law applies to the first specific dispute, thus acknowledging the claim as being secured by a maritime lien. Creditor *S*

32. See, e.g., *Bankers Trust Int'l Ltd. v. Todd Shipyard Co.*, [1980] 3 All E.R. 197 (P.C.) (UK); Greffin, *supra* note 31.

33. A maritime lien is a statutory, normally unrecorded lien, created even in the absence of a contractual agreement between the creditor and the debtor (the vessel's owners), the purpose of which is to secure payments owed by the vessel's owners to his otherwise unsecured creditors when their claims originate as a result of the vessel incurring operating expenses. Creditors holding a maritime lien can sue the vessel *in rem* for its value as well as its owners *in personam*. See generally Raymond P. Hayden & Kipp C. Leland, *The Uniqueness of Admiralty and Maritime Lien: The Unique Nature of Maritime Liens*, 79 TUL. L. REV. 1227 (2005).

argues that this dispute is, instead, regulated by the law of State X, which does not acknowledge a maritime lien when the claim originates as a voluntary service rendered by the claimant to the vessel (as opposed to a claim of an involuntary creditor, i.e., resulting from a tortious act). As for the second specific dispute, which concerns the order of priorities between the two claims, Creditor *U* argues for the application of a law according to which maritime liens outrank any ship mortgage, while Creditor *S* argues for the application of the forum law, which recognizes the superiority of the ship mortgage over the maritime lien.

How should this case be decided according to the policy considerations insertion rationale? Israeli law, for example, supplied an answer. In a case decided by the Israeli Supreme Court in 1990³⁴ (*Greifin v. Kur Sa'har Ltd.*), Justice Shoshana Netanyahu introduced the rationale and ruled that both specific disputes should be characterized as procedural and, thus, decided according to the law of the forum (which in that case, while acknowledging Creditor *U*'s claim secured status, mandated that it be outranked by the ship mortgage, thereby causing Creditor *S*'s claim to outrank Creditor *U*'s claim). The Justice, who was joined on this principle by Chief Justice Meir Shamgar,³⁵ explained that the "procedure" characterization ought to be chosen due to certain specific policy considerations, which in the case at hand, should be taken into account. For example, regarding the first specific dispute, which concerned the question of a maritime lien being formed in the first place, the Justice ruled that at least two policy considerations call the court to opt for a "procedure" characterization.³⁶ The first was the need to downsize the number of maritime liens.³⁷ The Justice stated that while the forum law—i.e., Israeli law—is known for having a small number of maritime liens, which as a matter of maritime law or property law are generally considered unwarranted and welfare decreasing, characterizing the dispute as one of substance may result, at least in future cases, in application of a foreign law.³⁸ However, application of foreign law may lead to a far greater number of maritime liens being acknowledged by the forum court than "is warranted." Second, the Justice pointed to a need to simplify the choice-of-law process.³⁹ In

34. *Greifin*, *supra* note 31.

35. *See id.* at 59 (Meir Shamgar, C.J.) (commenting that "sometimes the characterization as procedure serves as a tool, the purpose of its utilization is to apply forum law. It happens, when policy considerations require the application of forum law to the specific dispute at hand").

36. *Id.* at 45, 54.

37. *Id.* at 45, 60.

38. *Id.*

39. *Id.* at 45, 59.

this context, Justice Netanyahu stated that when considering application of foreign law to the issue of creation of an entitlement, one familiar with choice-of-law methodology should think of the next stage (i.e., ranking the entitlement according to an order of priorities) and refrain from enabling the application of a foreign law.⁴⁰ Indeed, the Justice explained that because the dispute concerning the order of priorities should be regulated by forum law, the dispute regarding the creation of the entitlement should as well.⁴¹ Otherwise, the court may have to decide where along the order of priorities an unfamiliar entitlement should be ranked. Because the order of priorities is regulated by forum law and to prevent confusion, forum law should also regulate the question of whether an entitlement of some sort exists at all.

One should note that those advocating the idea of utilizing the substance-procedure distinction as a tool to insert policy considerations into the choice-of-law process are actually arguing for an utterly open and disclosed manipulation of this process—one that differs immensely from any hidden manipulation of the choice-of-law process to which critics sometimes refer.⁴² Thus, the policy considerations that are inserted into the choice-of-law process should be, it is argued, explained by the court making the choice-of-law decision and disclosed for review.

In Israel, the appearance of the policy insertion tool rationale had an effect, for example, in the context of characterizing collective redress mechanisms as either procedural or substantive. In a recent case, a Tel-Aviv District Court was called to remove in a summary judgment a class action lawsuit filed by 512 residents of Gush Etzion, a collection of Jewish settlements located south of Jerusalem, against the Israeli Electric Company following ongoing and repetitive disruptions to the supply of electricity to the plaintiffs' homes.⁴³ The defendant in this case argued that the Israeli Class Actions Law of 2006 does not apply to events that occurred at the plaintiffs' place of residence, which—for choice-of-law purposes—is not considered Israeli territory.⁴⁴ Rejecting the defendant's argument and accepting the plaintiffs counter-argument that the Class Actions Law of 2006 should be characterized as procedural for the purpose of deciding its application to the current

40. Greifin, *supra* note 31, at 45, 73.

41. *Id.* at 45, 74.

42. *See, e.g.,* Boys v. Chaplin, *supra* note 16, at 392 ("It may be that this appeal can be decided, quasi-mechanically, by the accepted distinction between substance and procedure I have no wish to depreciate the use of these familiar tools. In skillful hands they can be powerful and effective") (Lord Wilberforce).

43. Class Action (Tel Aviv) 1745-09 Israel Electric Co. v. Fischman (Nov. 21, 2010).

44. Earlier arguments made by the defendant, regarding both want of jurisdiction by the Israeli courts and forum inconvenience, were also rejected by the District Court.

lawsuit, the District Court relied on the above-mentioned Supreme Court's ruling in the Greifin case and decided that the Class Actions Law of 2006 should indeed be characterized, at least for the purpose of the current case, as procedural. The District Court emphasized that in doing so, it is guided by two major policy considerations. The first is the need to allow the plaintiffs to bring their case to court in the form of a class action lawsuit, rather than in the form of 512 separate individual lawsuits, which would unnecessarily burden the court system. The second is the plaintiff's constitutional right to equality, which mandates that the plaintiffs be accorded the same entitlements as any other Israeli resident, including the entitlement to file a class action lawsuit under the auspices of the Class Actions Law of 2006.

III. THE DOCTRINAL COMPETITION

A careful reading of case law, one that attempts to step back for a wider perspective, reveals that on occasion, while expected to discuss the substance-procedure distinction when contemplating the application of foreign or forum law, courts prefer to concern themselves with other choice-of-law doctrines. In particular, substitute doctrinal contexts for the substance-procedure distinction seem to be the doctrines of public policy and the presumption against extraterritoriality. Consider each of these doctrines separately.

A. Public Policy

The traditional choice-of-law process calls upon the judge to characterize the specific dispute or disputes brought before him or her and with regard to each dispute follow the connecting factor associated with the resulting characterization (and then localize that factor to decide the exact territory whose law should apply). The judge is, thus, directed to apply the law of one jurisdiction to the characterized specific dispute. However, if, at the end of this process, the judge reaches the conclusion that the applicable law is foreign, he or she may, nonetheless, refrain from applying that law by ruling that such an application would be inconsistent with the forum's public policy.⁴⁵

The public policy doctrine ("order public international") prevents the application of foreign law (or judgment) in as much as its application is inconsistent with what the forum considers to be "some fundamental principle of justice, some prevalent conception

45. See, e.g., COLLINS, *supra* note 1, at 8-17.

of good morals, some deep-rooted tradition of the common weal.”⁴⁶ In other words, in the conflict of laws, the public policy doctrine is the forum’s way of stating that the forum’s tolerance of foreign laws (or judgments) and the forum’s respective willingness to apply them is not without limits. A particular foreign law, whose application under the circumstances is intolerable from the forum’s viewpoint, shall not be applied. However, the public policy doctrine also reveals that the forum is willing, at least to a certain extent, to tolerate applicable foreign legal arrangements and regulations that differ from the forum’s own standard norms. Indeed, mere difference between an applicable foreign legal norm and the forum’s own norms should ordinarily be an insufficient cause to ignore the foreign norm and should *not* bring about the application of the forum’s norms instead of the foreign norm.

While always suspect due to its propensity to generate uncertainty because of its flexible nature,⁴⁷ the doctrine is an important escape hatch, allowing the forum court to avoid being forced to apply a foreign law which, in light of its contents, the forum court considers unwarranted. Some consider the public policy doctrine to be rather useful.⁴⁸ Thus, an argument put forward as early as the 1940s called for replacing the substance-procedure distinction with a wider application of the public policy doctrine.⁴⁹ Such a doctrinal replacement would eliminate the need to grapple with the substance-procedure distinction but would, nonetheless, enable the forum to apply its own law to the specific issue. Most legal systems, however, have not adhered to this proposal and have not abandoned the substance-procedure distinction.

Regardless, courts naturally tend to gravitate toward practical solutions to the legal problems they face, and the problem of the uncertain public policy doctrine is no different. In an attempt to transform the doctrine into a more practical and predictable tool, it has been recently argued that the public policy doctrine should continue to evolve along an already existing trend of being

46. *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (N.Y. 1918).

47. See, e.g., Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in *the Conflict of Laws*, 56 COLUM. L. REV. 969, 973 (1956); Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. PRIVATE INT’L L. 201, 202-03 (2008).

48. See, e.g., *Enderby Town Football Club Ltd. v. The Football Ass’n Ltd.*, [1971] 1 All E.R. 215, 219 (Lord Denning) (noting the ability of the doctrine, which was famously compared to an “unruly horse,” to “jump over obstacles . . . and come down on the side of justice . . .”).

49. See Edmund M. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944) (advocating a moderate version of the argument, he suggests that the law of the locus should apply to all matters of substance [except where its application would violate the public policy of the forum] and to all matters of procedure that are likely to have a material influence upon the outcome [except when its application violates the public policy of the forum or when “weighty practical considerations” demand the application of the law of the forum]).

employed to block applicable foreign norms only sparingly. To that end, it has been suggested that three principles should serve to guide the court.⁵⁰ Consider these principles in detail as understanding them can, at the very least, shed light on the nature of the public policy doctrine. The first principle is proximity.⁵¹ The forum court should examine its proximity to the specific dispute to justify the execution of regulatory authority. For example, when the litigating parties are both foreigners who are disputing a foreign transaction with purely foreign implications, the forum should normally not consider itself in near proximity to justify invoking public policy considerations. The second principle is relativity.⁵² The forum court should examine the nature of the norms from which the applicable foreign law diverges, particularly the extent to which such norms are perceived by the forum as absolute or merely local. For example, a foreign law violating internationally recognized human rights appears to be inherently inconsistent with the forum's public policy, whereas a norm entertained exclusively by the laws of the forum should not normally be considered inconsistent with the latter's public policy. The third principle concerns the seriousness of the breach.⁵³ The forum court should examine the extent of the divergence between the applicable foreign law and the protected norm. In particular, the forum court must examine whether the breach is minor and technical or fundamental. For example, a slight difference in the scope of money damages awarded by the foreign law in comparison to damages normally awarded by forum law should not normally constitute a serious breach of any norm and, thus, should not trigger the public policy doctrine.

B. Extraterritoriality

The presumption against extraterritoriality is preoccupied with the extraterritorial application of local laws—particularly when the purpose is regulation—to cases having contact with foreign jurisdictions. The doctrine calls upon the forum court to construe local regulation as having no application outside the territory of the forum unless a contrary legislative intent can be inferred.⁵⁴

50. See Mills, *supra* note 47, at 210-18.

51. See *id.* at 210.

52. See *id.* at 212.

53. See *id.* at 218.

54. See, e.g., *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2877 (2010) (U.S. doctrine with relation to federal statutes); Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011) (criticizing the U.S. Supreme Court's decision for leaving a loophole that allows extraterritorial application: while the

The doctrine mirrors a merger of two rules of construction⁵⁵: first, the rule according to which statutes should be construed not to violate international law, and second, the rule according to which jurisdiction is generally territorial. The presumption's rationale derives from both a "horizontal" (i.e., vis-à-vis other jurisdictions) and "vertical" (i.e., vis-à-vis a particular litigant) fairness and utility perceptions willingly adhered to by the forum. These perceptions jointly call upon the forum to limit the application of its laws in the global context.

The presumption against extraterritoriality can also replace the substance-procedure distinction, in as much as one of the parties to the litigation (usually the plaintiff, who filed suit with the forum court for that purpose) seeks the application of forum law for the purpose of having a particular local regulation apply to govern his relationship with his opponent. An example would best illustrate this observation. In recent years, courts around the world have debated the question of global class actions and of other collective redress mechanisms, such as the derivative suit mechanism.⁵⁶ In Israel, for example, a District Court was recently called to approve the filing of a derivative suit brought by Israeli minority shareholders of a company incorporated in the Dutch Antilles (for tax purposes) against the company's controlling shareholders its and officers, all of whom were also residents of Israel.⁵⁷ The complaint against the defendants focused on allegations of misconduct by the defendants, which allegedly inflicted serious economic damage on the company.

Examined from the perspective of the substance-procedure distinction, the question that the forum court must answer is whether to characterize as procedural (and, thus, subject to forum law) one of the following: the derivative action certification mechanism

presumption can indeed be rebutted, it can also be declared inapplicable if shown that the case at hand is not of foreign but of local focus); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465 (discussion before the U.S. Supreme Court's decision in the Morrison case); Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071 (2010) (same).

55. See William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687 (2011).

56. In corporate law, a derivative action mechanism allows minority shareholders and, in certain jurisdictions, single directors or even creditors, to file and litigate on behalf of the corporate entity a lawsuit against an insider (e.g., a presiding or former director, officer, or controlling shareholder) or a third party whose action has allegedly injured the corporate entity. The derivative action is an essential and well-known corporate governance device, the purpose of which is to ensure that agency problems that inherently trouble corporations do not hamper attempts to obtain redress from wrongdoers whose actions have injured the corporation. For a general discussion, see, e.g., ARAD REISBERG, *DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE* (2007); DEBORAH A. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE* (2011-2012).

57. Derivative Suit 19646-04-10 Wilson v. Imagest Int'l N.V. (May 15, 2011) [hereinafter Wilson].

itself, the relevant part of the foreign law that concerns derivative action certification, or any specific dispute regarding derivative action certification.⁵⁸ If the court answers to the affirmative, then it should apply its own law. Otherwise, the *lex causae* ought to apply, which, in most cases, would no doubt be the foreign law (or otherwise, the parties would not have disputed over the matter). In the case at hand, the *lex causae* was determined to be the law of the place of incorporation.⁵⁹

Examined from the perspective of the public policy exception, the question that the forum court must answer is whether applying the relevant part of the foreign law (i.e., Dutch Antilles law) that concerns derivative action certification (or lack thereof) is inconsistent with the public policy of the forum. Again, if the court answers in the affirmative, it should apply its own law. Otherwise, the foreign law should apply.

Examined from the perspective of the presumption against extraterritoriality, a different question arises: can the forum court apply its own law to the specific dispute(s) regarding derivative action certification, taking into consideration the fact that (at least) the corporation is foreign? Does the forum's regulation on derivative action certification have such extraterritorial application? Has the forum legislator intended to apply its law on derivative action certification in a case such as the one before the court?

The Israeli court decided to frame the matter brought before it as one of extraterritoriality rather than to discuss the substance-

58. Recall that as far as characterization for the purpose of striking the substance/procedure dichotomy is concerned, it is difficult to pinpoint the subject of characterization. Should the court characterize the legal institution at hand (i.e., the derivative action certification mechanism), the foreign allegedly applicable norm, or the specific dispute that the parties raise? However, in as much as characterization is mobilized with a concrete rationale, and not *a priori*, there seems to be little practical importance in answering this question. It will, therefore, be ignored.

59. When concerned with specific disputes characterized as internal affairs of the corporation, most legal systems normally apply either the law of the foreign jurisdiction in which the relevant corporate entity has incorporated (*lex incorporationis*) or the law of the jurisdiction in which the corporate entity has its principal place of business (law of the real seat). See STEPHAN RAMMELOO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW—A EUROPEAN PERSPECTIVE 11-20 (P.B. Carter QC, ed., 2001) (discussing the differences between the two alternative approaches); PASCHALIS PASCHALIDIS, FREEDOM OF ESTABLISHMENT AND PRIVATE INTERNATIONAL LAW FOR CORPORATIONS Ch. 1 (Paul Beaumont & Jonathan Harris, eds., 2012) (discussing and comparing the two choice-of-law rules); JUSTIN BORG-BARTHET, THE GOVERNING LAW OF COMPANIES IN EU LAW 4-8 (2012) (discussing the theoretical controversy between the two approaches and its history); Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 989 (2004) (describing the *lex incorporationis* approach in the U.S.); Christian Kersting, *Corporate Choice of Law—A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1 (2002) (comparing the U.S. and the EU); Werner F. Ebke, *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, 36 INT'L LAW. 1015 (2002) (explaining the theoretical foundations of the "Real Seat" doctrine). Israel applies the law of the place of incorporation. See Wilson, *supra* note 57, at § 3.1.

procedure characterization. The court did not explain why it chose to do so, although a reasonable explanation would be that the parties themselves, when presenting their line of arguments, actually guided the court's framing. Indeed, the court also employed the public policy doctrine to discuss the choice-of-law question and did so as a result of an argument to that effect brought by the plaintiffs.⁶⁰

Regarding extraterritoriality, the court ruled that a proper interpretation of the Israeli Company Law of 1999, which defines "a company" for the purpose of the statute as one that has incorporated under Israeli law, brings about the conclusion that those sections of the Israeli statute that concern a derivative action do not apply to any foreign incorporated entities, including the one in the case at hand.⁶¹ The court went on to reject the plaintiff's argument that application of the foreign law, which forbids a derivative action, is inconsistent with Israeli public policy. In this context, the court emphasized that the plaintiff, who enjoyed the tax benefits associated with incorporation in the Dutch Antilles, cannot argue that application of Dutch Antilles law is against public policy.⁶²

IV. EMERGING THEMES

One interested in choice-of-law methodology in general and in the substance-procedure distinction in particular can analyze the Israeli experience to inquire into several policy debates. However, two remarkable developments that occurred in Israel require particular attention. Consider them separately.

A. Characterization

The first obvious question with regard to the substance-procedure distinction is how to draw the line between substance and procedure in specific cases, *i.e.*, how to characterize any particular specific dispute. Indeed, the substance-procedure distinction is one that normally cannot be drawn without some remaining doubt.⁶³ There exists no clear line to divide procedural

60. Wilson, *supra* note 57, at 5.

61. *Id.* at para. 2.

62. *Id.* at para. 3.

63. See *Harding v. Wealands*, [2005] 1 W.L.R. 1539, 1559 (Arden, L.J.) ("[T]here is no bright line between questions of procedure and questions of substance in relation to damages.").

norms from substantive ones in any context, let alone that of the conflict of laws.⁶⁴

In this respect, employing the substance-procedure distinction in a *functional* manner can be quite rewarding. Modern legal minds are well rehearsed in employing a jurisprudential distinction such as the substance-procedure to accomplish a particular goal, e.g., preventing local courts from being inconvenienced by foreign laws or foreign legal mechanisms. Taking a functional approach reduces the characterization question to a very simple, rational query, e.g., whether characterizing a specific dispute (for example, regarding the manner in which testimonies are heard by the court and the possibility of deposing witnesses in a civil trial) as procedural would better serve the predefined goal (to continue the previous example, of preventing any inconvenience to the local courts in a jurisdiction that does not allow depositions in domestic cases). Answering this question becomes a matter of logic and common sense rather than an arbitrary decision in an attempt to define a line (between substance and procedure) that does not exist empirically or objectively.

Moreover, employing the substance-procedure distinction to promote a rationale, rather than in an a priori manner, can also provide a flexible tool for courts to regulate the choice-of-law process, as several rationales can coexist. Indeed, the Israeli experience with the substance-procedure distinction, which included a process of judicial adoption of several alternative rationales to support a functional analysis of the dichotomy, demonstrates how the substance-procedure distinction can work concurrently to promote several rationales. Recall that Israeli case law concurrently acknowledged rationales such as preventing the forum court from being inconvenienced by a complex foreign legal mechanism, on the one hand, and promoting efficiency in litigation by minimizing the costs of proving foreign laws, on the other hand.

However, the Israeli experience also demonstrates that the real question is the extent to which the functional approach should be allowed to proceed. As discussed earlier, the most important development in the Israeli conflict of laws context of substance versus procedure concerns the gradual inclusion of various policy considerations in the process of the substance-procedure characterization. Indeed, in Israel, the substance-procedure distinction gradually became a context that allowed courts to insert various policy considerations into a process that was initially meant to be neutral and policy-free, at least as far as the subject matter of characterization. The problem with such a trend is that when

64. See the authorities cited in note 4, *supra*.

the forum court turns to the aid of policy considerations to characterize specific disputes as either substantive or procedural, it will naturally opt for those considerations with which it is most sympathetic. These considerations are likely to be those advocated by substantive forum law. The result is straightforward: the substance-procedure distinction becomes a back door through which the forum law may enter and be applied, even to specific disputes regarding which foreign law should apply.

For example, in the *Greifin* case, a local policy consideration, which called for the acknowledgment of only a limited number of maritime liens (as these liens were considered by the law of the forum to be unwarranted), took over the substance-procedure distinction once a functional approach was undertaken by the court.⁶⁵ In a sense, entertaining this policy consideration meant applying local law, even if indirectly.

However, altogether giving up on employing policy considerations to drive the substance-procedure distinction also seems to be unacceptable, as it will no doubt result in a return to arbitrarily drawing the distinction between substance and procedure.

What should, therefore, be done?⁶⁶ I argue that to prevent a complete destruction of neutrality in the choice-of-law process—and a resulting shift from the traditional to the modern choice-of-law methodology—the choice of regulation (i.e., the dilemma between applying forum law or foreign law), notwithstanding the doctrinal context that serves the court to execute the choice-of-law decision, should be limited to entertaining policy considerations of an *institutional* nature only. Clearly, such policy considerations should pertain to, for example, the forum court as an institution, the identity of the parties litigating, whether they are individuals or a class (but not to their specific identities), and their existing alternative fora. Other policy considerations, including those that concern substantive law (e.g., deterrence in any form or shape) or the process of choice of law, should be excluded. The reason for placing such a limit is obvious: to avoid slipping into a choice-of-law regime that, in practice, abandons neutrality in favor of a particular substantive law. The institutional limit upon policy considerations serves as a barrier to maintaining some degree of neutrality in the choice-of-law process. It reflects a balance between, on the one hand, the need to prevent certain applications

65. See the text accompanying note 34, *supra*.

66. The following discussion is based on the assumption that abolishing the substance-procedure distinction is not an option. Indeed, any difficulties with the substance-procedure dichotomy can be resolved if lawmakers would insist, for example, on employing the public policy doctrine to include situations that previously fell into the doctrinal confines of the substance-procedure distinction. See note 49, *supra* and accompanying text.

of foreign law that would be unbearable to the forum court and the need to maintain a neutral characterization process, on the other hand.

Translating this recommendation into practice means—to illustrate in terms of Israeli choice-of-law doctrine—that rationales such as the inconvenience rationale (characterizing a specific dispute as substantive or procedural to prevent undue burden on the local court when it is concerned with resolving the civil dispute) or the efficiency rationale (characterizing a specific dispute as substantive or procedural to minimize the costs associated with any involvement with expensive-to-prove foreign law) are legitimate engines through which the substance-procedure distinction can be mobilized. These rationales relate to the forum court as an institution or to the parties' needs as a class of litigants. However, any attempt to employ the distinction as a tool to loosely promote various policy considerations should be barred. Making the substance-procedure distinction based on a view that considers this dichotomy to be a tool for injecting policy considerations into the choice-of-law process creates too high a risk for loss of neutrality during characterization.

Notwithstanding, attending to the second theme emerging from the Israeli experience may—as will be explained shortly—entirely terminate the need to resolve the characterization problem as far as choosing a rationale for the substance-procedure distinction is the issue.

B. Framing

A second, perhaps even more important, theme emerging from the Israeli experience with the substance-procedure distinction concerns what I call “framing”—the search for the “correct” choice-of-law doctrine to be employed by the court when attempting to decide which law applies to a specific dispute. Framing concerns contexts in which the breadth of two or more choice-of-law doctrines overlap in a manner that allows either the litigants or the court to conduct the choice-of-law discussion within the confines of either doctrine. Framing is the process of making a decision as to which doctrine should win the competition for judicial attention. It is a problem that feeds on judicial incoherence and incompleteness (as judges in civil proceedings look, first and foremost, to resolve the disputes presented to them rather than to write comprehensive theoretical dissertations) and opportunism by litigants (who evoke choice-of-law doctrines selectively, according to their own needs and interests). Insufficient knowledge of lawyers and judges may,

at times, also generate a question of framing. However, the most challenging appearance of the framing problem occurs when the court must decide which among more than one doctrine should serve as a platform to discuss the relevant matters of choice-of-law, when each doctrine would lead to a different result.

Note that while framing may be a problem in any area of the law, in the context of the choice-of-law process, it can be extremely disturbing. Not only may it influence the result of the process and the judicial decision as to which law should apply to a particular specific dispute, framing may also change the very nature of the choice-of-law process, transforming it from a mechanical, policy-free process to a process overwhelmed with policy considerations and vice versa.

The substance-procedure doctrine faces competition over judicial attention from doctrines such as public policy and, perhaps even more importantly, from the extraterritoriality doctrine or, to be more exact, the presumption against extraterritoriality.

Consider the clash between the substance-procedure doctrine and the doctrine of extraterritoriality. To illustrate, recall that in one case in which a derivative action was initiated in Israel on behalf of a foreign corporation, the court refrained from employing the substance-procedure distinction and, instead of characterizing the derivative action mechanism as either substantive or procedural, examined whether the relevant sections of the Israeli corporate code that concern derivative action apply to a case in which the corporation is incorporated abroad.⁶⁷ The manner in which both the doctrine of substance-versus-procedure and the presumption against extraterritoriality have been employed by Israeli courts reveals that territoriality discussions differ markedly from discussions over the substance-procedure characterization. While the former doctrine basically maintains the choice-of-law process as a neutral one, at least rhetorically, and, as a default rule, simply tends to avoid extraterritorial application of local legislation by evoking the presumption against extraterritoriality, the substance-procedure distinction is often packed with various policy considerations, even to the extent of promoting those considerations with which the forum most identifies.

The first question that arises with regard to framing following that case is whether a court contemplating the application of foreign law to regulate a specific dispute should initiate a discussion regarding the proper substance-procedure characterization of the specific dispute put before it, even in those cases in which the parties themselves do not evoke this question. Often, one of the

67. *See supra* note 57 and accompanying text.

litigating parties argues each and every doctrine, even if only to attempt and make his case before the court. However, on other occasions, the parties are either unaware or disinterested in the possibility of arguing for a substantive or a procedural characterization.

Each of the three doctrines mentioned (i.e., the substance-procedure distinction, public policy, and the presumption against extraterritoriality) has, of course, a different ideology to support it. Thus, while the answers these doctrines supply may be identical, the reasons supporting them may differ. Notwithstanding, a second question of framing arises, as the court must decide which doctrine should serve as a platform to discuss the relevant matters of choice of law.

Of course, the court can employ all three doctrines but, in such a case, must expect occasional conflicting results. Such a result may be particularly challenging in those instances in which the substance-procedure distinction is employed to carry further one or more of the rationales described earlier.⁶⁸ To be sure, while the court theoretically may come to a conclusion that the specific dispute before it should be characterized as procedure, for example, the court may also come to the conclusion that the legislator did not intend for its local law to apply to the case at hand, as such an application would be excessively extraterritorial. In such a case, a doctrinal clash would confuse the court as to whether the local law should be applied or not.

When discussing framing in the concrete context of the substance-procedure distinction, which doctrine should, therefore, reign supreme in the context of the tripartite doctrinal clash between the substance-procedure distinction, the public policy doctrine and the presumption against extraterritoriality? From a choice-of-law methodology viewpoint, I argue that the public policy doctrine seems to be the better platform to be employed by courts. Consider the explanation.

The substance-procedure doctrine seems to have excluded itself de-facto from being chosen as the relevant framework. In jurisdictions that follow the traditional choice-of-law methodology, which is based on neutrality (i.e., the forum strongly attempts to refrain from any inclination towards either the forum law or the foreign law), the substance-procedure has demonstrated itself to be quite problematic. The discussion in Part II of the paper revealed that while the distinction between substance and procedure cannot be executed in an a priori manner without a rationale to drive it, as the line between substance and procedure is highly blurred and

68. For a discussion of these rationales, *see supra* Part I.

from a purely jurisprudential viewpoint may not even exist, the substance-procedure doctrine cannot handle any rationale whatsoever and, in fact, must be carefully harnessed. Indeed, once lawmakers attempt to employ the substance-procedure distinction to promote any policy consideration that comes to mind—as seems to have occurred in certain jurisdictions⁶⁹—the road becomes much shorter to making the substance-procedure distinction a “back door” through which the law of the forum would be excessively applied.

The presumption against extraterritoriality does not seem to be a very good platform to the specific choice-of-law question presented here. The reason lies in this doctrine’s relatively rigid and arbitrary nature. The presumption against extraterritoriality works well when, on the one hand, statutes are silent on their application to transnational cases and, on the other hand, local regulation has a tendency to spread excessively to transnational cases. However, in many contexts, there seems to be no specific problem of excessive extraterritoriality, due to the rather clear-cut choice-of-law rule that applies. For example, when the forum has a derivative mechanism legislation that *specifically* articulates its applicability, or lack thereof, in the transnational context, the presumption against extraterritoriality becomes irrelevant.

In contrast, the public policy doctrine serves as a context in which the forum can “put down its foot” and plead intolerance towards an offensive applicable foreign law. It is, therefore, an exception to the rule. More importantly, the public policy doctrine is shaped and litigated in practice as an exception, as the question judges ask themselves when employing it is whether application of the foreign law is so unbearable that the doctrine must be evoked to apply the law of the forum instead of the applicable foreign law. Even if the judge is only mildly cautious, she would be inclined to refrain from employing the public policy doctrine to apply the law of the forum instead of the foreign law. Moreover, as was described in Part III, in recent years, the doctrine’s open texture is beginning to take shape along certain predictable vectors (e.g., proximity, relativity, seriousness of breach).⁷⁰ The adoption of these vectors serves to contain the doctrine and streamline it to perform in practice as an exception only, thus allowing foreign law to be applied more freely.

69. See the discussion of UK and Israeli law, *supra* note 31, and the accompanying text.

70. See the discussion in the text following note 50.

V. CONCLUSION

The need to distinguish between substance and procedure in the context of conflict of laws will surely continue to fuel debates among scholars and lawmakers, as vague doctrines often do. As noted, discussions fall along a continuum that stretches from a position calling for a complete abolition of the doctrine, passing through a position urging lawmakers to employ the dichotomy in a purely a priori manner, relying on precedent alone, and ending in a position that calls lawmakers to utilize the doctrine to inject policy considerations into a neutral choice-of-law process. As presented in this paper, the Israeli experience with this complex doctrine, however, exposes at least two significant themes that choice-of-law experts must pay attention to: the slippery slope associated with any attempt to employ the substance-procedure distinction to promote policies and the need to focus judicial attention on certain doctrinal contexts to maintain coherence during the choice-of-law process. Understanding the Israeli experience of recent years with the substance-procedure distinction holds a promise of improving our understanding of the complex choice-of-law methodology.

NEW PROPOSALS FOR HUMAN RIGHTS TREATY BODY REFORM

JOANNE PEDONE* AND ANDREW R. KLOSTER**

“As the perceived usefulness of attaching the label ‘human right’ to a given goal or value increases, it can be expected that a determined effort will be made by a wide range of special interest groups to locate their cause under the banner of human rights. Thus, in the course of the next few years, UN organs will be under considerable pressure to proclaim new human rights without first having given adequate consideration to their desirability, viability, scope or form.”

- Philip Alston, 1984¹

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* Associate, Bond, Schoeneck & King, PLLC. J.D. 2010, Columbia Law School.

** Legal Fellow, Center for Legal & Judicial Studies, The Heritage Foundation. J.D., 2010, New York University School of Law. This article was written while both authors were fellows at a human rights organization under the auspices of the Economic and Social Council (ECOSOC) at the United Nations. The authors would like to thank Terrence McKeegan for his thoughtful editorial assistance.

1. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 614 (July 1984) [hereinafter *Conjuring*].

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I. INTRODUCTION

“Reform” in international human rights law has become a narrow concept. A survey of the literature reveals that nearly any suggestion for reform concerns greater enforcement of international human rights substantive norms.² While these first-order concerns are laudable—indeed, they cut to the heart of why we have an international legal regime at all—reformers have failed to address important second-order questions about transparency, accountability, and democratic decision-making in the international legal order itself.³ Specifically, they have failed to address the

2. Indeed, almost all discussion of the subject speaks only of treaty body “strengthening.” See, e.g., U.N. High Commissioner for Human Rights, The Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System (Nov. 19, 2009), <http://www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf> [hereinafter Dublin Statement I] (“The purpose of all forms of reform of the treaty body system must be the enhanced protection of human rights at the domestic level.”); U.N. High Commissioner for Human Rights, Strengthening the United Nations Human Rights Treaty Body System: Dublin II Meeting (Nov. 10-11, 2011), http://www2.ohchr.org/english/bodies/HRTD/docs/DublinII_Outcome_Document.pdf [hereinafter Dublin Statement II] (the Dublin Statements are discussed at greater length *infra*); Michael O’Flaherty, *Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement*, in THE DELIVERY OF HUMAN RIGHTS: ESSAYS IN HONOUR OF PROFESSOR SIR NIGEL RODLEY 68 (Geoff Gilbert et al. eds., 2011) [hereinafter *Reform*]; Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

3. The term “first-order” or “substantive” reform refers to primarily outward-looking reform efforts that seek to reform the international order. This reform presupposes that the

proper role of the human rights treaty bodies.⁴ Each of the nine major human rights treaties⁵ creates a treaty body, or panel of ten to twenty-three experts, tasked with monitoring the self-evaluative periodic compliance reports submitted by States Parties⁶ to each treaty.

When these treaty bodies frequently act extralegally, they are rarely called to task. In seeking to improve the enforcement of human rights norms, the international legal community has neglected norms of treaty interpretation and state sovereignty. In practice, treaty bodies have generated acrimony rather than dialogue, and these misguided reform efforts may actually be destructive to the healthy functioning of the human rights treaty body system.

It is the purpose of this article to address the neglected question of treaty body role. Section II provides a nuts-and-bolts guide to the treaty body mandates for United Nations delegates, States Parties, and international lawyers. This section sketches the proper and improper actions for treaty bodies to take. It is our contention that if treaty bodies were limited to their proper role, they could more effectively use their already scant resources to promote human rights.⁷ Section III provides an in-depth analysis of three treaty bodies, showing how their practices have strayed

treaty body understands and can apply its mandate. The term “second-order” or “procedural” reform refers primarily to inward-looking reform efforts that seek to address the functioning of the treaty body itself, with the ultimate goal of better implementation of its first-order mandate.

4. Each of the nine international human rights treaties created its own treaty body, which is a group of ten to twenty-three human rights experts focusing specifically on the rights and obligations to which states agreed in the particular treaty.

5. The major international human rights treaties discussed in this article are: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), the Convention on the Rights of the Child (1989) and its optional protocols (2000), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), and the International Convention on the Rights of Persons with Disabilities (2006), and the Committee on Enforced Disappearances monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

6. “States Parties” refers to nations that have agreed to be bound by a particular treaty.

7. The point seems obvious, but in a recent discussion of treaty body reform, a continued refrain was that “some of the questions [posed during review of States Parties’ treaty reports] seem to be driven by the area of expertise of the Committee member rather than the treaty provisions and the situation in the country.” U.N. High Commissioner for Human Rights, Informal Technical Consultation for States Parties on Treaty Body Strengthening, at 9 (May 12-13, 2011), http://www2.ohchr.org/english/bodies/HRTD/docs/Sion_report_final.pdf [hereinafter Technical Consultation]. When treaty body experts are more concerned with their personal academic interests than discharging their treaty mandate, it is of little wonder that time and money are wasted.

far from their limited mandates, and proposing explanations for how and why treaty bodies have overstepped their mandates. Section VI identifies the inaction of States Parties as enabling a host of problems that have distorted the treaty body system. Section V provides specific suggestions for internal reform of the international human rights legal apparatus.

II. TREATY BODY AUTHORITY: A NUTS-AND-BOLTS GUIDE FOR STATES PARTIES

A. Treaty Body Development

As states began making international commitments to uphold human rights, the need to monitor nations' compliance with their treaty obligations became apparent. The seeds of the treaty body system originated in 1951, when the United Nations Economic Social Council first discussed the idea of having nations submit periodic reports detailing their progress in the field of human rights with respect to the Universal Declaration of Human Rights.⁸ This reporting system was more fully fleshed out in 1956, and the Commission on Human Rights received and monitored these reports.⁹

States subsequently began entering binding international treaties that incorporated the self-reporting model,¹⁰ this time creating a treaty-specific organ to facilitate States Parties in their reporting obligations: the treaty body. Each of the nine international human rights treaties created their own treaty body,¹¹ focusing on the

8. U.N. Secretary-General, *Annual Report on Human Rights*, ¶ 1, U.N. Doc. E/CN.4/517, (Mar. 7, 1951).

9. E.S.C. Res. 624 B, U.N. ESCOR, 22d Sess., Supp. No. 1, U.N. Doc. E/2929 (Aug. 17, 1956). The Commission on Human Rights continued to receive periodic reports from states for the next couple of decades, and it issued its last report on these periodic reports in 1979. See Philip Alston, *The Historical Origin of 'General Comments' in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* 763, 772 (Lawrence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001) (hereinafter *Historical Origin*).

10. U.N. High Commissioner for Human Rights, *The United Nations Human Rights Treaty Body System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30, at 25-26 (2005), <http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf> [hereinafter Fact Sheet No. 30].

11. The nine human rights treaty bodies are as follows: The Committee on the Elimination of Racial Discrimination ("CERD") monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); The Human Rights Committee ("HRC") monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols.

The Committee on Economic, Social and Cultural Rights ("CESCR") monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966). It should be noted that the CESCR is technically not a treaty body because it was created in 1987 by resolution of the Economic and Social Council ("ECOSOC"), instead of by the treaty

rights and obligations to which States Parties agreed in the particular treaty. Each treaty body has a specific mandate laid out in the treaty, which all entail monitoring the self-evaluative periodic reports submitted by States Parties. The first treaty body was created in the late 1960s, while the last two were created in 2006.

B. Functions of the Treaty Bodies

Typical recent legal scholarship¹² suggests the following functions of treaty bodies, highlighting the broad role these bodies now play: (1) monitoring the periodic reports submitted by States Parties; (2) issuing concluding observations, with criticisms, on the States Party periodic reports; (3) issuing interpretive general comments on treaty provisions; (4) hosting days of general discussion on thematic issues; and (5) where authorized by the treaty or optional protocol to the treaty, considering individual communications or complaints against States Parties regarding treaty violations.¹³

Yet these recent assertions of treaty body power require further critical review. This section analyzes several functions treaty bodies currently serve in order to determine whether treaty bodies have been granted such authority in their mandates. The following discussion examines the scope of treaty body powers more closely, from the perspective of both the mandate text and the treaty bodies' immediate understanding of the mandate, evinced by early practices. This inquiry shows that nations intended treaty bodies to stimulate ongoing informal examination

it monitors. *See* E.S.C. Res. 1985/17, U.N. Doc. E/RES/1985/85, at 15-16 (May 28, 1985); Fact Sheet No. 30, *supra* note 10, at 7 n.2.

The Committee on the Elimination of Discrimination Against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); the Committee Against Torture ("CAT") monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); the Committee on the Rights of the Child (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); the Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the Committee on the Right of Persons with Disabilities ("CRPD") monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); and the Committee on Enforced Disappearance (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

12. *See, e.g.*, Dinusha Panditaratne, *Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse Since 1997?*, 8 HUM. RTS. L. REV. 295, 297-322 (2008) (discussing the reporting requirements of Hong Kong to the HRC and CESCR, and assuming the legitimacy of treaty body general comments, concluding observations, and dialogue with delegations).

13. *See, e.g.*, Fact Sheet No. 30, *supra* note 10, at 16-17.

of human rights, spurring a non-coercive “kind of examination of conscience” by the international community.¹⁴

1. Proper Role of Treaty Bodies: Back to Basics

A review of the treaty body mandates, and the treaty bodies’ early exercise of those mandates, shows they have the following limited powers:

1. Monitor the periodic reports of States Parties;
2. Honor States Parties’ requests to send a delegation during the consideration of their State Party’s periodic report;
3. Issue summaries of States Parties’ compliance in treaty body annual reports; and
4. Issue collective,¹⁵ non-binding, and non-critical¹⁶ comments, suggestions, and recommendations on States Parties’ periodic reports.

These limited powers reflect the meaning of the human rights treaties derived, at root, from the text of the treaties themselves.

This textual approach does not seek to take a side in any legal philosophical debate about interpretive theory, but rather follows customary international law reflected in the Vienna Convention on the Law of Treaties (VCLT).¹⁷ Under the VCLT, the authority of a treaty stems from obtaining the consent of the states over which it will be binding.¹⁸ Essentially, all of international treaty law, including international human rights treaty law, rests at least to some degree upon the free contracting of sovereign Westphalian

14. Rep. of the Human Rights Comm., ¶ 486, U.N. Doc. A/43/40; GAOR, 43d Sess., Supp. No. 40, (Sept. 28, 1988); *see also* U.N. Secretary-General, Note by the Secretary-General, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, ¶ 123, U.N. Doc. A/44/668 (Nov. 8, 1989) [hereinafter Independent Expert] (“In order to maintain a constructive emphasis on the nature of the work of the Committees and in order to facilitate a consensus-based approach, the treaty bodies have [correctly, in my view] sought to avoid any inference that they are passing judgment on the performance of a given State party on the basis of an examination of its report.”).

15. *See infra* Section II.B.3 on the split between the four older treaty bodies and the five newer treaty bodies.

16. Torkel Opsahl, *The Human Rights Committee*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 369, 407-08 (Philip Alston ed., 1992) (arguing that many HRC members understood their role as cooperating with States Parties, and they “strongly oppose[d] the idea that the [HRC] should criticize individual States Parties or determine that they do not fulfill their obligations to implement the [International Covenant on Civil and Political Rights].”).

17. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Article 31 lays out the general norms of interpretation.

18. This is evidenced by the contractual language used to describe states in Article 2 of the VCLT. *See id.* at 133.

nation-state entities.¹⁹ These freely contracting agents, out of self-interest or altruistic motive, come together and make an agreement that they enshrine in a written, ratified document. This written document, the VCLT notes, is the focal point in assessing States Parties' agreements.²⁰ This document is to be read "in good faith" and "in accordance with the ordinary meaning" of the terms of the treaty.²¹

These terms, as well as the VCLT reference to "context" and the fail-safe interpretive rules in Article 32,²² point to the fact that interpretation is a dynamic process, and that textual documents never provide airtight terms. Generally, however, parties acting in good faith know the scope of their obligations. As further examination of the genesis of the nine human rights treaty bodies will

19. Some commentators see *jus cogens* as a concept developed as a limitation on this freedom of contract. See, e.g., Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 297 (2006). However, even where commentators envision a thicket of peremptory norms or robust international governance, this occurs against a background of contract. See, e.g., Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 365 (2008) (note especially that even where robust international institutions are envisaged, the author still presupposes the need for a "transfer" of power, implying that such power resides naturally in states themselves).

20. VCLT, *supra* note 17, at 340.

21. *Id.* In accordance with the VCLT, the primary goal in making a good faith interpretation of treaty terms entails understanding what the States Parties to a given treaty intended collectively, which is evidenced by the treaty text and by state practice and statements. See also Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 380-403 (1991). Johnstone notes that when states enter a treaty, "the interpretive task is to ascertain what the text means to the parties collectively rather than to each individually." *Id.* at 380-81.

22. Article 32 of the VCLT reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

show, it is manifestly clear from the text that the treaty bodies do not have the authority to do the following:

1. Issue binding legal interpretations of treaties;²³
2. Create new obligations under their respective treaties;
3. Enforce their suggestions or comments;²⁴
4. Require States Parties to appear before the treaty body;²⁵
5. Pressure States Parties to change their domestic laws, especially on areas not covered by the treaty;
6. Enforce and/or monitor States Parties' compliance with other conferences, treaties, or resolutions; and
7. Host days of general discussion on thematic issues.²⁶

While the mandated powers of the treaty bodies are not necessarily self-explanatory, treaty bodies are still constrained by the norms of treaty interpretation in interpreting their own mandates. In a pragmatic manner, the treaty body-monitoring role often requires treaty bodies to make a judgment about the meaning of treaty provisions, including their own mandate, even though they are prohibited from issuing authoritative legal interpretations of those same treaties. To some, this fact of dynamic self-assessment by treaty bodies indicates that the treaty bodies are not bound at all by treaties, and that they may, in practice, do whatever they wish. To others, this fact would demand the abolition of treaty

23. In fact, States Parties have made numerous statements regarding their stance that general comments are not legally binding, and were not contemplated to be legally binding when treaties were negotiated. Per Article 31(3)(b) of the VCLT, this subsequent unanimous practice informs the context of the treaty. *See e.g.*, Rep. of the Human Rights Comm., U.N. Doc. A/50/40; GAOR, 50th Sess., Supp. No. 40, at 135, (Oct. 3, 1995) (“The United Kingdom is of course aware that the General Comments adopted by the [Human Rights] Committee are not legally binding.”) *See also* the United States’ statements that the ICCPR “does not impose on States Parties an obligation to give effect to the [Human Rights] Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations” of the ICCPR. *Id.* at 131. (“[T]he Committee lacks the authority to render binding interpretations or judgments,” and “[t]he drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.” *Id.*

24. *See, e.g.*, Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251, 252 (2007) (noting that treaty bodies issue “non-binding decisions on individual complaints as well as . . . concluding observations and recommendations relating to the State reporting and inquiry procedures”); Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 215 (2008) (“Concluding Observations have a non-binding and flexible nature.”); Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 253 (2008) (noting that treaty bodies “are not judicial bodies and their Concluding Observations are not legally binding”).

25. Nonetheless, some treaty bodies require delegations to be present during its consideration of a state’s periodic report. *See, e.g.*, Fact Sheet No. 30, *supra* note 10, at 22 (“Some treaty bodies may proceed with consideration of a State party’s report in the absence of a delegation; others require a delegation to be present.”).

26. *See infra* Appendix.

bodies to ensure proper treaty implementation. However, these extreme views forget the lesson of the VCLT: demanding “good faith” in applying the “ordinary meaning” of treaty provisions provides concrete guidance to treaty body members. Thus, treaty bodies that *try* to faithfully execute their mandate will generally succeed.²⁷

However, it is obvious that on occasion a treaty body acting in good faith will make a mistake, perhaps misinterpreting the scope of a treaty commitment or, perhaps worse, misinterpreting its jurisdiction. In these cases, the VCLT indicates that the States Parties retain the ultimate interpretive authority.²⁸ States Parties have recourse to the internal treaty processes, but as sovereign contracting entities they retain the right to discuss, interpret, and modify their treaties.²⁹ While there are serious questions regarding the good faith of States Parties in assessing treaty commitments, it is important to recognize that the question of good faith pervades the life and application of the treaty. Put another way, if the States Parties are not to be trusted with human rights treaty obligations at the back end, how can we trust the system that these same States Parties created? The international human rights treaty system is built on trust and cooperation, including the understanding that “good faith” interpretation of treaties is a realizable goal for treaty bodies and States Parties.

Upon examining the mandates and practices of all nine human rights treaty bodies, we have identified the common functions of this institution. All the treaty body mandates include the primary function of reviewing the self-reports of nations. The review process typically starts with each State Party submitting its periodic report to the treaty body through the Secretary-General of

27. Our proposals take this for granted. Full-on semantic skepticism does not just call into question our proposals, but calls into question the very notion of “treaty making” in general.

28. Some have criticized the so-called “consent theory” of international law. See, e.g., John A. Perkins, *Essay: The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT’L L.J. 433, 435 n.2 (1997) (invectively criticizing the “consent thesis,” but also noting that the International Court of Justice remains committed to the theory).

29. The third preambular paragraph to the VCLT affirms that “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.” VCLT, *supra* note 17, at 332. See also Michael Bowman, *Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform*, 7 HUM. RTS. L. REV. 225, 229 n.25 (2007). The VCLT, therefore, places the locus of control for treaty interpretation in States Parties. This is a “foundational” principle, and it essentially means that “no state can ultimately be compelled to participate in any [treaty reinterpretations] against its will.” *Id.* at 229. According to Michael Bowman, “[t]his critical constraint upon the establishment of legal commitment, which is an inescapable concomitant of the concept of national sovereignty, naturally applies no less to the modification and amendment of treaties than to their original conclusion.” *Id.*

the United Nations,³⁰ after which the treaty body may request³¹ additional information from States Parties. States either submit written responses or orally discuss these issues when the treaty body formally takes up review of their report.

Periodically, treaty bodies are obligated to report back to the General Assembly. Included in the report of the treaty bodies is a summary of all the reports of the States Parties. The goal of this process is to help States Parties self-monitor their implementation of the substantive treaty obligations in their cultural, administrative, legislative, and judicial systems.³²

The following discussion considers particular practices treaty bodies have adopted, and it examines them in the historical context from which treaty bodies arose, giving particular consideration to the support for these practices in the textual mandates.

a. Scope of Authority to Issue Concluding Observations

When used in recent parlance, “concluding observations” refers to a State Party-specific evaluation issued by a treaty body after it reviews the States Party’s periodic report. These typically include the treaty body criticisms of the State Party, along with steps to be taken to remedy the treaty body’s concerns. However, the authority for issuing concluding observations is almost nonexistent. In fact, this phrase does not appear in *any* of the treaties.

Instead, many treaties use the words “suggestions,” “general recommendations,” and “comments” to describe the realm of authority treaty bodies have when monitoring States Parties periodic reports. The ad hoc construction “concluding observation” originates neither from the international human rights treaties nor from early treaty body understandings of their mandates.³³ In the

30. The U.N. Secretary-General serves a unique and limited role in the treaty body system, serving as an intermediary between the States Parties and the treaty bodies. The Secretary-General is also responsible in each treaty for providing staff and facilities for the treaty bodies. In practice, however, the Secretary-General is either sidestepped when States Parties speak directly to treaty bodies, or given too much authority, as when the Office of the High Commissioner for Human Rights (“OHCHR”) itself seeks to unify the treaty body system. The CEDAW Committee was being serviced under the Division for the Advancement of Women rather than the OHCHR until 2008.

31. It is important to note that while there are a number of Optional Protocols that authorize independent fact-finding on the part of the treaty bodies, neither in the treaties nor the Optional Protocols are there any mechanisms to force a State Party to furnish information or permit investigation. This point is often raised by States Parties when *in situ* investigation is discussed. See Technical Consultation, *supra* note 7, at 14 (“[S]ome States also questioned the fact that treaty obligations did not provide for *in situ* visits.”).

32. Fact Sheet No. 30, *supra* note 10, at 19.

33. For example, the CERD Committee, which was the first treaty body and had been functioning since 1970, simply agreed in 1991 that it would, for practical reasons, in the future begin issuing comments on States Parties’ reports as “concluding observations,” which would express the “collective view of the whole Committee.” Michael Banton, *Deci-*

earliest version of the periodic reporting system on the Universal Declaration of Human Rights, monitored by the Commission on Human Rights, it was agreed that the Commission could make comments, conclusions, or recommendations on the reports so long as they were “of an objective and general’ nature.”³⁴ According to Philip Alston, the word “objective” was diplomatic jargon for “non-country specific” and the word “general” meant that “no comments should deal with particular situations.”³⁵ Instead of criticizing particular states on particular circumstances, the reporting process was viewed as “a channel through which experience might be exchanged”³⁶ in a constructive and general manner.

Likewise, for much of the over forty year history of the treaty body system, treaty bodies did not issue comments on any State Party in particular, with many members concluding they lacked the authority to do so.³⁷ Before treaty bodies began issuing concluding observations, many understood the words “suggestion,” “general recommendation,” and “comment” to authorize them to issue collective remarks upon review of all States Parties’ reports in the annual reports that treaty bodies must give to the United Nations General Assembly.³⁸ In an effort to avoid taking on a

sion-taking in the Committee on the Elimination of Racial Discrimination, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 55, 67 (Philip Alston & James Crawford eds., 2000).

34. *Historical Origin, supra* note 9, at 771 (quoting Comm’n on Human Rights, Rep. of the 12th Sess., Mar. 5-29, 1956, U.N. Doc. E/CN.4/731; ESCOR, 22d Sess., Supp. No. 3, at 4 (Apr. 1956)).

35. *Id.* at 771 (citing Comm’n on Human Rights, Rep. of the 12th Sess., Mar. 5-29, 1956, U.N. Doc. E/CN.4/731; ESCOR, 22d Sess., Supp. No. 3, at 7 (Apr. 1956)).

36. *Id.* The report shows that states viewed the comments by the Commission on Human Rights on the periodic reports in the following way:

[The] annual reports were to be a channel through which experiences might be exchanged, but not an instrument by means of which individual Governments might be criticized . . . in studying annual reports the Commission sometimes might not have any recommendations to make, but might wish to make “general comments” or draw “general conclusions” on successes and achievements of “general significance.”

Id.; see also *Historical Origin, supra* note 9, at 771.

37. See Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 28 (2006) [hereinafter *Concluding Observations*]. The treaty body system began functioning in the early 1970s, shortly after the first treaty body, the Committee on the Elimination of Racial Discrimination, was formed by the International Convention on the Elimination of All Forms of Racial Discrimination (1965). The first collective concluding observations appeared in 1990 with the CESCR issuing State Party-specific comments on States Parties reports. See Philip Alston, *The Committee on Economic, Social and Cultural Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 473, 494-95 (Philip Alston ed., 1992)* [hereinafter *The Committee*].

38. The Committee on the Rights of the Child (“CRC”) is the one exception, which has been issuing concluding observations since it commenced its activities. *Concluding Observations, supra* note 37, at 30; see also, e.g., Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Obser-

critical and authoritative role that could discourage nations, treaty bodies initially filled their annual reports with summaries from their reviews,³⁹ including reports on their oral dialogues with nations.⁴⁰

Many believed the objective of treaty bodies was to “avoid evaluation at all costs.”⁴¹ The Human Rights Committee (HRC), created in 1976, viewed recommendations related to specific nations as outside its mandate.⁴² Many HRC members understood their role as cooperating with States Parties, and they “strongly oppose[d] the idea that the [HRC] should criticize individual States Parties or determine that they do not fulfill their obligations to implement the [ICCPR].”⁴³ The HRC did not issue its first concluding observation until 1992, which was also the first time *any* treaty body issued a “full-fledged”⁴⁴ concluding observation for each State Party.⁴⁵

Despite this early history, the process of treaty bodies issuing State-Party specific concluding observations has developed and become more extensive over time. Some treaty bodies have begun issuing interpretations of the treaties they monitor (called “general comments”) and then holding States Parties to these new standards, harshly criticizing those that have not changed their laws to reflect the treaty body’s understanding of human rights.⁴⁶ There are two possible explanations for this: (1) the four earliest treaty bodies⁴⁷ have been subject to external pressure to expand their roles in spite of their mandates and (2) the five later treaty bodies⁴⁸ have been influenced by this practice in their interpretation of their mandates.

Scholars—and not States Parties—have been pushing the earliest four treaty bodies to take a more aggressive role. Scholars make such calls for the expansion of power in the abstract, based

vations of the Committee on the Rights of the Child: Peru, U.N. Doc. CRC/C/15/Add.8 (Oct. 18 1993).

39. Effective Implementation, *supra* note 14, ¶ 18.

40. The HRC began reporting on its dialogues with nations in 1985. *Concluding Observations*, *supra* note 37, at 29.

41. *The Committee*, *supra* note 37, at 473.

42. Opsahl, *supra* note 16, at 407-08.

43. *Id.*

44. *Historical Origin*, *supra* note 9, at 775.

45. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee: Algeria, U.N. Doc. CCPR/C/79/Add.1 (Sept. 25, 1992). Although in rudimentary form, these comments were issued separately for each State Party. The first State Party-specific comments issued collectively appeared in 1990 from the CESCR. *See The Committee*, *supra* note 37, at 473.

46. *See infra* Section III.A.

47. CERD, HRC, CESCR, and CEDAW.

48. CAT, CRC, CMW, CRPD, and CED.

on how they think a treaty body ideally could be most effective, and they rarely mention the treaty body's mandate.⁴⁹ For example, Philip Alston, a prominent human rights scholar, served as the Independent Expert on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System from 1989 to 1997. He suggested treaty bodies move away from the summaries in their annual reports.⁵⁰ Instead, treaty bodies should "consider encouraging the recording of more clearly focused concluding observations by individual experts, particularly in situations where the responses provided are seen to be less than satisfactory," and these concluding observations would be State Party-specific and more critical.⁵¹

While this proposal may or may not be a role treaty bodies could perform effectively, the fact remains that States Parties created treaty bodies, and they did not approve the issuance of "concluding observations" in any treaties. Furthermore, as even experts like Alston admit, giving treaty bodies the power to pressure States Parties to take a certain course of action fundamentally changes their role.⁵²

The later treaty bodies do have mandates that appear to contemplate some contact between the treaty bodies and the States Parties individually. For example, the mandate for the Committee Against Torture (CAT) allows it to make "general comments on a [State Party] report as it may consider appropriate[,] and it shall forward these to the State Party concerned."⁵³ While it is unclear precisely what "general comments" entails, it should be noted that the earlier CAT Committee concluding observations commented on States Parties' reports by summarizing exchanges with the nation's representatives and drafting one or two paragraphs offering its conclusions and recommendations.⁵⁴ Its more recent concluding observations tend to be over ten pages for each State Party, and they push the scope of its authority to questionable

49. See, e.g., Martin Scheinin, *The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform—Without Amending the Existing Treaties*, 6 HUMAN RIGHTS L. REV. 131, 133-34 (2006) (proposing the HRC be granted the power to monitor both the ICCPR and the ICESCR via a new resolution by ECOSOC, with the eventual goal of having only one treaty body without needing to amend any of the treaties).

50. Independent Expert, *supra* note 14, ¶ 18.

51. *Id.* ¶¶ 19, 124.

52. *Id.* ¶¶ 123-24.

53. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19(3), Dec. 10 1984, 1465 U.N.T.S. 113 [hereinafter CAT]. Ironically, the CAT Committee has issued numerous "concluding observations," while it has issued only two "general comments." See *supra* Section II.B. for a discussion on the practice of issuing "general comments."

54. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶¶ 42-458, U.N. Doc. A/48/44(SUPP) (June 24, 1993).

extremes.⁵⁵ These concluding observations presume to authoritatively instruct each State Party to make detailed changes to its domestic laws and international obligations. For example, the 2010 concluding observation for Liechtenstein instructs it to renegotiate a treaty it entered with Austria in 1982.⁵⁶

Likewise, concluding observations in many instances make reference to “matters extraneous to the actual treaty obligations”⁵⁷ of States Parties, including other treaties, declarations, and outcome documents at conferences. Michael O’Flaherty,⁵⁸ a prominent figure in international law, criticizes CEDAW’s incessant practice of referencing extraneous sources and non-treaty related issues, which he claims “rais[es], at a minimum, issues of mandate and competency.”⁵⁹ This overreach shows another problem with treaty body concluding observations: if treaty bodies ignore their mandate’s limitations on issuing such statements in the first place, certainly no reason exists for treaty bodies to constrain the substance of the concluding observations.

b. Scope of Authority to Issue General Comments

In contrast to concluding observations, which are State Party-specific, treaty bodies have been issuing general comments,⁶⁰ which are non-State Party specific. In contemporary jargon, the term “general comment” refers to treaty interpretation performed by treaty bodies. For example, the Committee on the Rights of the Child has issued twelve general comments, including elaborating on treaty provisions such as the right to education for children.⁶¹

55. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding Observations of the Committee Against Torture, Yemen, U.N. Doc. CAT/C/YEM/CO/2/Rev.1 (May 25, 2010).

56. Committee Against Torture, *Concluding Observations of the Committee Against Torture: Liechtenstein*, ¶ 19, 44th Sess., U.N. Doc. CAT/C/LIE/CO/3 (May 25, 2010).

57. *Concluding Observations*, *supra* note 37, at 33.

58. Michael O’Flaherty has recently seemed to take a different stance on the limits of treaty body power. As the driving force behind the Dublin Statement, described in Section VI.A., he is a proponent of creating a unified treaty body that would potentially have authority to consider and enforce rights against States Parties in treaties to which they have never ratified. One goal of the Dublin Statement is to avoid having to involve States Parties in the renegotiation of treaties; O’Flaherty believes this universal treaty body can likely be created without the need to amend treaties, noting that reform goals absolutely requiring a change to treaties “must be of such an importance as to ‘justify the protracted and sometimes unpredictable process of amendment.’” *Reform*, *supra* note 2, at 322 (quoting Dublin Statement I, *supra* note 2, ¶ 16).

59. *Concluding Observations*, *supra* note 37, at 42.

60. The CEDAW Committee’s version of the general comment is termed “general recommendation.”

61. *General Comment No. 1, Article 29(1): The Aims of Education*, Annex IX, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001).

However, the practice of issuing “general comments” has undergone a dramatic transformation.

First, it should be noted that only two treaties use the phrase “general comment,” although all treaty bodies have begun issuing non-State Party specific statements that they call “general comments” or “general recommendations.”⁶² Second, the treaty body mandates typically give the treaty body the power to make comments, suggestions, or recommendations after reviewing a State Party’s report. In the mandates, the relevant language is *always* anchored to the consideration of a State Party’s report.⁶³

From the same provision in their mandates, treaty bodies have been finding their authority to issue both concluding observations and general comments; that is, there are not separate treaty provisions supporting the issuance of concluding observations and

62. See CAT, *supra* note 53, at art. 19(3) (“Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned.”); International Covenant on Civil and Political Rights, art. 40(4), Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter IC-CPR] (“The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.”)

63. See International Convention for the Protection of All Persons from Enforced Disappearance, art. 29(3), Dec. 20, 2006, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 [hereinafter ICPEP] (“Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate.”); International Convention on the Rights of Persons with Disabilities, art. 36(4), Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 [hereinafter CRPD] (“Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.”); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 74(1), Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW] (“The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned.”); Convention on the Rights of the Child, art. 45(d), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (“The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45,” where article 44 requires States Parties to report on their implementation of the treaty, and article 45 allows the committee to receive reports on the implementation of the treaty from relevant United Nations organs and the Secretary-General); CAT, *supra* note 53, at art. 19(3) (“Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate.”); Convention on the Elimination of All Forms of Discrimination Against Women, art. 21(1), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (“The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties.”); E.S.C. Res. 1985/17, *supra* note 11, at 16 (“The Committee shall submit to the Council a report on its activities, including a summary of its consideration of the reports submitted by States parties to the Covenant, and shall make suggestions and recommendations of a general nature on the basis of its consideration of those reports”); International Convention on the Elimination of All Forms of Racial Discrimination, art. 9(2), Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD] (“The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties.”).

general comments. A good faith read of the mandates could result in a spectrum of powers between neutrally summarizing the reports, making collective suggestions in consideration of the reports, issuing non-State Party specific comments on procedural matters, and issuing suggestions and recommendations for specific States Parties. However, the language clearly does not authorize freestanding legal interpretations divorced from the consideration of States Parties' reports. It also strains credulity that a good faith read of the same treaty provision authorizes *both* nation-specific critical commentary as well as legal interpretations of treaty provisions in the abstract.

Historically, treaty bodies began issuing general comments before they began issuing concluding observations.⁶⁴ Following the early tradition of the Commission on Human Rights in monitoring periodic reports on the Universal Declaration of Human Rights, treaty body comments on States Parties' reports were not country-specific.⁶⁵ But the substance of these early general comments hardly resembles the legal exegeses these comments have become.⁶⁶ For example, in 1979, almost ten years after the first treaty body began its work, none of the treaty bodies had issued any general comments interpreting substantive treaty provisions.⁶⁷ The HRC, which actually has a mandate containing the words "general comment," did not start issuing any form of general comments until 1981, and before this point the committee disagreed on whether it could do this and on what method to follow if it was so mandated.⁶⁸

The modern general comment, which emerged in the early 1990s,⁶⁹ vastly exceeds treaty body mandates and unreservedly

64. The one exception is that the CRC, which was formed in 1990, began issuing concluding observations in 1993, and issued its first general comment in 2001.

65. *Historical Origin*, *supra* note 9, at 771-76.

66. The intricacy of these comments can be seen by the practice of the CRC, which often issues general comments in excess of twenty pages, complete with tables of contents. *See, e.g.*, Committee on the Rights of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39th Sess., U.N. Doc. C/GC/2005/6 (Sept. 1, 2005).

67. Independent Expert, *supra* note 14, ¶¶ 14, 17.

68. *Id.* ¶ 13. *See Historical Origin*, *supra* note 9, at 772-76. The narrower approach carried the day, requiring comments to be of a general nature to "summarize the experience the Committee has gained in considering States reports." *Id.* at 775 (quoting ¶ 1 U.N. Doc. CCPR/C/SR.260 (1980)). Although the compromise achieved on the scope of general comments is not completely clear, at the very least these debates indicate that the development of country-specific "concluding observations" should have been precluded.

69. For example, in 1991 the CEDAW Committee decided to embark on a long-term program to issue general comments on substantive matters in the treaty. Mara R. Bustelo, *The Committee on the Elimination of Discrimination Against Women at the Crossroads*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 79, 96 (Alston et. al. eds., 2000). The CEDAW Committee issued its first such revolutionary general comment in 1992, General Recommendation No. 19 concerning violence against women.

repudiates earlier cautious practices. Most of the general comments read like a judicial opinion interpreting a statute. They incorporate other treaties,⁷⁰ conventions, and statements extraneous to the treaty, and their opinions often go far beyond the text of the treaty.

General comments have assumed the guise of binding legal interpretations of treaty provisions, which triggers a snowball effect. Treaty bodies have been overstepping their mandates to issue these general comments, and then courts and bodies in a position to make binding decisions rely on these pronouncements, often imposing them on nations.⁷¹ With the advent of the interpretive general comment, the danger is that States Parties ratifying a treaty may not actually know what the treaty means. Increasingly, vital interpretive questions have been stealthily claimed by a handful of treaty body members, essentially acting unconstrained.

A good faith interpretation of these mandates can accommodate a range of methods for issuing suggestions and recommendations, but treaty bodies simply have not been given the power to make freestanding authoritative interpretations of treaty provisions.

c. Scope of Authority to Dialogue with State Representatives

Although most treaties provide for only limited discussion between States Parties and treaty bodies, treaty body communications with individual state representatives have increased over

70. See, for example, general comment number 15 issued by the CERD Committee:

In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Report of the Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, delivered to the General Assembly, 48th Sess., Supp. No. 18, U.N. Doc. A/48/18 (Mar. 17, 1993).

71. For example, in 2006, the Constitutional Court of Colombia legalized abortion by referencing the CEDAW Committee's views. Sentencia C-355/06 [2006], Corte Constitucional [Constitutional Court], (Colom.).

time. The first treaty body, the Committee on the Elimination of Racial Discrimination (“CERD Committee”), monitors the International Convention on the Elimination of All Forms of Racial Discrimination (1965). It met for the first time in January 1970, and it considered mostly procedural matters.⁷² As it began receiving periodic reports from States Parties, the CERD Committee pioneered the practice of inviting States Parties to send a delegation for the formal discussion of its report, a practice now followed by all treaty bodies.⁷³ The CERD Committee entered into dialogues with States Parties about these reports, and it summarized these discussions in the annual report it submits to the General Assembly.⁷⁴ The purpose for the discussions is to foster a cooperative, collaborative setting to bring about a “constructive dialogue [that] should have no conclusion.”⁷⁵ States Parties do not come before the treaty body as one would come before a judge; treaty bodies viewed pressuring, and even just evaluating states, as beyond their mandates.⁷⁶

Contrary to some current practices,⁷⁷ oral dialogues between treaty bodies and States Parties, to the extent treaty body mandates permit them, are voluntary.⁷⁸ None of the treaty body

72. Independent Expert, *supra* note 14, ¶ 11.

73. Fact Sheet No. 30, *supra* note 10, at 31. Not all treaty bodies necessarily have this power, but Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) notes that reports made to the General Assembly are based upon “the reports *and* information received from the States Parties.” CERD, *supra* note 63, at art. 9(2) (emphasis added).

74. *See, e.g.*, Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/42/18; GAOR 42d Sess., Supp. No. 18, at 10-158 (1987). The HRC was the first treaty body to begin summarizing and publishing these dialogues in its annual report, starting in 1984. *Concluding Observations*, *supra* note 37, at 29. This is a practice that all treaty bodies have abandoned, except for the CEDAW Committee, which still publishes summaries of the dialogues. *Id.* at 30-31.

75. *The Committee*, *supra* note 37, at 473.

76. *Id.*

77. For example, the working methods of the CEDAW Committee the “presence and participation” of a States Parties “are *necessary* at the meetings of the Committee when their countries’ reports are examined.” U.N. Secretariat, Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination Against Women, Note by the Secretariat, Annex III, ¶ 10, Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/2009/II/4 (Jun. 4 2009) (emphasis added).

78. The narrowest mandate on this point is the one that created the CEDAW Committee, which monitors the Convention on the Elimination of All Forms of Discrimination Against Women (1979). The mandate does not expressly or, arguably, even implicitly authorize any contact, face-to-face or otherwise, between the CEDAW Committee members and States Parties, and in fact the CEDAW Committee, limited to meet only two weeks in any year, would normally not have the time to dialogue. The practices of the CEDAW Committee are particularly troubling because it also takes one of the most aggressive approaches, oftentimes bullying and chastising States Parties that have not taken the actions it recommends. *See* Section III.A. *See also* Bustelo, *supra* note 69, at 79, 80 (noting “it is important to keep in mind that the Convention itself made no provision for a communications procedure.”). While the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women does provide more powers for CEDAW, only ninety-nine

mandates require States Parties to submit to treaty body demands to appear before them or to justify their laws or policies. Accordingly, some States Parties have pushed-back against treaty bodies acting beyond the scope of their mandates.⁷⁹

Additionally, most treaty bodies have been holding days of general discussion, during which the treaty body invites outside participants, such as NGOs, experts, United Nations agencies, professional associations, and delegations from States Parties, to discuss a particular theme or issue of concern. These discussions have often been geared toward composing a new general comment interpreting the treaty provisions.⁸⁰ The CRC began this practice in 1992, and most of the treaty bodies have followed suit more recently.

However, none of the treaties clearly allow treaty bodies to assume this function. Instead, three of the treaty bodies have added hosting days of general discussion to their rules of procedure, not citing any treaty provision for authority.⁸¹ The other three treaty

of the 186 nations that are parties to the treaty have adopted the Optional Protocol, or about half of the countries.

79. Dr. Krisztina Morvai, a former CEDAW Committee member, noted that poorer countries “are regularly challenged about their human rights obligations and are often dependent on aid,” which leaves them “particularly vulnerable” to treaty body pressure to change their cultural norms. Krisztina Morvai, *Respecting National Sovereignty and Restoring International Law: The Need to Reform UN Treaty Monitoring Committees*, Briefing at the U.N. Headquarters, (Sept. 6, 2006), <http://fota.cdnetworks.net/pdfs/Krisztina-Morvai-statement-final.pdf>. The CEDAW Committee, for example, has been forceful in pressuring states to liberalize their laws on abortion, which contradicts the deeply held cultural beliefs of some states. The Pakistani delegate told the CEDAW committee in their 2007 review that “killing a fetus was regarded as murder.” Comm. on the Elimination of All Forms of Discrimination Against Women, Consideration of Reports Submitted by State Parties Under Article 18 of the Convention, Summary Record of the 782d Meeting, ¶ 33, U.N. Doc. CEDAW/C/SR.782 (July 18, 2007); see also Samantha Singson, *Pakistan Tells Pro-Abortion UN Committee that “Abortion is Murder,” Friday Fax*, CATHOLIC FAM. & HUM. RTS. INST. (May 31, 2007), <http://www.c-fam.org/fridayfax/volume-10/pakistan-tells-proabortion-un-committee-that-abortion-is-murder.html>. Cameroon, in a written response to CEDAW’s pressure to liberalize abortion laws, powerfully objected to the treaty body’s disregard for its culture and values:

It should be noted that, in our society, motherhood is extremely sacred. The desire to have children is linked to the desire for renewal and continuity of one’s race, family line, or sociological group. Children thus serve as a sort of bridge between generations past and present, while representing future prospects for communities. . . . Therefore, any abortion performed for non-medical or non-therapeutic reasons, i.e. other than to save the life of the mother or child, impedes the expression of this vital social dynamic.

Comm. on the Elimination of Discrimination Against Women, Responses to the List of Issues and Questions with Regard to the Consideration of the Combined Second and Third Periodic Reports, CAMEROON, ¶ 17, U.N. Doc. CEDAW/C/CMR/Q/3/ADD.1 (Nov. 10, 2008).

80. OFFICE OF THE HIGH COMMISSIONER FOR HUM. RTS., WORKING WITH THE UNITED NATIONS HUMAN RIGHTS PROGRAMME: A HANDBOOK FOR CIVIL SOCIETY 44 (2008), available at <http://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook4.pdf>.

81. The CRC, the CRPD, and the CEDAW Committees.

bodies that have hosted these discussions do not even have support from their own rules of procedure.⁸²

A review of the scholarship reveals an absence of discussion on the grounding for this treaty body practice. General days of discussion present at least two serious problems. In the context of the Convention on the Rights of the Child, States Parties contemplated this discussion-generating role for the Secretary-General—not the CRC. Article 45 states that the CRC can “recommend” that the General Assembly request the Secretary-General undertake “studies on specific issues relating to the rights of the child.”⁸³ The CRC practice has been contravening the procedure set out by the States Parties.

Additionally, days of general discussion place treaty bodies at the center of treaty interpretation, presuming to relegate States Parties to just one set of participants among many that can elaborate the meaning of treaty provisions. The treaties do not give treaty bodies this interpretive power, and given their institutional limitations,⁸⁴ they are particularly vulnerable to straying from the good faith interpretations required by the VCLT.⁸⁵

III. TREATY BODY MANDATE CREEP⁸⁶

Having laid out the proper role of treaty bodies, the following section zeroes in on three particular treaty bodies to show how they have been operating far beyond their proper scope of authority. After laying out the mandate for each treaty body, key actions will be highlighted to examine how each treaty body operates in practice. This section will show how the dynamic combination of institutional self-promotion and powerful lobbying factions at the United Nations has enabled NGOs and treaty bodies to, as predicted by Philip Alston, “locate their cause under the banner of human rights.”

82. The CESCR, the CERD, and the CMW Committees.

83. CRC, *supra* note 63, at art. 45(c).

84. *See infra* Section IV.C.

85. For example, the CESCR in November 2010 hosted a day of general discussion on the right to sexual and reproductive health. Comm. on Economic, Social, and Cultural Rights, Day of General Discussion on “the Right to Sexual and Reproductive Health” (Nov. 15, 2010), <http://www2.ohchr.org/english/bodies/cescr/discussion15112010.htm>. However, the International Covenant on Economic, Social and Cultural Rights makes no mention of this right, nor does it include any language pertaining to similar rights.

86. By “mandate creep,” we refer to the progressive assumption of power beyond that which is stated in the respective treaty body mandates. In modern democratic systems, the judicial check on the legislative function is designed to prevent even the most well-intentioned legislator from exceeding his or her bounds. In practice, the treaty bodies have no such restraint, and their history has been one of continual jurisdictional expansion.

A. CEDAW: Treaty Bodies and Regulatory Capture

1. The CEDAW Committee Mandate

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 by the U.N. General Assembly, is a comprehensive treaty dealing with the various forms of discrimination against women. Articles 17 through 22 create and circumscribe the CEDAW Committee, charged with monitoring States Parties' periodic reports on their compliance with the treaty. According to Article 17, the CEDAW Committee consists of twenty-three "experts of high moral standing and competence."⁸⁷ The CEDAW Committee is granted only three powers by the treaty:

1. Making suggestions and general recommendations based upon the examination of reports and information received from the States Parties;⁸⁸
2. Inviting specialized agencies to submit reports on the implementation of the CEDAW treaty in areas falling within the scope of their activities;⁸⁹
3. Reporting annually to the General Assembly of the United Nations on its activities.⁹⁰

It should be noted that the mandate does not authorize "concluding observations." It also requires any suggestions or recommendations to be "based" on the CEDAW Committee's review of the periodic reports. The treaty body's highly constricted mandate shows that States Parties envisioned it playing a relatively minor role.

In further support of this conclusion, the CEDAW Committee has its meeting time limited by the treaty to a two-week period, and States Parties have refused to accept an amendment to the treaty to extend this timeframe.⁹¹ The CEDAW Committee's

87. CEDAW, *supra* note 63, at art. 17.

88. *Id.* at art. 21.

89. *Id.* at art. 22.

90. *Id.* at art. 21.

91. *Id.* at art. 20(1); Bustelo, *supra* note 69, at 82 (explaining that the United Nations General Assembly has had to approve extensions on an exceptional basis because states would not accept a 1995 amendment to the treaty to extend the duration of the CEDAW meetings; the amendment needed to be accepted by a two-thirds majority of states, but by the fifty-first session of the General Assembly, less than ten states had accepted the amendment). Most recently, the General Assembly once again agreed to temporarily extend the CEDAW Committee's meeting time, in the absence of the approval of States Parties for an amendment to the treaty, to three annual sessions of three weeks each, with a one-week

limited mandate does not even clearly authorize *any* contact between the CEDAW members and States Parties—face to face contact or otherwise.⁹² The treaty body is required to send its reviews of the reports to the Secretary General of the United Nations, and is not authorized to communicate with a State Party.⁹³ The narrow mandate likewise does not include any provisions for convening days of general discussions.

2. Substantive CEDAW Provisions and Their Implementation by the CEDAW Committee

Despite these limits on the CEDAW Committee's authority, it has assumed an aggressive role in both policing states and interpreting the CEDAW treaty. The treaty body has gone beyond the good faith interpretations necessary to carry out its mandate when monitoring treaty compliance, in contravention of the VCLT. Instead, the CEDAW Committee had been expanding treaty provisions to incorporate new rights not contemplated by states.

The clearest example of this overstepping can be seen in the context of abortion. International consensus on the topic has proven impossible because countries hold widely divergent views. Consequently, the negotiation of many international human rights treaties that could address abortion, even tangentially, has resulted in an agreement to reserve the issue for states to resolve individually.⁹⁴

However, in 1999, twenty years after the CEDAW treaty was adopted, the CEDAW Committee determined that Article 12 of the

pre-sessional working group for each session. G.A. Res. 62/218, ¶¶ 14, U.N. Doc. A/RES/62/218 (Feb. 12, 2008).

92. See CEDAW, *supra* note 63, at arts. 17-22. It directs all communications to be mediated by either the United Nations Secretary General or the Economic and Social Council. See also Bustelo, *supra* note 69, at 80 ("It is important to keep in mind that the Convention itself made no provision for a communications procedure."). While the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women does provide more powers for the CEDAW Committee, only 99 of the 186 nations that are parties to the treaty have adopted the Optional Protocol, or about half of the countries.

93. CEDAW, *supra* note 63, at art. 21.

94. For example, the Convention on the Rights of the Child also does not mention abortion. The drafting history shows some delegations believed differences in domestic laws on abortion required the treaty to essentially remain silent on the issue before it could be ratified. Sharon Detrick, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 102 (1999); Commission on Human Rights, *Report of the Open-Ended Working Group Established by the Commission to Consider the Question of a Convention on the Rights of the Child*, ¶¶ 10, 18, U.N. Doc. E/CN.4/L.1542 (1980).

treaty contained a right to abortion. Article 12, which addresses women's health care, is textually silent on abortion:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.⁹⁵

Because the treaty does not reference abortion, even proponents of abortion rights have flatly acknowledged that the treaty simply leaves the question of abortion for states to decide individually.⁹⁶

Article 12 contains the phrase “family planning,” and two international conferences in 1994 and 1995 expressly confirmed that states did not understand “family planning” to include abortion rights.⁹⁷ Nonetheless, just four years later in 1999, the CEDAW Committee issued General Recommendation 24, asserting “family planning” includes a right to abortion.⁹⁸ It cited to no au-

95. Article 12, in full, reads as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

CEDAW, *supra* note 63, at art. 12.

96. See Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 272 (2002) (“There is absolutely no provision in CEDAW that mandates abortion or contraceptives on demand, sex education without parental involvement, or other controversial reproductive rights issues. CEDAW does not create any international right to abortion. To the contrary, on its face, the CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory states and seeking to ensure equal access for men and women to health care services and family planning information. In fact, several countries in which abortion is illegal—among them Ireland, Rwanda, and Burkina Faso—have ratified CEDAW.”)

97. The two outcome documents from these conferences expressly stated that abortion is not a means of family planning. See Int'l Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Programme of Action of the United Nations International Conference on Population & Development, ¶ 7.24, U.N. Doc. A/CONF.171/13 [hereinafter Cairo] (“Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning. . . .”). This document also stated that “[i]n no case should abortion be promoted as a method of family planning.” *Id.* at ¶ 8.25; see also Fourth World Conference on Women, Beijing, P.R.C., Sept. 4-15, 1995, Beijing Declaration and Platform for Action, ¶ 106(j)-(k), U.N. Doc. A/CONF.177/20 [hereinafter Beijing] (echoing the 1994 document's conclusion that abortion should not “be promoted as a method of family planning.”).

98. See Rep. of the Comm. on the Elimination of Discrimination against Women, 20th sess., Jan. 19- Feb. 5, 1999, ¶ 31(c), U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38

thority for this proposition. General Recommendation 24 stated that domestic legislation criminalizing abortion should be amended so women can undergo abortion without being subject to any punitive measures.⁹⁹ Regardless of the wisdom of this policy, the text and the background of Article 12 show abortion is simply outside the jurisdiction of the treaty. It defies credulity that the CEDAW Committee made a good faith interpretation of its mandate and of Article 12, consistent with the requirements of the VCLT. Because abortion is not in the treaty text, and states have explicitly rejected this interpretation of family planning, General Recommendation 24 cannot be surmised from a good faith read.¹⁰⁰

Compounding the violation of its mandate, the CEDAW then forced this fabricated right on states via its concluding observations. In 1979, many states had laws criminalizing abortion, and they did not change these laws following ratification of the CEDAW treaty.¹⁰¹ Nonetheless, copious examples of coercive concluding observations exist, as the CEDAW Committee has now criticized well over eighty nations for having restrictions on abortion, based on the authority of its very own General Recommendation Number 24.¹⁰²

The concluding observations also cite the non-binding outcome documents from the aforementioned 1994 and 1995 conferences as authority.¹⁰³ This is all the more perplexing because, not only is

(1999) (“Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive provisions imposed on women who undergo abortion[.]”).

99. *Id.* ¶ 14 (“The obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals [B]arriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”).

100. Evidence exists that treaty body members have been influenced by the meeting at Glen Cove to create an international right to abortion, driven by international non-governmental organizations (NGOs), which knew they were advocating for this right by “stealth.” See Section III.A.3.

101. See Alisa Harris, *Stealth Treaty*, WORLD (Feb. 23, 2008), available at <http://www.worldmag.com/articles/13766> (noting that “[w]hen the UN adopted CEDAW in 1979, most countries still criminalized abortion. Some of the 185 states to ratify the treaty still do.” According to Amnesty International, CEDAW does not require the legalization of abortion, and this is evident because “[m]any countries in which abortion is illegal—such as Ireland, Burkina Faso, and Rwanda—have ratified the Convention.” *A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN*, AMNESTY INTERNATIONAL, available at http://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf).

102. Thomas W. Jacobson, *CEDAW Committee Rulings Pressuring 83 Party Nations to Legalize Abortion 1995-2010*, FOCUS ON THE FAMILY (June 4, 2010), http://www.c-fam.org/docLib/20101022_CEDAWAbortionRulings95-2010.pdf. This number has since increased as the concluding observations for the 47th Session, October 4-22, 2010, have been released.

103. The CEDAW Committee also took this tactic based on the advice of the meeting at Glen Cove, which asserted a “consensus” on sexual and reproductive health at these two conferences and encouraged treaty bodies to update treaties by changing the “treaty imple-

the CEDAW Committee not authorized to monitor States Parties' compliance with extra-treaty documents, but these documents also did not create an international right to abortion either.¹⁰⁴

For example, one CEDAW member accused Rwanda of not following its treaty obligations because of its "criminalization of adultery, *concubinage*, abortion and prostitution."¹⁰⁵ The Rwandan representative tried to justify her country's laws by explaining these laws were in place to help women, whose rights, for example, are often abused in the practice of concubinage or prostitution, and that their Constitution holds that life begins at the moment of conception.¹⁰⁶

However, the treaty body has no jurisdiction to question Rwanda on its abortion laws in the first place. In addition to its lack of authority on domestic abortion laws, Article 6 of the treaty holds that states should enact laws "to suppress all forms of traffic in women and exploitation of prostitution of women."¹⁰⁷ It is difficult to see how a state's laws criminalizing prostitution can, in good faith, be read as violating its treaty obligation to enact laws to "suppress" prostitution. Nonetheless, the 2009 concluding observation for Rwanda continues to criticize its laws in these areas, once again citing for authority non-binding conference outcome documents (inaccurately), its own general recommendations, or nothing at all.¹⁰⁸ Such CEDAW Committee actions are far removed from the treaty, since the mandate creates no powers to issue conclud-

mentation and monitoring process" to reflect this new understanding. *Round Table of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health Rights*, available at http://www.centerforundocs.org/downloads/glencove/glencove_roundtable_SRHR.pdf [hereinafter *Roundtable*].

However, the only consensus reached on this topic at these two conferences was that abortion was not a method of family planning. In fact, opposition to international abortion rights was so fierce that an organizer of the 1994 conference at Cairo noted, "It was clear to us that given the diametrically opposite views on the subject held by different member states, the Conference would not be in a position to endorse, on a global basis, the concept of legal abortion, even in the case of rape or incest." JYOTI SHANKAR SINGH, *CREATING A NEW CONSENSUS ON POPULATION* 55 (1998). The Glen Cove meeting was held just two years later.

104. The outcome documents mention abortion only insofar as to limit it: abortion should not be used for sex-selection, and States Parties should help women "avoid abortion," "eliminate the need for abortion," and focus on the "prevention of abortion." Cairo, *supra* note 97, ¶¶ 4.15, 7.24, 8.25, 7.6. See also Beijing, *supra* note 97, ¶¶ 38-39, 106(j)-(k), 107(a), 115, 124(i), 259, 277(c), 283(d).

105. U.N. CEDAW, 43d Sess., 885th mtg. at 38, U.N. Doc. CEDAW/C/SR.884 (Feb. 4, 2009) [hereinafter *Summary Record*].

106. *Id.* at 44.

107. CEDAW, *supra* note 63, at art. 6.

108. U.N. CEDAW, 43d Sess., at 36, U.N. Doc. CEDAW/C/RWA/CO/6 (Jan. 19-Feb. 6, 2009) ("The Committee recommends that the State party review its legislation relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion in accordance with the Committee's general recommendation No. 24, on women and health, and the Beijing Platform for Action.").

ing observations or general comments, and the treaty creates no right to legalized abortion or prostitution.

3. Regulatory Capture of the CEDAW Committee: The Example of Glen Cove¹⁰⁹

While part of the explanation for the drastic overreaching of treaty bodies such as the CEDAW Committee can be attributed to institutional self-promotion, treaty bodies also have external forces actively lobbying them. In December 1996, treaty bodies became the targeted mechanism for many lobbyists to “locate their cause under the banner of human rights.” With immense financial resources,¹¹⁰ lobbyists conceived and ran a conference in Glen Cove, New York, to “dialogue” with representatives of six major human rights treaty bodies,¹¹¹ seeking to expand the activity of these treaty bodies in the field of women’s health—specifically reproductive and sexual health. Not only was this meeting avowedly the “first occasion on which members of the [then six] human rights treaty bodies met to focus on . . . a specific thematic issue,”¹¹² but the theme they discussed was unrelated to the mandates of any of the treaties in question.¹¹³

The report¹¹⁴ of that meeting specifically indicates that treaty body members were encouraged by event organizers to collaborate and to expand their operations into the area of reproductive

109. For a fuller discussion of the Glen Cove meeting, see Douglas Sylva & Susan Yoshihara, *Rights by Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*, 7 NAT’L CATH. BIOETHICS Q. 97 (2007).

110. The Glen Cove Roundtable was sponsored by the UN Population Fund, the UN Office of the High Commissioner for Human Rights (which has oversight of the treaty bodies), and the UN Division for the Advancement of Women. Participants included officials from most of the major UN agencies, members of all the human rights treaty bodies, and pro-abortion nongovernmental organizations, including International Planned Parenthood Federation. *Roundtable*, *supra* note 103, at 1.

111. Attending the meeting in their official capacity were the following: two representatives of the Committee on the Rights of the Child, two representatives of the Human Rights Committee (responsible for the ICCPR), two representatives of the Committee on the Elimination of Discrimination against Women, six representatives of the Committee against Torture, two representatives of the Committee on the Elimination of All Forms of Racial Discrimination, and two representatives of the Committee on Economic, Social, and Cultural Rights. Also present were a number of representatives of other United Nations and NGO groups. *Roundtable*, *supra* note 103, at 1-2.

112. *Roundtable*, *supra* note 103, at 4.

113. Only the recent convention on disability rights uses the phrase “sexual and reproductive health,” and even this phrase explicitly excludes abortion, which was also discussed at the meeting. CRPD, *supra* note 63, at art. 10. None of the treaties discussed at Glen Cove have any relation whatsoever to “sexual and reproductive health.”

114. *Roundtable*, *supra* note 103. In its eighteenth and nineteenth sessions, the CEDAW Committee officially “welcomed” findings in the Roundtable Report. Rep. of the Comm. on the Elimination of Discrimination against Women, 18th & 19th Sess. ¶ 442, U.N. Doc. A/53/38/Rev.1; GAOR, 53d Sess., Supp. No. 38 (1998).

health, with little discussion of the extralegality of such actions.¹¹⁵ The report instructed the CEDAW Committee, for example, to “apply the right to non-discrimination on the ground of gender, in relation to the criminalization of medical procedures which are only needed by women, such as abortion (article 1 and article 12, Women's Convention).”¹¹⁶ In this light, it is little wonder why the CEDAW Committee found the right to abortion in Article 12 just three years later. Not only was the treaty body being pressured to interpret the treaty on matters outside the treaty's jurisdiction, but it was also being pushed into making authoritative treaty interpretations beyond the scope of its limited mandate.

In addition, many of the U.N. functionaries were moonlighting on the boards of the lobbying organizations themselves.¹¹⁷ Tellingly, at the time of the meeting half the members of the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) were simultaneously serving on the boards of one or more of the NGOs seeking to change the operation of the treaty bodies.¹¹⁸ When the treaty bodies were presented with a list of “recommendations,”¹¹⁹ which included specific demands for greater NGO power, it is easy to see why only one Committee pushed back, admonishing those present to be “wary of exceeding their mandates.”¹²⁰

This lobbying is to be expected in the current human rights treaty body system: it is analogous to the well-documented concept of “regulatory capture.”¹²¹ Public choice economics informs us that where there is a regulatory body, such as a treaty body, charged with acting in the public interest, there will be winners and losers in any decision that body makes. Groups with high-stakes

115. Specifically, without referencing the treaty body's mandate, a member of the Human Rights Committee detailed the process to use the right to life (Article 6), the right to equality before the courts and before the law (Articles 14 and 26), the right to freedom of movement (Article 12), the right to protection of privacy and home (Article 17), and the right to freedom of expression (Article 19) of the ICCPR to advance the right to abortion. *Roundtable, supra* note 103, at 22-23.

116. *Id.* at 36-37.

117. For example, Nafis Sadik was simultaneously the executive director of the United Nations Population Fund (UNFPA), the chair of the 1994 United Nations International Conference on Population and Development, as well as a board member of the board of directors of the abortion rights lobbying group, the Center for Reproductive Rights.

118. Susan Yoshihara, *The Quest for Happiness: How the U.N.'s Advocacy of Economic, Social, and Cultural Rights Undermines Liberty and Opportunity*, in CONUNDRUM: THE LIMITS OF THE UNITED NATIONS AND THE SEARCH FOR ALTERNATIVES 182 (Brett D. Schaefer, ed., 2009).

119. *Roundtable, supra* note 103, at 8.

120. *Id.* at 25-26 (CERD Chairperson Michael Banton noted that “treaty bodies should respect the limits of their competence . . . [and] be wary of exceeding their mandates or of overlapping their functions.”).

121. For a good overview, see Michael Levine, *Regulatory Capture*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267 (Peter Newman ed., 3d ed. 1999).

interests in the outcome will lobby hard to control the regulatory body: this phenomenon is called “rent seeking.”¹²² The general public, on the other hand, will have only a diffuse interest in maintaining the integrity of the system. Consequently, without constant vigilance, these interested groups can “capture” the regulatory body.

In the context of treaty bodies, NGOs with specific agendas represent rent-seekers, while the States Parties to treaties represent the general public. Because States Parties have diffuse interests, they do not expend resources maintaining the integrity of the treaty body system. On the other hand, rent-seeking behavior on the part of reproductive health NGOs has led them to identify human rights treaty bodies as a target for lobbying efforts.¹²³ The approach adopted by the Glen Cove Roundtable does not accord with proper procedure by which international law is made, as there was no participation by or consensus among member states. Nonetheless, these efforts have largely been successful: we have moved from public acknowledgement that no human rights treaty creates jurisdiction over sexual and reproductive health prior to the Roundtable,¹²⁴ to position papers finding a right to abortion in every major human rights treaty,¹²⁵ and now to the contention that there is a background *jus cogens* providing a non-derogable international right to abortion.¹²⁶ This shift can be explained as a function of the capture of treaty bodies by interested parties. Such a phenomenon has long been in the back of the minds of some of the leading human rights scholars; as Philip Alston warned, “in the course of the next few years, UN organs will be under considerable pressure to proclaim new human rights without first having given

122. See Gordon Tullock, *Rent Seeking*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 147 (Peter Newman ed., 3d ed. 1999).

123. See, e.g., CENTER FOR REPRODUCTIVE RIGHTS, STEP-BY-STEP GUIDE: USING THE UN TREATY MONITORING BODIES TO PROMOTE REPRODUCTIVE RIGHTS (2004), available at http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub_bp_stepbystep.pdf. Interestingly, this behavior goes beyond “rent-seeking” because it sought to expand the jurisdiction of the captured bodies, rather than simply exploiting existing jurisdiction. In effect, this is “rent-creating.”

124. See, e.g., Liesbeth Lijnzaad, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 319 (1995) (noting that a reservation by Malta to the CEDAW treaty “is over-cautious, as the Women’s Convention is generally considered not to contain a right to abortion”).

125. Zampas & Gher, *supra* note 24, at 251 (arguing that abortion is a human right that can be found in various treaty “rights to privacy, liberty, physical integrity and non-discrimination.”).

126. LAW STUDENTS FOR REPRODUCTIVE JUSTICE, HUMAN RIGHTS LAW PRIMER, 13 (2d ed. 2011), available at http://lsrj.org/documents/resources/LSRJ_HR_Primer_2nd_Ed.pdf (arguing that the right to life has been considered *jus cogens*, and women’s right to life entails rights to abortion because, it is argued, laws against abortion lead to higher rates of maternal mortality).

adequate consideration to their desirability, viability, scope, or form.”¹²⁷

*B. The CERD Committee: Institutional Self-Promotion
and Pressuring States Parties*

1. The CERD Committee Mandate

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted by the U.N. General Assembly on December 21, 1965, was the first of the binding international human rights treaties. States Parties condemned racial discrimination and agreed to actively eliminate such discrimination. The treaty created the Committee on the Elimination of Racial Discrimination (“CERD Committee”), which consists of eighteen “experts of high moral standing and acknowledged impartiality” to monitor the reports of States Parties on treaty implementation.¹²⁸ The CERD Committee has four basic functions:

1. Reviewing States Parties’ reports and request further information from the States Parties as necessary;¹²⁹
2. Submitting an annual report to the United Nations General Assembly on its activities, including any suggestions and general recommendations based on the examination of States Parties’ reports;¹³⁰
3. Facilitating resolution of State Party complaints regarding the alleged treaty violations of other States Parties.¹³¹
4. After explicit consent from the subject State Party, receiving and considering communications from individuals or groups of individuals within its jurisdiction claiming to be victims of treaty violations by that State Party.¹³²

This section focuses on the Article 9 powers to review the States Parties’ reports, which is the central function of the CERD Committee.¹³³ Clearly, the limited mandate to review these periodic reports does *not* expressly include the power to issue

127. *Conjuring*, *supra* note 1, at 614.

128. CERD, *supra* note 63, at art. 8(1).

129. *Id.* at art. 9.

130. *Id.*

131. *Id.* at arts. 11-13.

132. *Id.* at art. 14.

133. Banton, *supra* note 33, at 56 (noting that most of the CERD Committee’s time is spent on monitoring reports under Article 9). The procedures in Articles 11 through 13 for complaints by States Parties against other States Parties have never been utilized.

concluding observations on each State Party, to dialogue with States Parties regarding their reports, to issue general comments interpreting treaty provisions, or to host days of general discussion—although the treaty body has undertaken all these practices.¹³⁴ Yet the greater problem has not been the practices themselves, but rather the authority with which the CERD Committee presumes to act. For example, a good faith read of this mandate might include some procedural form of concluding observations or general comments, but these formats cannot be read to authorize authoritative interpretations of the CERD or to enforce non-treaty commitments (for example, non-binding declarations) on States Parties. The CERD Committee's narrow mandate simply does not provide it with such powers.

2. Substantive CERD Provisions and Their Implementation by the CERD Committee

The CERD Committee's role has drastically expanded since it first began operating in 1970. Unique to this treaty, the concept of racial discrimination has evolved from States Parties' understanding in 1965, and with it, the treaty body has tried to grab power to remain relevant. Article 1 of the treaty defines "racial discrimination" in the following way:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹³⁵

Perhaps shedding light on the kind of discrimination states then had in mind, Article 3 notes that States Parties "particularly condemn racial segregation and apartheid."¹³⁶ According to the CERD Chairperson, States Parties were almost exclusively focused on ending the apartheid, and they had a relatively narrow idea of racial discrimination, assuming that racism was "a social pathology caused by either colonialism or the dissemination of doctrines of racial superiority."¹³⁷ This historical context raises

134. In fact, giving the CERD Committee the power to provide suggestions and general recommendations at all was added at the last minute, first proposed just less than one month before the treaty was adopted in 1965. See *Historical Origin*, *supra* note 9, at 770.

135. CERD, *supra* note 63, at art. 1.

136. *Id.* at art. 3.

137. Banton, *supra* note 33, at 58.

several interpretive questions regarding the application of the treaty today.

However, what is clear from examination of the CERD Committee's mandate is that States Parties did not give the treaty body the authority to tackle these serious interpretive questions.¹³⁸ Even taking a broad read of the mandate and assuming that some form of concluding observations and general comments are permissible, the CERD Committee's practices have nonetheless overstepped its mandate in the following ways: (1) instructing States Parties on rights and duties irrelevant to the treaty, (2) stretching the definition of racial discrimination beyond that contemplated by States Parties, and 3) failing to anchor its general comments to the review process of States Parties' reports.

a. Extratreaty Focus

In 1972, the CERD Committee first "stretched its mandate," according to the CERD Chairman Michael Banton, when it was zealously trying to eliminate the apartheid.¹³⁹ It issued General Recommendation Number 3, which, without citing to any authority in the treaty, invited States Parties to submit information regarding the status of their "diplomatic, economic and other relations with the racist regimes in southern Africa."¹⁴⁰ The treaty focuses exclusively on States Parties respecting the prescribed rights of individuals within their jurisdiction. Thus, the CERD Committee has no basis for instructing States Parties to reveal their relationships to particular regimes, especially those not even party to the treaty.¹⁴¹ Instead of focusing on the rights and duties actually outlined in the treaty, the CERD Committee stretched its mandate to accommodate its policy goals.

Likewise, the CERD Committee has continued to focus on matters "irrelevant to the implementation of [CERD] obligations," which the CERD Chairman has described as a "major problem."¹⁴² As a prime example, the Chairman pointed to the past concluding observations on Iraq. The 1997 Concluding Observation references Iraq's commitments in other human rights instruments unrelated

138. See also *Historical Origin*, *supra* note 9, at 770 (noting the last-minute creation of the CERD Committee). It is highly unlikely that the States Parties envisioned this body having such important interpretive powers when they considered its very existence for less than one month.

139. Banton, *supra* note 33, at 59.

140. General Recommendation III Concerning Reporting by States Parties, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 6th Sess. (1972), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II), at 270 (May 27, 2008).

141. South Africa ratified the CERD in 1998.

142. Banton, *supra* note 33, at 62.

to the CERD treaty.¹⁴³ It recommended that Iraq comply with Security Council resolutions “calling for the release of all Kuwaiti nationals and nationals of other States who might still be held in detention” and “provide all information available on missing individuals of such States.”¹⁴⁴ It remains unclear what relation detaining citizens of other nations has to “racial discrimination” in the treaty. Nevertheless, treaty body members justified this recommendation by arguing that the preamble to the CERD “places it within the broader framework of human rights instruments.”¹⁴⁵ The CERD preamble, like all other preambles to the international human rights treaties, references preceding important treaties, declarations, and resolutions. Apparently the CERD Committee believes this empowers it (and presumably all other treaty bodies) to address any and all human rights violations. While a novel theory, international treaty law certainly does not support this approach. It also undermines the entire human rights treaty body system, which has allocated different treaty bodies to focus on a distinct set of rights.

b. Disregard for States Parties' Intent

The second major practice overstepping the CERD Committee's mandate has been expanding the definition of “racial discrimination” well beyond what States Parties contemplated. Regardless of the necessity for an evolving understanding of the phrase, States Parties—and not the treaty body—must be the driving force behind these new concepts. Yet the roles have been exactly reversed. For example, the CERD Chairman acknowledged that the treaty body provided the stimulus for expanding “racial discrimination” beyond its original focus on the apartheid and legal segregation.¹⁴⁶ He admitted that without the treaty body's general recommendations numbers nineteen¹⁴⁷ and twenty-three¹⁴⁸ in the 1990s, pulling unintended de facto discrimination and discrimination against indigenous peoples into the definition of racial discrimination, “states might not have perceived the

143. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Addendum: Iraq, U.N. CERD, 51st Sess., U.N. Doc. CERD/C/304/Add. 28 (Sept. 17, 1997).

144. *Id.* ¶ 14.

145. Banton, *supra* note 33, at 63.

146. *Id.* at 70.

147. Rep. of the Comm. on the Elimination of Racial Discrimination, 50th sess, Sept. 22, 1995, at 150, U.N. Doc. A/50/18; GAOR, 50th Sess., Supp. No. 18 (1995).

148. Rep. of the Comm. on the Elimination of Racial Discrimination, 52d sess, Sept. 26, 1997, at 122-23, U.N. Doc. A/52/18; GAOR, 52d Sess., Supp. No. 18 (1997).

relevance to the [CERD]” of these issues.¹⁴⁹ Regardless of the merit of their policy decisions, this approach contravenes the good faith interpretation required under the VCLT and displaces the role of States Parties in formulating the meaning of their international agreements.

These new “rights” have often come at the expense of encroaching on the jurisdiction of other international human rights treaties. In 2000 the CERD Committee declared the “gender related dimensions of racial discrimination” within its jurisdiction.¹⁵⁰ It asserted, for example, that instances of “gender bias in the legal system” should fall under the CERD because it may prevent women from bringing legal action against instances of racial discrimination.¹⁵¹ But the CERD Committee completely disregarded the scope of the CEDAW treaty, particularly Article 15, which gives women equal legal capacity with men at “all stages of procedure in courts and tribunals.”¹⁵² This reinterpretation makes the CERD Committee more powerful and relevant, but it goes far beyond its mandate and it fails to consider its role within the larger treaty body system. These examples of institutional self-promotion also show the treaty body’s near blatant disregard for the intent of States Parties in its quest to broaden the scope of racial discrimination.

c. Imposing Non-treaty Obligations

The third major abuse of its treaty body mandate involves the issuance of general comments. The CERD Committee has also recently started the unprecedented practice of issuing general comments adopting and promoting non-binding outcome documents from conferences. In 1997, the United Nations General Assembly decided to hold the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and it directed the Commission on Human Rights to act as the preparatory committee.¹⁵³ The resulting World Conference took place in 2001 in Durban, South Africa, and it produced an outcome document entitled the Durban Declaration and Programme of Action.¹⁵⁴ The CERD Committee had no formal role in either organiz-

149. Banton, *supra* note 33, at 70.

150. Rep. of the Comm. on the Elimination of Racial Discrimination, 56th sess, Mar. 6-24, 2000, at 152, U.N. Doc. A/55/18; GAOR, 56th Sess., Supp. No. 18 (2000).

151. *Id.*

152. CEDAW, *supra* note 63, at art. 15.

153. G.A. Res. 52/111, ¶ 29, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/111 (Feb. 18, 1998).

154. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31- Sept. 8, 2001, U.N. Doc. A/CONF.189/12.

ing or hosting the conference.¹⁵⁵ This conference generated an immense amount of controversy, especially regarding the relationship between Israel and Palestine, and as a result many countries did not support the outcome document.¹⁵⁶

The second World Conference, or the Durban Review Conference, held in 2009, examined the progress made since the first conference.¹⁵⁷ Once again, the CERD Committee neither organized nor hosted the conference, and instead the Human Rights Council¹⁵⁸ occupied this role. Also creating intense controversy, many countries—including the United States—boycotted the event entirely.¹⁵⁹ The Outcome Document of the Durban Review Conference both reaffirmed the commitments made during the first conference and assessed their implementation, although it suffered from the same reduced participation due to its controversial nature.¹⁶⁰

Despite the polemical positions that emerged from these two conferences, the CERD Committee began urging all States Parties, regardless of their participation in the two Durban conferences, to comply with the outcome documents. After each conference, the treaty body issued an unprecedented “follow-up” general comment. These general comments did not even presume to be rooted in a provision of the CERD treaty. The CERD Committee simply declared that it was incorporating the provisions of these outcome documents into its mandate,¹⁶¹ and it recommended States Parties

155. The General Assembly did instruct the CERD Committee, along with “[g]overnments, the specialized agencies, other international organizations, concerned United Nations bodies, regional organizations, non-governmental organizations. . . the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and other human rights mechanisms” to “assist” the Commission on Human Rights as necessary. G.A. Res. 52/111, *supra* note 153, ¶ 30.

156. *Mixed Emotions as Durban Winds Up*, BBC NEWS, Sept. 8, 2001, <http://news.bbc.co.uk/2/hi/africa/1530976.stm>; Ofeibea Quist-Arcton, *Africa: The United States and Israel Pull Out of the Durban Racism Conference*, ALLAFRICA, Sept. 3, 2001, <http://allafrica.com/stories/200109030134.html>.

157. The General Assembly created this conference in 2006. G.A. Res. 61/149, ¶ 33, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/149 (Feb. 7, 2007).

158. The Human Rights Council replaced the Commission on Human Rights in 2006. G.A. Res. 60/251, U.N. GAOR, 60th Sess., U.N. Doc. A/Res/60/251 (Apr. 3, 2006).

159. Julian Borger, *UN Racism Conference Boycotted by More Countries*, THE GUARDIAN, Apr. 19, 2009, <http://www.guardian.co.uk/world/2009/apr/20/un-race-conference>; Laura Trevelyan, *UN Racism Event Highlights Divisions*, BBC NEWS, Apr. 24, 2009, <http://news.bbc.co.uk/2/hi/americas/8017710.stm>; Bruno Waterfield, *Britain Isolated amid UN Racism Summit Boycott*, THE TELEGRAPH, Apr. 19, 2009, <http://www.telegraph.co.uk/news/5182662/Britain-isolated-amid-UN-racism-summit-boycott.html>.

160. See Durban Review Conference, Geneva, Switz., Apr. 20-24, 2009, *Rep. of the Durban Review Conference*, U.N. Doc. A/CONF.211.8.

161. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 33, Follow-up to the Durban Review Conference, U.N. CERD, 75th Sess., U.N. Doc. CERD/C/GC/33 (Sept. 29, 2009) [hereinafter Gen. Rec. 33]; Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/2009/11 (2009).

comply with them¹⁶² and instructed States Parties to begin reporting on their compliance in their next periodic reports.¹⁶³

These general comments essentially take the non-binding conference documents, which were not even endorsed by all States Parties, and then imposed them as additional obligations, having the same legal status as a binding treaty commitment. For a treaty body that historically questioned its ability to even issue general comments, these two general comments in particular show the CERD Committee's increasing disregard for its mandate. One thing is clear from a good faith read of the CERD Committee's mandate: the treaty body monitors the CERD treaty obligations. Yet the conferences were not focused on the CERD treaty, and most of the declarations refer to matters outside the scope of the treaty. Nonetheless, these general comments discuss the treaty body's approval of the outcome documents produced following two controversial conferences. Because these outcome documents are extraneous to the treaty, they are wholly irrelevant for treaty monitoring purposes.

The CERD Committee has been, in the words of Professor Alston, "attaching the label 'human right' to a given goal or value," which in this context means ignoring the proper scope of the treaty in order to be at the forefront of other important but unrelated human rights issues. It is understandable that this small group of experts would passionately pursue their ideals and take the opportunity to change the scope of a binding treaty, thereby giving themselves more power in the process. In its effort to remain relevant and to respond to changing ideas on racial discrimination, it has risked ostracizing some States Parties and undermining its legitimacy by casting itself into uncharted territory. A greater respect for its limited mandate would let States Parties negotiate the difficult questions raised by implementing the treaty, and this process would help ensure that the treaty provisions are interpreted in good faith without forcing contentious terms on nations.

C. Committee on the Rights of the Child

1. CRC Committee Mandate

The Convention on the Rights of the Child (CRC) came into force on September 2, 1990, and currently has 140 signatories,

nation of Racial Discrimination, 60th & 61st sess, Mar. 4-22, Aug. 5-23, 2002, at 111, U.N. Doc. A/57/18; GAOR, 57th Sess., Supp. No. 18 (2002) [hereinafter Gen. Rec. 29]. B.B. 21.7.3

162. Gen. Rec. 33, *supra* note 161, at 3; Gen. Rec. 29, *supra* note 161, at 110.

163. *Id.*

which include every member of the United Nations except Somalia and the United States.¹⁶⁴ By this treaty, States Parties have recognized a number of rights for children, which term is defined in Article 1 as all persons under the age of majority—eighteen—unless “majority” is defined by a State Party as having been attained earlier. There is no textual lower bound for the age of a “child;” this is left to States Parties. For example, the ratification declaration by Guatemala that has been accepted by the Secretary General notes that “with the aim of giving legal definition to its signing of the Convention, the Government of Guatemala declares that article 3 of its Political Constitution establishes that: “The State guarantees and protects human life from the time of its conception.”

The Committee on the Rights of the Child (“The Committee”) was established “for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken” in the CRC¹⁶⁵, and consists of ten experts elected to four-year terms.¹⁶⁶ The Committee reviews the voluntary reports submitted by States Parties every five years¹⁶⁷ and is required to submit biennial reports on its activities to the General Assembly, through ECOSOC.¹⁶⁸

As with other human rights treaties, there are explicit mechanisms for changing the legal obligations under the treaty. First, Article 50 delineates the amendment process, which requires approval of any amendment by both the General Assembly and two-thirds of all States Parties to the CRC to be effective. In addition, Article 51 notes that reservations may be made to the CRC. Finally, Article 52 permits any States Party to denounce the CRC by notifying the Secretary General: such denunciation becomes effective one year later.

2. A Broad Textual Mandate

Interestingly, the Committee has a broader textual mandate than any of the other human rights treaty bodies in three important respects. First, third party specialized United Nations agencies are “entitled to be represented at the consideration of the implementation of such provisions of the present Convention as

164. *Status of the Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION (Oct. 21, 2012, 10:04 AM) available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

165. CRC, *supra* note 63, at art. 43.

166. *Id.* at art. 43(2), (6).

167. *Id.* at art. 44(1).

168. *Id.* at art. 44(5).

fall within the scope of their mandate.”¹⁶⁹ The scope of the representation *as a matter of right* is quite limited, however, because it is up to the Committee’s discretion whether to “invite” the specialized agency to either actually provide expert advice, or provide formal reports to the Committee. Further, such right is limited to the mandate of the specialized agency in question, and this jurisdictional limitation is likely up to the Committee itself to determine. Still, such participation is not in any other human rights treaty body mandate, and seems related to the broad, interdisciplinary nature of the subject matter of the CRC.

A second way in which the CRC treaty body mandate is broader than any other human rights treaty is that when a States Party submits a five-year compliance report to the Committee and the States Party indicates a need for technical assistance or advice from a third-party specialized United Nations agency, the Committee is authorized to forward the report and any comments the Committee has related to the request.¹⁷⁰ This is important, because it represents the only textual authorization of a treaty body to forward materials to third parties, and even then *only where the State Party so requests or indicates*. Also, there is no mention of a dialogue process between the Committee and the third party agency: this rules out days of “thematic discussion” and implies that the State Party will dialogue directly with the third party agency. As with other treaty bodies, the CRC Committee is very limited in *ex parte* contact with States Parties.

The final way in which the CRC treaty body mandate is broader than other human rights treaties is the most important. The Committee is directly authorized to make “suggestions and general recommendations” and transmit such reports directly any States Party concerned and the General Assembly. Again, there is no contact with States Parties that is not also copied to the General Assembly. In addition, the language “any States Party concerned” encourages general recommendations applicable to more than one States Party, and discourages singling out States Parties), *but only related to information received pursuant to Articles 44 and 45*.

In fact, the legal requirement for a relation between materials submitted at one stage and the subsequent statements by the CRC explains the choice of word “recommendation” rather than “comment.” To make a “comment” does not imply relation back to a previous state of affairs. To make a “recommendation,” however, implies constraining oneself to a specific pre-defined issue. Thus,

169. *Id.* at art. 45(a).

170. *Id.* at art. 45(b).

the suggestion and general recommendation power of the CRC Committee is strictly limited to voluntarily submitted reports by States Parties. The Committee does not make its own reports, or investigate States Parties, nor does the Committee make comments on areas outside the scope of its mandate. If a State Party fails to submit a report, in theory the only suggestion the Committee may make is the suggestion that the State Party submit a report.

Each of the three areas in which the CRC treaty body mandate goes far beyond the textual mandate of other human rights treaty bodies is an area where other treaty bodies, such as the CEDAW Committee, have simply acted as if they had such a textual mandate, reading the power to make general recommendations, for example, as an “implicit” power of that treaty body. However, States Parties were perfectly capable of saying that the CRC provides for “suggestions and general recommendations,” and there is no reason that they should have failed to make such a power explicit in the case of the CEDAW Committee. In other words, the absence of such provisions in other treaties is strong evidence that Committees without such textual authorization cannot do the same as the CRC Committee.

3. CRC Overreach

a. General Comments

To date, the CRC has issued thirteen general comments: the first, issued in 2001, clarified a treaty obligation relating to children’s educational rights.¹⁷¹ General recommendations, as noted *supra*, are permissible under the CRC textual mandate insofar as they pertain to information gathered from the voluntarily submitted oversight materials from States Parties. By conducting general “comments” rather than “recommendations,” the CRC has subtly overstepped its mandate. Reading any one of first twelve General Comments in light of the textual mandate, it is apparent that until recently the CRC did not feel the need to explicitly make this relation back.

Nevertheless, the most recent General Comment includes a welcome section entitled “Rationale for the Present General Comment.”¹⁷² This section, while referring vaguely to the fact that “the extent and intensity of violence exerted on children is alarming,” is

171. *See* Comm. on the Rights of the Child, General Comment No. 1, Article 29(1): The Aims of Education, Annex IX, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001).

172. Comm. on the Rights of the Child, The Right of the Child to Freedom from All Forms of Violence, at 3, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011).

a step in the right direction, at least attempting to tether the General Comment to a specific provision (Article 19 of the CRC), a specific factual circumstance (violence against children), and a specific audience (States Parties). Indeed, the General Comment repeatedly mentions that the job of the international community is to “assist States Parties” with compliance. This stands in stark contrast to the behavior of other human rights treaty bodies (with no textual authority to issue general recommendations at all) which start with a vague “right” and then *post hoc* seek to attach that right to four or five separate, unrelated treaty provisions, and direct States Parties, NGOs, other UN agencies, and private individuals collectively.

No matter how these comments might incidentally comport with the mandate of the CRC, however, the bottom line is that it sees itself as issuing “general comments on thematic issues,”¹⁷³ which goes beyond its treaty mandate and risks creating an institutional culture of legal noncompliance. A critical reevaluation is necessary.

b. Days of Thematic Discussion

As noted *supra*, the CRC has certainly overstepped its mandate with its own organization and execution of “days of thematic discussion.” While it is permitted to request the General Assembly to recommend to the U.N. Secretary General that the Secretariat conduct “studies on specific issues relating to the rights of the child,” the CRC itself has held days of thematic discussion on eighteen occasions. In further contravention of its mandate, the CRC has “adopted recommendations” following the conclusion of each annual conference.

The purported authority for these days of thematic discussion is Article 75 of the Rules of Procedure for the CRC,¹⁷⁴ which is in turn derived from Article 45(c) of the CRC.¹⁷⁵ As noted above, provision 45(c) deals with the general recommendation power, and requires a relation back to a specific material submitted by States Parties. Purporting to derive the authority to hold such “days of thematic discussion” from section 45(c) is, at best, negligent legal analysis. While section 45(a) permits competent United Nations

173. See Comm. on the Rights of the Child, *Monitoring Children's Rights*, OFFICE OF THE U.N. HIGH COMM'N FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/crc/> (last visited Oct. 24, 2012).

174. See Comm. on the Rights of the Child, Rules of Procedure, U.N. Doc. CRC/C/4/Rev.2 (Dec. 2, 2010).

175. See, e.g., Comm. on the Rights of the Child, Day of General Discussion: Children without Prenatal Care, 40th sess, Sept. 12-30, 2005, U.N. Doc. CRC/C/153 (2005).

bodies to be consulted for expert advice during consideration of the reports of States Parties, this is divorced from CRC practice insofar as the CRC continues to include NGOs, and insofar as these days of discussion are untethered from specific reports.

The adoption of “recommendations” from these discussions doubly oversteps the CRC’s mandate, and could call into question its independence from lobbying groups. To date, these recommendations have not been used as binding legal authority in any sense. However, as with the General Comments issued by the CRC, these actions, currently toothless, create dangerous precedent and can help foster a culture of legal noncompliance, devolving the CRC into another runaway treaty body.

c. Concluding Observations

Since commencing its activities, the CRC Committee has issued concluding observations, in accordance with the activities of other human rights treaty bodies, but in contravention of its mandate.¹⁷⁶ From a contractual standpoint, this overreach might appear to be less problematic than that of other treaty bodies, because States Parties contracted in an environment rife with overreach by other treaty bodies. Nevertheless, there is no VCLT provision providing for such an interpretation, and, as noted above, the overriding concern of the VCLT is the text of any agreement. These concluding observations, singling out States Parties as they do, butts up against the clear direction of the textual mandate of the CRC, which demands “general” comments. As with other treaty bodies, this practice of the CRC invents an adjudicatory function for the CRC not anticipated by States Parties.

4. Overview

The case study of the CRC is illustrative for several reasons. First, it provides an example of a broad (but not unlimited) textual mandate, proving that States Parties can write a broad mandate when they want to do so. Second, it showcases institutional improvement and a stronger respect for States Parties. This might in fact be *due* to a broader, but tangible, textual mandate. Finally, it highlights that even a better-functioning treaty body is routinely at risk for expanding its mandate. This should make clear the necessity for periodic “house cleaning” by States Parties.

176. *Concluding Observations*, *supra* note 37, at 30; *see, e.g.*, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Peru, 4th Sess., U.N. Doc. CRC/C/15/Add.8 (Oct. 18, 1993).

IV. VACUUM OF AUTHORITY: STATES PARTIES' NEGLIGENCE AND THE IMPACT ON THE TREATY BODY SYSTEM

Overstepping treaty body mandates is not always correlative with institutional self-promotion and regulatory capture. States Parties share some of the blame: they have not policed the treaty bodies when they have acted beyond their mandates, and they have not taken on an active role in resolving questions on treaty interpretation. The resulting vacuum of power has created opportunities for reformers to manipulate the treaty body system. It has also allowed treaty bodies to assume the role of treaty interpreters. This section examines how the hands-off approach taken by States Parties has led to disregard for treaty body mandates, opening the floodgates for drastic reforms and leaving States Parties vulnerable to treaty body assertions of power. As will be shown, the absence of State Party influence ultimately undermines the legitimacy of the treaty body system because treaty bodies are not institutionally equipped to fill the vacuum of authority.

A. Misfeasance of Treaty Body Members: Universal Standing Treaty Body Reform

The call for a unified treaty body, or “The Dublin Statement on the Process of Strengthening of the United Nation Human Rights Treaty Body System,” is a major reform effort that is more concerned with the “efficient and effective” operations of treaty bodies than the consent of the States Parties that created them.¹⁷⁷ Drafted and published by a number of “current or former United Nations human rights treaty body members acting in a personal capacity,” the Dublin Statement has neglected to consider the legality or democratic legitimacy of reform efforts.¹⁷⁸ As the international human rights legal framework has expanded to include nine major international treaties, commentators have begun to question how the system might be “universalized.”¹⁷⁹ The goal of such a universalization would be to more effectively implement the human rights treaties. Even the Office of the High Commissioner for Human Rights (OHCHR) itself has outlined a

177. Dublin Statement I, *supra* note 2, ¶ 4.

178. *Id.* ¶ 1.

179. *See, e.g.*, ANNE F. BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS (2001).

vision for a unified treaty body.¹⁸⁰ Whether or not effective human rights norm implementation demands a single, universal treaty body is a question of the first order that reformers take very seriously: they neglect to discuss whether such reform can legally be arrived at through the fiat of the OHCHR or whether it requires a new treaty negotiation process involving States Parties.

In fact, Michael O'Flaherty, a member of the Human Rights Committee, signatory of the Dublin statement, and as a longtime proponent of a unified treaty body, criticized the OHCHR Concept Paper, noting that it only "either postpones . . . or . . . only lightly touches" a "wide range" of issues, including the legal authority for Dublinesque reform.¹⁸¹ The Dublin statement devotes just a few sentences to legal authority, noting glibly that "[t]he creation of a unified standing treaty body raises significant legal issues."¹⁸² Unfortunately, in addition to correctly suggesting the legal possibility of amendments to the treaties, the OHCHR document incorrectly envisions as legal possibilities (1) "an overarching amending procedural protocol," (2) a "gradual transfer of competencies," and (3) a General Assembly resolution. None of these three possibilities are amendment procedures internal to the nine treaties themselves, and would therefore be extralegal.¹⁸³

This is not to call into question the motivations of the OHCHR or of human rights experts: it is simply to highlight the fact that these non-legal experts often envision grand schemes for social change without considering the corresponding legal authority for such change. For example, those who signed the Dublin Statement were mostly sociologists, professional feminists, political scientists, and politicians. While there were a few lawyers involved in signing the Dublin Statement, these lawyers were acting primarily as *advocates*, postponing the legal heavy lifting. Unfortunately, however, the legal issues have not been addressed elsewhere. Whether one believes that a unified standing treaty body is good or bad, one cannot deny that a dialogue must occur as to the legal authority to

180. See U.N. Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/CRP.1 (Mar. 22, 2006) [hereinafter *Concept Paper*]

181. Michael O'Flaherty & Claire O'Brien, *Reform of the UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, 7 HUMAN RIGHTS L. REV. 141, 172 (2007). This is not an understatement: the Concept Paper devotes only one short paragraph to questioning whether its recommendations be legal, and concludes that "[t]he creation of a unified standing treaty body raises significant legal issues." See *Concept Paper*, *supra* note 180, ¶ 64.

182. See *Concept Paper*, *supra* note 180, ¶ 64.

183. In fact, these three possibilities sidestep a difficult question of legitimacy: would a States Party to one treaty but not another become bound to both? It would seem clearly illegitimate, not to mention illegal, for the United States, as party to the CAT but not the CEDAW, to find itself bound to the CEDAW *because* of its ratification of the CAT.

create such a system, and the States Parties that created the treaty bodies must themselves be involved.

B. Negligence of States Parties

This overreach of human rights treaty bodies cannot occur, however, without the negligence of States Parties. Longtime CERD member, Michael Banton, commented on the surprising indifference exhibited by States Parties: “Should they not, as a collective, take more interest in the body they have established to work on their behalf?”¹⁸⁴ Rather than asserting proper procedure, States Parties often comply with extralegal demands of treaty bodies. In the case of powerful nations who fund the United Nations (such as the United States), such compliance might be motivated by self-interest.¹⁸⁵ In the case of nations with less clout, compliance can be compelled with soft-power: for example, referring to the possible withdrawal of economic aid or support for candidates to the human rights body itself.

Finally, some mistaken compliance by States is entirely innocent, as when Rwanda came before the CEDAW Committee in 2009, described in section III.A.2.¹⁸⁶ When the CEDAW Committee berated Rwanda for its “criminalization of adultery, *concubinage*, abortion and prostitution,” the Rwandan representative quite understandably began to object in first-order terms, explaining how, for example, its laws were intended to protect women.¹⁸⁷ The Rwandan delegate sought to answer the CEDAW Committee’s questions, not challenge the basis for asking questions in the first place. Yet perpetual awareness of the role of the treaty body is important to ensure its proper functioning. In the case of Rwanda, not only could the delegate have pointed out that the CEDAW Committee has no authority to demand revising domestic laws¹⁸⁸ and has no jurisdiction over abortion,¹⁸⁹ but also that the criminalization of prostitution is explicitly envisioned by the CEDAW treaty itself.¹⁹⁰

184. Banton, *supra* note 33, at 72.

185. A State Party on equal formal footing with other States Parties may nevertheless have greater power based upon its ability to withhold funding from the United Nations and thus influence substantive decisions. In this regard a state such as the United States may seek greater formal commitment as a way to exercise indirect authority over other states.

186. *Summary Record*, *supra* note 105, ¶ 38.

187. *Id.* ¶ 44.

188. See Section III.A.

189. See Section III.A.

190. Article 6 of the CEDAW treaty holds that States Parties should enact laws “to suppress all forms of traffic in women and exploitation of prostitution of women.” CEDAW, *supra* note 63, at art. 6.

When a State Party representative is told that it must decriminalize prostitution, the gut inclination of that representative is to justify the law itself and not to question the jurisdiction of the Committee. This breeds ill will and makes the State Party look as if it does not take human rights seriously. However, there is no reason why this should be the case. If States Parties collectively began reasserting their rights, questioning the jurisdiction of the treaty bodies would become as mundane as questioning jurisdiction in a private law court—this latter action is rightly seen as perfectly reasonable and in furtherance of systemic integrity.

C. Harm Caused to the Human Rights Treaty Body System

At first glance, overactive treaty bodies may seem to be an asset in the effort to protect human rights. The more aggressively treaty bodies monitor States Parties, theoretically the more likely States Parties will uphold human rights. However, this facile, ever-expanding conception of treaty bodies overestimates their capacity and competence and, more fundamentally, confuses their role in the human rights system by placing them in a coercive position never contemplated by States Parties.¹⁹¹ Instead, their history bears out a more limited, unique place for treaty bodies as facilitators of human rights, collaborating with States Parties to help them achieve their human rights obligations. They are not equipped to fill this vacuum of authority. Not only is this more effective, it is more legitimate.

1. Competency: Monitoring Periodic Reports vs. Making Law

Scholars commonly note that treaty body concluding observations have no binding legal status.¹⁹² While this has become a truism, treaty bodies have assumed the aura of binding legal authority as concluding observations have become more extensive. For this reason, some in the treaty body system see concluding observations as a “crucial tool.”¹⁹³ Treaty bodies cite to their own authority, and they repeat their treaty interpretations boldly and frequently as they hold States Parties accountable. While their

191. For example, a member of the Committee Against Torture noted that the treaty body review system has “grown and developed in ways unforeseen by the drafters.” Felicia D. Gear, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUMAN RIGHTS L. REV. 109, 116 (2007).

192. See, e.g., *Concluding Observations*, *supra* note 37, at 33 (noting that “it is clear that concluding observations, per se, impose no legal obligation on State[s] Parties”).

193. *Closing Remarks by the High Commissioner*, INFORMAL TECHNICAL CONSULTATION FOR STATES PARTIES ON TREATY BODY STRENGTHENING (May 12-13, 2011), available at <http://www2.ohchr.org/english/bodies/HRTD/docs/consultation/Sion/ClosingRemarksHC.pdf>.

“soft power” has increased their institutional legitimacy in the eyes of some international law scholars, this has come at the cost of the rule of law and democratic representation.¹⁹⁴

Law, in order for it to be effective, needs to be coherent, consistent, and predictable. Unfortunately, pronouncements coming out of treaty bodies are usually defective in these regards. Treaty bodies’ functions often overlap, which leads to differing and conflicting demands on States Parties for similar topics in concluding observations.¹⁹⁵ The authority treaty bodies have been assuming contravenes “basic principles of due process of law” because concluding observations result from “necessarily cursory” interactions between the members and States Parties.¹⁹⁶ States Parties do not have rights to formal representation before the treaty bodies, and oral exchanges often occur in less than one day.¹⁹⁷ These short exchanges, typically between three to ten and a half hours per State Party report, are repeated only once every four to five years.¹⁹⁸ Concluding observations vary in their sophistication, and many simply fail to ground their recommendations to States Parties on any authority. In addition, as we have shown, not only does this increase their unpredictability, but it unhinges any obligation for treaty bodies to offer rational justifications for their determinations.

Treaty bodies were not established to perform legal interpretations, and so they lack such institutional support. The members are not necessarily trained in legal analysis, which is not a role described in the mandate. In fact, many of the treaty body members also lack any legislative or legal backgrounds.¹⁹⁹ Additionally,

194. At the same meeting where the High Commissioner was contending that concluding observations were a “crucial tool,” some States Parties were concerned about the legitimacy of such “crucial tools.” See Technical Consultation, *supra* note 7, at 14 (“recommendations should focus strictly on the provisions of the concerned Treaty”).

195. For example, while the CRC has requested States Parties, such as India, to end the practice of sex selection abortion as discriminatory against unborn female children, the CEDAW Committee has framed the issue of abortion entirely in terms of women’s rights. The CEDAW Committee has encouraged States Parties to remove all restrictions on abortion because women have the right to determine the number/spacing of their children, and they should not be forced to undergo an illegal and unsafe abortion for any reason. Sex-selection abortion cannot be an exception under the CEDAW Committee’s formulation of the right. See Comm. on the Elimination of the Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cape Verde*, ¶ 30, U.N. Doc. CEDAW/C/CPV/CO/6 (Aug. 25, 2006); Comm. on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article Concluding Observations: India*, ¶ 34, U.N. Doc. CRC/C/15/Add.228 (Feb. 26, 2004).

196. *Concluding Observations*, *supra* note 37, at 36-37.

197. *Id.* at 37.

198. Anne F. Bayefsky, *Committee on International Human Rights Law and Practice: Report on the UN Human Rights Treaties: Facing the Implementation Crisis*, BAYEF-SKY.COM, available at <http://www.bayefsky.com/reform/ila.php> [hereinafter *First Report*].

199. While the ICCPR states that consideration should be “given to the usefulness of the participation of some persons having legal of *Discrimination against Women*—

unlike a court, or even an administrative agency, treaty bodies lack transparency and legislative or political accountability to States Parties. According to Amnesty International, “[v]acancies for seats on treaty bodies are seldom publicized,” and no procedures exist for “formal consultation at the national level with civil society.”²⁰⁰ The illusion of authority becomes all the more problematic when States Parties fail to subject treaty bodies to meaningful oversight.

If treaty bodies reassumed the role as non-adversarial facilitator to help States Parties examine their human rights records, then they would be acting within their competence. Mandates generally describe ideal members as having extensive human rights backgrounds.²⁰¹ While candidates may or may not also have legal backgrounds, the mandate makes them best suited to advise States Parties on human rights issues specific to the treaty they monitor. Instead of performing legal interpretations of treaty provisions, treaty bodies are best suited to engage States Parties in a constructive dialogue on human rights issues pertinent to the treaty.

2. Independence: Who’s Really Running the Show?

While initially nominated by States Parties, treaty body members are encouraged to perform their roles without consideration of the interests of their native countries.²⁰² The mandates for treaty bodies direct the members to act in their “personal capacities,”²⁰³ and so their allegiance should be to the

Membership, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cedaw/membership.htm> (last visited Nov. 16, 2012).

200. *Membership of Treaty Bodies*, AMNESTY INT’L, <http://www.amnesty.org/en/united-nations/treaty-bodies/membership> (last visited Oct. 27, 2012).

201. See, e.g., CRPD, *supra* note 63, at art. 34(3) (treaty body members “shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. . .”).

202. According to Louise Arbor, the former UN High Commissioner for Human Rights, “[t]he ultimate success of any monitoring system . . . depends on the calibre and independence of the experts monitoring implementation of treaty standards.” Concept Paper, *supra* note 180, ¶ 61. The Office of the High Commissioner for Human Rights describes treaty bodies as “committees of independent experts that monitor implementation of the core international human rights treaties.” *Monitoring the Core Int’l Human Rights Treaties*, OFFICE OF THE HIGH COMM’R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Feb. 11, 2013).

However, in practice, it is difficult for treaty body members to remain completely neutral and abandon their national allegiances. As treaty body member Michael Banton noted, members cannot simply “slough their national identities as snakes slough their skins.” Banton, *supra* note 33, at 57.

203. ICPED, *supra* note 63, at art. 26; CRPD, *supra* note 63, at art. 34(3); ICRMW, *supra* note 63, at art. 72(2)(b); CRC, *supra* note 63, at art. 43; CAT, *supra* note 53, at art. 17; CEDAW, *supra* note 63, at art. 17; ECOSOC Res. 1985/17, *supra* note 11; ICCPR, *supra* note 62, at art. 28(3); CERD, *supra* note 63, at art. 8(1).

treaties they monitor. Unlike other entities that may have political agendas, treaty bodies occupy a uniquely independent role as non-adversarial and non-political resources for States Parties. Many mandates also expressly require treaty bodies to act independently and impartially.²⁰⁴

However, treaty bodies have bitten off more than they were mandated to chew, and consequently, they need more manpower to accomplish their ambitions. Even though treaties have given NGOs no formal role, treaty bodies have enlisted their help.²⁰⁵ They assist treaty bodies by submitting “shadow reports,” which NGOs prepare to “shadow” the periodic reports submitted by States Parties, they appear at days of general discussion, they influence the drafting of general comments, they are authorized to present country-specific information before the treaty body at meetings to review States Parties’ reports,²⁰⁶ and they influence the follow-up procedures to implement treaty body recommendations.²⁰⁷

NGOs, given their position to consider just a handful of strongly held interests, represent rent-seekers trying to capture treaty bodies to promote their lobbying agendas. While NGOs can passionately defend human rights, their interested approach stands in marked contrast to the independence mandated from treaty bodies.²⁰⁸ Nonetheless, treaty body members are often

204. ICCPR, *supra* note 62, at art. 38 (“Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.”)

205. *See, e.g.*, Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 307-313 (2004) (arguing that human rights treaties envisioned no role for NGOs—with the exception of the Convention on the Rights of the Child—because all the monitoring tasks were explicitly reserved to treaty bodies, which are “made up of nonpartisan experts selected to serve based on their expertise . . .”). Treaty bodies began looking to NGOs in the mid-1980s, although the legitimacy of seeking their input was controversial. *Id.* at 307. Consequently, some HRC members would “surreptitiously glance at documents submitted to them by NGOs, hiding them under their desks.” Peter R. Behr, *Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGOs*, available at <http://unu.edu/unupress/lecture14-15.html> (last visited Feb. 11, 2013). By the mid-1990s, the use of NGO-produced information was “no longer subject to debate . . .” *Id.*

206. For example, the practice of the CEDAW has allowed NGOs to present country-specific information to the CEDAW at both its pre-sessional working group and during a plenary informal meeting. Rep. of the Comm. on the Elimination of Discrimination against Women, 20th sess., Jan. 19-Feb.5, 1999 & 21st sess., June 7-25, 1999, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38; *see also* Bustelo, *supra* note 69, at 107.

207. Blitt, *supra* note 204, at 301 (quoting World Conference on Human Rights, June 15-16, 1993, *Recommendations for Enhancing the Effectiveness of United Nations Activities and Mechanisms: Vienna Statement of the International Human Rights Treaty Bodies*, ¶ 16, U.N. Doc. A/CONF.157/TBB/4 (June 16, 1993)).

208. Since NGOs are not subject to professional standards of independence, one commentator has argued they form “a representative consortium of leading” human rights NGOs “working together with independent academic and judicial figures having expertise in

simultaneously acting as representatives for NGOs. This can be especially problematic for developing countries where, as often happens, their dialogues with treaty bodies are poorly attended by the public and the media, leaving only one or two NGO representatives in the room.²⁰⁹ While this fact alone does not immediately mean a treaty body member's allegiance is to her policy agenda rather than the treaty she monitors, it does create the appearance of impropriety and give potential undue influence to the NGO.

Devoted NGO advocates can become so enamored by the possibility of creating substantive rights that they can lose respect for the procedural limits placed on treaty bodies. As noted above, at the time of the 1996 Roundtable at Glen Cove, half of the CEDAW Committee was also simultaneously serving on powerful women's rights lobbying groups.²¹⁰ One such group, the Center for Reproductive Rights (CRR), has actively promoted the recommendations made at the Glen Cove meeting. Even years afterward, CRR acknowledged that "there is no binding hard norm that recognizes women's right to terminate a pregnancy" in international law.²¹¹ Nonetheless, the Glen Cove meeting explicitly instructed treaty bodies on how they could read abortion into the various provisions in the treaties they monitor, even over the objection of the CERD chairperson who was concerned about exceeding his mandate.²¹² Showing that CRR is aware that it is illegitimately pushing treaty bodies into changing international law, it remarks on the need to keep this approach secretive in an internal memo:

[T]here is a stealth quality to the work: we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile victories will gradually put us in a strong position to assert a broad consensus around our assertions.²¹³

NGOs have been using treaty bodies as the backdoor to furthering their interests when domestic political efforts have met insurmountable resistance.

international law, human rights and regulatory systems" for the purpose of self-regulation. Blitt, *supra* note 205, at 307. Such standards of professionalism have yet to be created.

209. *First Report*, *supra* note 198.

210. Yoshihara, *supra* note 112, at 182.

211. *Documents Reveal Deceptive Practices by Abortion Lobby*, Extensions of Remarks, 108th Cong., 1st sess., 149 CONG. REC. E2534-E2547 (daily ed.) (Dec. 8, 2003) (statement of Hon. Christopher H. Smith) [hereinafter *Deceptive Practices*].

212. Roundtable, *supra* note 103, at 25-26.

213. *Deceptive Practices*, *supra* note 211, at E2538.

States Parties have not taken an active role in holding treaty bodies to their mandates, so the risk of treaty body capture remains especially serious. In addition to the unrepresentative effect this will have on international law, primarily it takes a key resource away from States Parties. The self-reporting human rights approach envisioned treaty bodies as independent partners to help States Parties examine their “conscience” on human rights. Treaty bodies have increasingly become just another lobbying organ making demands on States Parties.

V. PROPOSALS

The foregoing has demonstrated the necessity for housecleaning in the international human rights treaty system: the following provides some concrete proposals for reform for the benefit of States Parties and treaty body members alike.

A. Proposal: Greater States Parties’ Involvement

Perhaps the most important change that could be brought to the current human rights treaty system would be a reassertion of the rights of States Parties. In fact, such a program has been recently proposed by a number of States Parties led by the Russian Federation.²¹⁴ In the abstract, this proposal is entirely uncontroversial: it has no formal element, as it is already written into the fabric of the treaty body system itself. Yet interested third parties involved in the treaty body capture described above oppose such efforts. What are the rights of States Parties, and how might their reassertion help to reform the treaty body system?

1. States Parties May Amend Treaties

Six of the nine human rights treaties include an explicit amendment process.²¹⁵ The procedure is identical for each: any

214. See G.A. Res. 66/124, U.N. GAOR, 66th Sess., U.N. Doc. A/66/L.37 (Feb. 16, 2012). The proposal was supported by Belarus, Bolivia, China, Cuba, Indonesia, Iran, Nicaragua, Pakistan, Russia, Syria, Tajikistan, Venezuela, and Zimbabwe.

215. See CRPD, *supra* note 63, at art. 47; ICRMW, *supra* note 63, at art. 90; CRC, *supra* note 63, at art. 50; CAT, *supra* note 53, at art. 29; International Covenant on Economic, Social and Cultural Rights, at art. 29, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; ICCPR, *supra* note 62, at art. 29. In addition to these six explicit amendment processes, the remaining CEDAW treaty (Art. 26) and CERD (Art. 23) treaty contain “revision” procedures whereby a States Party indicates a desire for revision, and the General Assembly decides upon the action to take. It is unclear if the scope of the revision power is as great as that of amendment, however, but the ability of any member of the General Assembly to block language in principle should indicate that the two mechanisms be interchangeable, both requiring unanimous consent of the States Parties.

State Party proposes an amendment and files it with the Secretary-General's office, which then communicates to each States Party that an amendment has been filed and determines if there is support for an amendment conference of States Parties. Upon ratification, depending on the treaty, by two-thirds or a majority of States Parties, the amendment is sent to the General Assembly for approval, and then back to States Parties for signature. If any State Party disagrees with the amendment, it may vote against it, and if the amendment passes it may choose not to be bound by the amendment. In practice, therefore, this procedure requires unanimity. States Parties serious about reasserting their rights would do well to consider making use of the amendment process.

2. States Parties May Denounce Treaties

Many of the nine human rights treaties includes not only a reservation provision to ensure that States Parties can unilaterally guarantee that they will not be bound by more than they agreed to,²¹⁶ but also a denunciation mechanism.²¹⁷ A denunciation terminates all future obligations under a treaty going forward, and is described in the VCLT Article 56. A denunciation is a unilateral right in contract: there is no review of the legality of a denunciation, and parties have license to denounce a treaty for any reason.

However, States Parties are still bound by their obligations up until the effective date of a denunciation. Thus, the picture of a rogue state seeking to retroactively avoid treaty obligations is simply false: denunciation is a forward-looking instrument.²¹⁸ Because of this, denunciation is a legitimate tool for reigning in wayward treaty bodies: if treaty implementation begins to exceed the bounds of reasonable interpretation, threats may be made warning of possible denunciation. If the treaty as applied begins to

216. Treaty bodies continually issue reports lamenting the scope and number of reservation by States Parties. This practice is questionable, but they rightly recognize that progress in this area is a matter of convincing States Parties to voluntarily withdraw their reservations. *See, e.g.,* Lijnzaad, *supra* note 124, at 367 (claiming that the discussion of the progressive elimination of reservations is within the scope of the CEDAW Committee mandate to monitor periodic reports of States Parties). In addition, treaties often bar reservations incompatible with the treaty as a whole: were a treaty body or a gathering of States Parties to determine a reservation so anathema to the treaty itself as to be rendered null in this way, the question becomes whether the States Party is or has ever been bound by the treaty or not.

217. CRPD, *supra* note 63, at art. 48; ICRMW, *supra* note 63, at art. 89; CRC, *supra* note 63, at art. 52; CAT, *supra* note 53, at art. 31; CERD, *supra* note 63, at art. 21.

218. "A state that withdraws in accordance with an exit provision does so lawfully and thus does not, in theory, suffer a reduction in its reputation for complying with international agreements." Timothy Meyer, *Power, Exit Costs, and Renegotiation in Int'l Law*, 51 HARV. INT'L. L.J. 379, 394-95 (2010).

differ greatly from the treaty as negotiated, States Parties may seek to denounce future treaty obligations while remaining faithful to previous obligations. In fact, this is exactly what States Parties on occasion do,²¹⁹ and a more widespread practice would help maintain the integrity of the human rights system.

3. States Parties May Meet to Discuss Their Treaty Obligations

The third and perhaps most important way a State Party might seek to reassert its rights is in constructive dialogue with other States Parties. Many treaties, for example, contain provisions for negotiation and arbitration of inter-State interpretive disputes, yet none have taken advantage of this process.²²⁰ More importantly, the CRPD contains a regular meeting of States Parties to “consider any matter with regard to the implementation” of it.²²¹ Other conventions contain no such explicit requirement, but States Parties, as the operative force behind the treaties, retain the right to meet when they choose. Nevertheless, it would be beneficial to amend the remaining treaties to include such an explicit *requirement*. As has been seen throughout this article, where States Parties abdicate their interpretive duties, they create a legal vacuum, which invites third parties to unduly influence the development of international human rights law.

In practice, however, there is greater controversy. As with any vested interests, there is a thicket of cocktail party opposition to overcome: jobs and informal networks built upon the illegitimate system are at risk. In fact, when the Russian Federation organized a bloc of States Parties to pass a resolution calling for reform of the treaty body system, the effort was resisted by a number of NGOs who drafted a response letter, demanding that the proposal by Russia not be brought to the General Assembly until the NGOs had their say.²²² Yet aside from self-motivated criticism, there is a

219. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005). Helfer finds over 1500 treaty denunciations from 1945-2004. He rightly notes that there are costs to exiting treaties and to threats of exiting treaties, but these are practical considerations concerning a perfectly legal mechanism.

220. Banton, *supra* note 33, at at 73.

221. CRPD, *supra* note 63, at art. 40. The United Nations General Assembly has also urged States Parties to meet to address meeting their reporting obligations. G.A. Res. 49/178, ¶ 6, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/178 (Mar. 5, 1995). However, according to the CERD Chairperson, the States Parties have not effectively addressed their treaty obligations as these regular meetings. Banton, *supra* note 33, at 72-73. In order to prevent inter-state politics from taking over at such meetings, States Parties will need to explicitly set aside time and procedures to examine questions of treaty interpretation and implementation.

222. See Letter from Bjorn Pettersson, Dir., Int'l Service for Human Rights, to General Assembly (Jan. 18, 2012), available at <http://www.amnesty.org/es/library/asset/>

real concern that States Parties, given too much leeway, will perpetually avoid binding international commitments.

This controversy should not dissuade reformers. Rather, it should imbue them with a greater sense of purpose. Balancing the need for a robust human rights treaty system with the rights of States Parties and fidelity to the textual mandates of treaty bodies is an ongoing process that States Parties should be involved with regularly. Thus, we propose that States Parties should consider devoting more resources to active participation in the human rights dialogue, including by seriously assessing their interpretive role through dialogue with other States Parties and the amendment process.

B. Proposal: Ethics Rules for Treaty Body Membership

The community of experts available for nomination to human rights treaty bodies is remarkably insular: the same names come up again and again. As noted above, States Parties, particularly States Parties with less financial power, often rubber-stamp the reelection of experts.²²³ Furthermore, the pool of experts on which to draw is rather small. As noted above, there is substantial cross-pollination between treaty body membership and the membership of lobbying groups and other major economic interests. Some of this is to be expected, even laudable, given the self-selection of interested experts: it takes a certain quality of spirit to devote one's life to protecting the innocent.

As treaty bodies have expanded beyond their mandates, they have become increasingly susceptible to powerful activists eager to promote their agendas. For example, while treaty body members hold four-year terms, Hanna Beate Schopp-Schilling was a member of CEDAW for almost twenty years.²²⁴ In the quest to increase CEDAW's power, she called for "creative approaches" to treaty interpretation.²²⁵ She identified such interpretation as the process of changing "norms," instead of doing a legal interpretation on the treaty text, as required by the VCLT.²²⁶

No treaty body has mandated ethics rules; however, the ICCPR does require that each member perform his or her functions "impartially and conscientiously,"²²⁷ and the CMW and the CERD

IOR40/001/2012/en/2268befd-db18-4a72-9180-82a27ad9481d/ior400012012en.pdf (last visited Feb. 11, 2013).

223. See Morvai, *supra* note 38.

224. 1989-2008

225. Hanna Beate Schopp-Schilling, *Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination Against Women*, 7 HUMAN RIGHTS L. REV. 220 (2007).

226. *Id.*

227. ICCPR, *supra* note 62, at art. 38.

require their treaty body members to act with “impartiality.”²²⁸ The treaties also all require the treaty body members to be of high moral character or standing. Given the lobbying pressures on treaty body members, and the likelihood that these experts have affiliations with organizations advancing a particular agenda, treaty bodies could require their members to take an oath or to adhere to a code of ethics laid out in the rules of procedure. No formal procedures exist to remove or discipline errant treaty body members. Having clear ethical requirements, perhaps also identifying conflicts of interest that would require recusal, could be a way to hold treaty body members morally accountable to their commitments in the treaty.²²⁹

C. Proposal: Treaty Bodies Follow Treaty Mandates

To propose that treaty bodies remain faithful to their mandates seems circular and ineffectual. But treaty body members are professionals—moral agents who should be a real part of any reform effort. In addition to seeking greater legal acumen and democratic accountability, and in addition to suggesting a promise or oath of office, when treaty body members see the benefits of fidelity to their mandates, we are confident that they will be more inclined to cooperate. Listed here are some benefits that treaty body members should consider.

First, several nations have refused to sign onto human rights documents, and many of those that have done so also include reservations to the instruments. The OCHCR and other actors have lamented both facts. These same nations have often lamented the “imperialism” or “progressive” overreach of the treaty bodies.²³⁰ By sticking to their mandates, treaty body members encourage greater support for the human rights system. States could have more confidence in the system if they knew novel interpretations would not be later imposed on them. Second, many have lamented the limited resources available to treaty bodies and their insurmountable workload. Yet these concerns were addressed during the drafting process: the limited textual mandates of treaty bodies

228. ICRMW, *supra* note 63, at art. 72(1)(b); CERD, *supra* note 63, at art. 8.

229. Recently, some States Parties have made similar recommendations. *See* Technical Consultation, *supra* note 7, at 18.

230. *See, e.g.*, Christof Heyns & Frans Viljoen, *THE IMPACT OF UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* 43 (2002). Indeed, the very title of the book, implying that the multilateral human rights treaties are propriety to the “United Nations” helps to stymie a sense of ownership on the part of marginalized nations. Reinvigorated human rights practice by States Parties might have the additional benefit of human rights “buy-in.”

are designed to maintain a reasonable workload.²³¹ Third, as has been documented, the direct attacks on States Parties by treaty bodies—including pressure behind closed doors and specific comments—have created acrimony in a system that ought to be collaborative and congenial. Treaty body members who remain faithful to their treaty mandates will likely find their recommendations treated with greater respect if they cooperate with States Parties to help them examine their human rights records.

VI. CONCLUSION

In ratifying each of the nine human rights treaties, States Parties agreed to a much narrower role for treaty bodies than treaty bodies occupy today. Broadly, treaty bodies were meant to review and comment upon the periodic compliance reports submitted voluntarily by States Parties and issue a summary of all the reports to the United Nations General Assembly. Subsequent Optional Protocols provided for certain adjudicative procedures, but the interpretive scope of decisions was essentially limited to the parties in dispute, and in no case was seen as authoritative or universal.

We have identified a number of reasons for why, as a descriptive matter, this might have happened. Since States Parties took a lax approach to interpreting treaties, the ideological and economic interests of a small group of self-selected experts captured the treaty bodies, and these bodies then expanded their activity to create rents. After explaining the resulting harms from this distortion of the treaty body system, we have provided some examples of how this might be remedied. Ultimately, the greater involvement of States Parties in bringing new blood into treaty bodies, and policing the interests of current panels, is essential. Additionally, ethics rules are particularly important because breaches of ethics rules provide flash points for public debate, shining light on practices that currently go on in the dark. Finally, treaty bodies themselves need to become aware of their limited mandates and must respect those limits to ensure the proper functioning of the treaty system.

231. The chairperson of CEDAW has recommended limiting the page count of States Parties' submissions. This suggestion does reduce workload, but it does nothing to address underlying structural problems and in fact exacerbates mandate creep by forcing States Parties to squeeze first-order information into forms determined by the treaty body and preventing second-order objection on jurisdictional or other grounds. If a States Party has only five pages to talk about its CEDAW compliance, it has no room to object to illegitimate actions by the treaty body itself. See Technical Consultation, *supra* note 7, at 20.

While a comprehensive assessment of the role of treaty bodies will not occur overnight, we hope that we have contributed to the necessary dialogue. The need for reform is undeniable, not only because of illegal actions taken by treaty bodies, but also because the proper functioning of human rights treaty bodies is important for the health of the norms themselves. We are convinced that more active participation by States Parties in treaty interpretation, treaty body ethics rules, and greater respect for treaty body mandates, would strengthen the international human rights framework by legitimating the human rights norms themselves and helping world peoples internalize their commitment thereto. Whatever one's position on the proper role of treaty bodies, these proposals, in principle, should be uncontroversial. As with any reform effort in international law, the devil is in the details:²³² nevertheless, the internal reform of the treaty body system is a critical subject, and worthy of future debate.

232. It is true, for example, that the reassertion of the rights of States Parties runs up against the soft power of the treaty bodies themselves, that may stifle efforts with threats of funding removal and other adverse action taken in concert with the international legal regime.

<u>Treaty Body Overview</u>						
<u>Treaty</u>	<u>Entered into Force</u>	<u>Number of Members</u>	<u>Reports due every</u>	<u>General Comments?</u>	<u>States Parties May Denounce?</u>	<u>Interpretive Disputes Settled By</u> ²³³
CERD	Jan. 4, 1969	18	2 years	No	Yes	Negotiation or referral to the ICJ (Art. 22)
ICCPR	Mar. 23, 1976	18	4 years	No	Yes	Unaddressed (reserved to States Parties)
ICESCR	Jan. 3, 1976	18	5 years	No	Yes	Unaddressed (reserved to States Parties)
CEDAW	Sept. 3, 1981	23	4 years	No	Yes	Negotiation, arbitration, or referral to the ICJ (Art. 29)
CAT	June 26, 1987	10	4 years	Yes, may make general comments "on the report"	Yes	Negotiation, arbitration, or referral to the ICJ (Art. 30)
CRC	Sept. 2, 1990	18	5 years	Yes, based upon Art. 44 and Art. 45 information	Yes	Unaddressed (reserved to States Parties)
CMW	July 1, 2003	14	5 years	No	Yes	Negotiation or arbitration (Art. 92)
CRPD	n/a	18	4 years	No	Yes	

233. As a theoretical matter, all disputes must be settled with the unanimous consent of States Parties. In practice, States Parties manifest this unanimous consent with mechanisms internal to the treaty (amendment, arbitration, or referral to the ICJ here), or the ever-present right of freely contracting States Parties to withdraw or renegotiate

**THE POLITICAL INFEASIBILITY
OF “THIN” CONSTITUTIONS:
LESSONS FROM 2003-2006 ISRAELI
CONSTITUTIONAL DEBATES**

HANNA LERNER*

This article questions the constitutional advice commonly offered to societies deeply divided over the vision of their state (e.g., Egypt, Tunisia, Turkey, and Israel) to draft a “thin” constitution. According to this liberal constitutionalist approach, the constitution-making process is not expected to interfere with value-ridden conflicts (e.g., minority rights or the role of religious law) but rather to provide an institutional framework for future democratic deliberation and decision-making on divisive issues. While normatively a thin constitution is an attractive ideal, this instrument, I argue, is at odds with social, political, and institutional realities in contemporary societies driven by identity conflicts. Based on a close empirical analysis of the failed attempt to draft a thin constitution in Israel from 2003-2006, this article illustrates two central obstacles to realizing the ideal of a thin constitution: the first stems from an inherent incoherence in that ideal, since in fact thin constitutions have a strong symbolic content in representing a particular type of liberal democracy. The idea of thin constitution rests on widespread public acceptance of the principles of political liberalism, defined by John Rawls in terms of “overlapping consensus,” yet conflicts over liberal rights are usually at the heart of the constitution debate in divided societies. The second problem stems from the effects of existing institutional legacies—particularly judiciary-legislature relation—on the drafting process. The legacy of constitutional dialogue between the judiciary and the legislature hinders the separation between constitutional debates on procedural-institutional and ideational-foundational issues, during the constitution-drafting process. Thus the timing of constitution writing, whether it occurs at the state-building stage or during a transitional phase decades after independence, is of great im-

* Assistant Professor in Political Science at Tel Aviv University. For helpful comments and valuable suggestions I would like to thank Asli Bali, Nathan Brown, Mirjam Künkler, Janet McLean, Shylashri Shankar, Faina Milman-Sivan, Murat Somer, Yofi Tirosch, and for the participants of the Workshop on Constitution Writing, Human Rights, and Religion, Rockefeller Foundation, Bellagio Center (July 2012). Earlier version of this paper was also presented at the Conference on Constitution Making, Democracy and Transitional Justice, TESEV, Ankara, Turkey (2011) and I particularly thank Levent Köker for helpful remarks. I am grateful to Itay Pollack and Reut Tondovski for their excellent research assistance, and to the Mandel Foundation and the EU Marie Curie International Reintegration Grant for financial support.

portance. The article concludes that the difficulties of writing a thin constitution are increasing, rather than decreasing, over the years.

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I. INTRODUCTION

The language of constitution writing has become the lingua franca of twenty-first century politics. The recent wave of constitution writing, which began about two decades ago in post Communist Eastern and Central Europe and post-Apartheid South Africa,¹ seems far from being over. Many of the constitutions written since the turn of the new millennium take place in societies that are deeply divided over the citizenry's common vision, where the constitutional debate involves intensive disputes over core ideational questions such as the state's religious and national character. This was the case with recent projects of constitution drafting in post-conflict societies such as Iraq, Kenya, South Sudan, and Burundi;² or in recent and expected constitution writing in democratizing Muslim states such as Indonesia, Turkey, Mali; or those that stemmed from the Arab spring such as in Tunisia and Egypt, where tensions between religious law and individual rights are at the core of the constitutional debate.³ Even in New

1. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 363, 369 (1995).

2. Kirsti Samuels, *Post Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 663 (2006). See generally Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2005); ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ (Dick Howard ed., 2009); FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING (Laurel E. Miller ed., 2010).

3. See NADIRSYAH HOSEN, SHARI'A & CONSTITUTIONAL REFORM IN INDONESIA (2007); Nathan Brown, *Islam and Constitutionalism in the Arab World: A Puzzling End to Islamic Inflation*, Presented at the Workshop on Constitution Writing, Human Rights, and Religion, Rockefeller Foundation (July 2012).

Zealand and in Israel, two of the three democracies with no written constitution, the political system recently initiated endeavors to draft a formal constitution in reaction to increasing tensions over national and religious identity issues.⁴

The advice commonly provided by constitutional experts under conditions of intense disagreement over basic norms and values is to draft a “thin” constitution.⁵ The constitution-making process, according to this approach, is not expected to interfere in value-ridden conflicts, but rather to provide a legal framework within which conflict resolution can be advanced. Thus, a constitution should be thin in the sense that it avoids making decisions on contentious identity questions and focuses on establishing democratic institutions that allow further deliberation on divisive issues.

This article criticizes this common constitutional advice and argues that a thin constitution fails to provide a relevant constitutional framework for contemporary, divided societies. While the ideal of a thin constitution may be normatively and theoretically attractive, given the social, political and institutional realities of societies riven by identity conflicts, this recommendation appears less viable and is eventually rejected by constitutional drafters.⁶ More specifically, I contend that theories that advocate for such an approach fail to take into account two obstacles to the drafting of a thin constitution: the first is concerned with the type of conflict in question. The idea of a thin constitution rests on widespread public acceptance of the principles of political liberalism, defined in Rawlsian terms as the distinction between citizens’ private identities (e.g., ethnic, cultural, and religious) and their shared public civic identity.⁷ However, in societies divided between competing visions of the state *in toto* (e.g., regarding the role of religion in the public sphere), this distinction is at the core of the constitutional debate, and thus cannot be regarded as the constitutional common denominator.

4. See *Constitutional Review Detailed*, THE NEW ZEALAND HERALD, Dec. 8, 2010, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10692881; HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES Ch. 3 (2011).

5. The term “thin” constitution was explicitly used in the recent Israeli constitutional debates, yet it represents a wider perspective of the role constitutions play under conditions of ideational disagreements. See discussion *infra* Section II. This usage of the term differs substantially from that of Mark Tushnet, who defines a “thin” constitution as providing “fundamental guarantees of equality, freedom of expression, and liberty.” MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11 (1999). Tushnet’s discussion refers to the particular context of the U.S. constitutional debate over judicial review. See *id.* at 6-32.

6. This article analyzes the rejection of a proposal for a thin constitution in Israel. Similarly, in Turkey in 2007, a proposal to draft a thin constitution was discussed but was never adopted. I will return to the Turkish example at the concluding section of the article.

7. See JOHN RAWLS, POLITICAL LIBERALISM 134 (1993).

The second problem with thin constitutions relates to the temporal dimension of constitution writing and the effects of the existing institutional legacy on the drafting process. Generally, constitutional theory tends to perceive the moment of constitution-making as a revolutionary moment of “new beginning,” in which the political order is being reconstructed.⁸ However, most contemporary projects of constitution writing or rewriting do not occur at a foundational moment of state building but rather decades after independence.⁹ At that stage, the institutional legacy that evolved over the years—particularly the constitutional dialogue between the legislature and judiciary—hinders the separation between constitutional debates over institutional issues from disputes over the character of the state. For that reason, I will argue, the challenges of drafting a thin constitution may increase as state institutions evolve and mature over the years, and thus the adoption of a thin constitution is becoming more difficult in well-functioning states rather than at moments of “new beginning” when state institutions are in their formative stage.

The analysis presented here to substantiate and exemplify these claims draws upon a study of the recent endeavor in 2003-2006 to craft a formal constitution in Israel. The participants in this highly contentious process explicitly addressed and rejected the option of drafting a thin constitution to resolve Israel’s complex internal identity conflicts. The original empirical research of these debates is based on close reading of parliamentary constitutional committee minutes (2003-2006) and Knesset debates; interviews with Ministers, Knesset members, and additional participants in the debates; as well as Supreme Court decisions and other archival materials. It reveals the intricate mixture of institutional and ideational tensions that precluded drafters from differentiating between two aspects of the constitutional debate—institutional design or re-design (e.g., regarding procedures of legislation or questions regarding the structure of the judiciary) and the foundational debate on the definition of the state’s identity (e.g., concerning the role of religious law or the right to equality). Consequentially, parliamentary and extra-parliamentary efforts to draft a constitution ended in 2006 in ways similar to constitutional debates in the early years of the state (1948-1950): neither produced a written constitution.

8. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 205 (1991); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992); Elster, *supra* note 1; TUSHNET, *supra* note 5.

9. See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 209 (2009); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

The article unfolds as follows: Section II presents the theoretical idea of a thin constitution, followed by discussion of the impediments in adopting it in the context of long-lasting ideational and inter-institutional struggles regarding issues of national and religious identity (Section III). Section IV analyzes the most recent attempt in Israel to write a formal constitution and demonstrate how the overlap between the judiciary-legislature tension and the religious-secular conflict blocked progress in the constitution-drafting process there. The concluding section (VI) relates the Israeli case study to the broader concern for the relevance of the proposal to draft a thin constitution for contemporary constitutional debates, particularly in Turkey.

One introductory remark is required before launching the detailed discussion: One may wonder to what extent the Israeli experience is relevant to the types of divided societies that recently, or currently, are engaged in constitution making. Indeed, Israel is usually perceived as an exception in constitutional literature as it is one of very few countries in the world without a written constitution (along with the UK and New Zealand) and the only country in the world that decided, at time of independence, not to adopt a formal constitution. Israeli constitutional exceptionalism is salient when compared to liberal democracies in North America and West Europe. However, if societal schisms—rather than constitutional formalities—are the primary basis of comparison, then Israel may represent a paradigmatic case of divided societies, particularly those characterized by intense struggles over the state's identity. In contrast to many Israeli scholars who tend to perceive Israeli society as “multicultural” and who commonly compare it to Western multicultural democracies such as Canada and the United States,¹⁰ I contend that the intensity and durability of Israel's internal conflicts, in addition to the nature of its constitutional debates, align it more closely with the divided societies of non-Western states such as India, Turkey, Indonesia, and Egypt. While in liberal western democracies, such as the United States and Canada, multicultural arrangements rest on a wide societal consensus on the basic principles of political liberalism; in divided societies (e.g., Israel and Turkey), such a consensus—particularly with regard to individual rights or the distinction between private identities and public shared identities—is difficult to find. In Section III, I elaborate on the definition of divided societies. As I show in an analysis of the Israeli case, its long-lasting

10. See MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 181-92 (2008); *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: A BOOK IN MEMORY OF ARIEL ROZEN-ZVI* 25-27 (Menachem Mautner et al. eds., 1998) [Hebrew]; *THE MULTICULTURAL CHALLENGE IN ISRAEL* (Avi Sagi & Ohad Nachtomy eds., 2010).

identity conflicts (particularly the Jewish-Palestinian national conflict and the Orthodox-secular intra-Jewish conflict) pose grave challenges to the state's democratic institutions and prospects for protecting individual rights. Understanding these potential dangers may be instructive for current societies debating their constitutions when there are deep disagreements over the shared credo of their state.

II. THE IDEA OF A THIN CONSTITUTION

Modern constitutions are by and large perceived in institutional or procedural terms. They are expected to establish the legal and political structure of governmental institutions and to regulate the balance of power. As András Sajó stated: "Constitutions—since the basic laws of the Greek city states (*polis*) until today—concern the relationship of the state's fundamental organs and its institutions. . . . Constitutions are about power"¹¹ The institutional role of constitutions to create and define the rules according to which governments function has not only practical, but also normative, implications. By constraining governmental power, constitutions play a normative role in manifesting the principles of constitutionalism.¹² According to this view, constitutions are expected to limit governmental power by crafting an institutional system that distributes powers between various branches of the government and provides a formal basis for protection of fundamental rights.¹³ Scholars employ the principles of constitutionalism to distinguish between "proper" or "true constitutions" and "nominal" or "façade constitutions."¹⁴

This view of the constitution's main role—to establish the institutional structure of government and to determine the rules of future legislation—is thin in contrast to a thicker understanding of constitutions, which acknowledges an additional role played by constitution—a foundational, or symbolic role in representing the ultimate goals and shared values that underpin the state. By delineating the commonly held, core societal norms and aspira-

11. ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 2 (Central Eur. Univ. Press ed. & trans., 1999).

12. CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 26, 123 (Ginn & Co. rev. ed., 1950); see also Keith E. Whittington, *Constitutionalism*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 281, 281-99 (Keith E. Whittington et al. eds., 2008).

13. See JON ELSTER & RUNE SLAGSTAD, *CONSTITUTIONALISM AND DEMOCRACY* 2-3 (1993).

14. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *AM. POL. SCI. REV.* 853, 861-62 (1962); cf. Donald Lutz, *Toward a Theory of Constitutional Amendment*, 80 *AM. POL. SCI. REV.* 335, 365 (1994).

tions of the people, constitutions are assumed to provide citizenry with a sense of ownership and authorship—a sense that “We the People” includes me.¹⁵ In other words, for constitutions to be popularly accepted as legitimate in democratic societies, they have to express the underlying common vision of the polity. In the words of W. F. Murphy, constitutions serve “as a binding statement of a people’s aspirations for themselves as a nation. . . . If a constitutional text is not ‘congruent with’ ideals that form or will reform its people and so express the political character they have or are willing to try to put on, it will quickly fade.”¹⁶ And as Joseph Raz acknowledged, constitutions in their thick sense express a common ideology and thus serve “not only as a lawyers’ law, but as the people’s law.”¹⁷ Thick constitutions, thus, serve as a basic charter of the state’s identity.¹⁸

To be clear, an important distinction is between theories of *thin* constitutions and those of *short* constitutions. Since the early days of American constitutionalism, short, framework-oriented constitutions were the dominant mode adopted by the drafters of both States’ and the United States’ Constitution. James Madison, for example, argued that short, institutionally oriented constitutions, which merely regulate institutions and citizens’ duties, are required to guarantee constitutional longevity and thus allow for political stability, which was the main purpose of written constitutions in his view.¹⁹ In the two centuries that followed, most constitutional scholars and political scientists shared Madison’s

15. A distinction somewhat similar to the procedural versus foundational aspects of constitutions is made by Donald S. Lutz, who distinguishes between power elements (“found in institutions for decision-making”), Donald S. Lutz, *Thinking About Constitutionalism at the Start of the Twenty-First Century*, 30 *PUBLIUS* 115, 129 (2000), and cultural elements (“cultural mores and values”) contained in every constitution, *id.* at 128. Lutz also added the element of justice as a key ingredient of constitutionalism. *Id.* at 129.

16. Walter F. Murphy, *Constitutions, Constitutionalism and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 3, 10 (Douglas Greenberg et al. eds., 1993). Similarly, according to Daniel J. Elazar, “Constitutions . . . also reflect, explicitly or implicitly, the moral principles underlying polities or regimes.” Daniel Elazar, *Constitution-Making: The Pre-Eminent Political Act*, in *THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS: REDESIGNING THE STATE* 232, 240 (Keith G. Banting & Richard Simeon eds., 1985).

17. Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 152, 154 (Larry Alexander ed., 1998).

18. This article focuses on the relations between identity and the constitution in the sense of a formal document. A recent growing body of work analyses the relation between identity and constitutions in a broader sense, including the way constitutions are interpreted and adjudicated. For leading examples, see MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT* (2007); GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010); RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).

19. See Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 *AM. POL. SCI. REV.* 837 (1999).

preference for short, loosely drafted framework constitutions.²⁰ By contrast, in recent years, some empirical studies have undermined the assumption that short constitutions secure constitutional durability and stability. For example, in their comprehensive comparative study of 935 written constitutions, Elkins, Ginsburg, and Melton demonstrated that longer and more detailed constitutional documents endure for a greater number of years than shorter and less detailed constitutions.²¹ Similarly, Christopher Hammons showed in a study that examined 145 constitutions written in the American states that longer and more detailed design of state constitutions enhances rather than reduces their longevity.²² Both studies, however, focus on constitutional length and details in terms of number of words included in the constitution or the number of provisions or topics listed in the constitution. Both studies refrain from making a distinction between types of constitutional provisions or their content. Thus, for example, they do not distinguish between constitutional provisions that address institutional or procedural regulations, such as electoral rules or procedures regarding the head of state; and more symbolic provisions, such as colors of the flag, national language, or religious rights. Elkins, Ginsburg, and Milton, for example, examine the effect of scope of topics included in constitutional documents on their durability, yet among the ninety-two topics they examine, only three or four address identity issues, such as language or rights, while the rest address procedural issues.²³

By contrast to these studies, which focus on short constitutions and examine their length in terms of number of words or number of provisions regardless of their content, the discussion of thin constitutions rests on a classification of constitutional provisions according to their content. More particularly, it requires the differentiation between provisions that address procedural issues and those referring to identity issues and basic rights. Such classification underpins the distinction between thin and thick constitutions.

The foundational and symbolic elements found in the thick constitution are usually expressed in the preamble and in state symbols or cultural practices (e. g., the declarations of the official language, the established religion, the official day of rest, the flag,

20. Hammons, *supra* note 19, at 837-38; ELKINS ET AL., *supra* note 9, at 84; WOODROW WILSON CENTER SPECIAL STUDIES, CONSTITUTION MAKING IN EASTERN EUROPE 393 (A.E. Dick Howard ed., 1993). See generally JAMES H. HUTSON & LEONARD RAPPORT, SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1987).

21. ELKINS ET AL., *supra* note 9, at 103-04, 141.

22. Hammons, *supra* note 20, at 839.

23. ELKINS ET AL., *supra* note 9, at 222-24.

the anthem, and the definition of nationality).²⁴ Advocates of thin constitutions consider such symbolic and foundational constitutional components to be either redundant or counter-productive. Giovanni Sartori, for example, warned against over-burdening the constitution with such provisions because they would prevent constitutions from fulfilling their central function of restraining arbitrary power.²⁵ He criticized the “bad constitutions” of his time as follows:

They have come to include unrealistic promises and glamorous professions of faith on the one hand, and numberless frivolous details on the other. Some of them are by now so “democratic” that either they are no longer constitutions (for a constitution limits the “will of the people” concept of democracy just as much as it limits the will of the power holders), or they make the working of the machinery of government too cumbersome for government to work, or both.²⁶

Similarly, András Sajó warned against the inclusion of controversial ideological elements in constitutions, as they might undermine their ability to limit governmental power in the name of universal human rights:

It is a rather risky endeavor if a constitution tries to find and encapsulate social consensus beyond basic rights (which can be universalized) and the pragmatic conditions of social peace. Such ambitious projects are but an opportunity to impose biased points of view. Constitutional history indicates that social systems often continue to exist by *concealing* conflicts among values and not by endorsing a special orientation.²⁷

24. Whether the inclusion of a Bill of Rights serves the constitution’s procedural/institutional role or also its foundational role is a question left open here. The formal expression of the foundational role of the constitution depends by and large on the type of national identity the constitution is expected to represent—for example, a unified, presumably homogenous, collectivity, resting on shared cultural, ethnic or religious background; or a plurality of “voluntaristic” individuals who do not share particular collective identity but define their shared identity in political or civic terms. In the latter case, a liberal Bill of Rights may be seen as representing the shared liberal values of the citizenry.

25. Sartori, *supra* note 14, at 862.

26. *Id.*

27. SAJÓ, *supra* note 11, at 38.

These conflicts, he argued, were either resolved over the years or generated civil war, as in the United States.²⁸ Either way, they should be resolved outside the constitution.

In general terms, the United States constitution is usually referred to as a paradigmatic case of a thin constitution. This is particularly the case if one considers the text of the constitution alone, independent of the first ten amendments that constitute the Bill of Rights.²⁹ In contrast, the 1937 Irish constitution is a good example of a thick constitution, as it includes essential elements regarding Irish national identity and religion. In practice, however, a thin constitution is an ideal type, as most of the nearly 190 constitutions in existence today contain both institutional and foundational elements. Rather than suggesting a general normative or empirical theory of thin or thick constitutions, this article focuses on a more specific question: to what extent is the ideal of a thin constitution relevant for divided societies that attempt to write a new constitution decades after independence, when the institutional legacy of the state has already evolved, particularly in regard to judiciary-legislature relations?

The argument that a thin constitution is the most appropriate tool for advancing a stable democratic order in divided societies is shared by most political and legal scholars who write on constitutions and constitution-making in the context of multinational, multi-religious, or multicultural societies.³⁰ While the idea of a thin constitution is theoretically and normatively attractive, the rest of the article will illustrate that such an instrument can be at odds with political realities. This is particularly the case when the constitution is written in the context of (1) intense ideational conflicts over the state's ultimate goals and shared values; and (2) state institutions being evolved and relatively well-functioning, and more particularly, the judiciary being relatively independent and the relationship between the various branches of government developing according to a particular institutional heritage.

These two conditions seem to be increasingly relevant to contemporary projects of constitution writing in countries such as

28. *Id.*

29. By contrast, the first modern constitutions in some American states such as Virginia (1776), Pennsylvania (1776), and Massachusetts (1780) represent a thick, rather than a thin, model of constitutions, as their drafters "looked upon constitutions as social compacts which defined the principles, including the ethical values, upon which the newly formed peoples were agreed and to which they presumably committed themselves." Cecelia M. Kenyon, *Constitutionalism in Revolutionary America*, in CONSTITUTIONALISM: NOMOS XX 84, 119 (J. Roland Pennock & John W. Chapman eds., 1979).

30. *But see* Nathan J. Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting*, 6 *PERSP. ON POLITICS* 675, 677-79 (2008); Saïd Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 *INT'L SOCIOLOGY* 7, 7-33 (2003), for rare exceptions.

Turkey, Egypt, Tunisia, and New Zealand, where constitutions are debated in the context of fundamental identity conflicts and in light of existing institutional legacy. My main argument is that while most constitutional theories ignore the timing dimension of constitution writing,³¹ this matter has a significant effect on the type of considerations taken into account by the constitutional drafters. In other words, when constitution making does not represent a moment of “new beginning,” a thin constitution is not a neutral proposal to create a constitutional sphere “above” ordinary politics. Rather, as any attempt to change the rules in the middle of the game, it is seen as part of the political struggle on the character of state. Thus, when a society is divided over basic beliefs and shared goals, constitution writing is not a neutral arena of “higher lawmaking,”³² but rather it is part of the political struggle to determine the shared vision of the state.

The next section will define the type of divided societies discussed in this article and will elaborate on the inherent difficulties they pose to the ideal of a thin constitution.

What is the alternative to drafting a thin constitution? Since constitutions are not supposed to be authored by lawyers or by experts of constitutional law but rather by “the people” through their political representatives, this question will be left open in this article. Moreover, the article rests on the assumption that constitutions are designed, first and foremost, for specific societies, addressing their unique social, political, and legal problems. Accordingly, foreign constitutional documents may serve as sources of inspiration for constitutional drafters, yet ultimately, democratic constitutions should result from an internal process of consultation, deliberation, and political decision-making. Whether such a process yields a *thick* rather than a *thin* constitution is thus a question left to be decided by domestic political actors. A brief historical overview reveals that under conditions of deep internal disagreements over the identity of the state, constitutional drafters tend to either include ambiguous constitutional arrangements in a written constitution (as happened in India in 1946-1949 and in Indonesia in 1945 in issues relating to religious identity),³³

31. The issue of timing of constitution-writing processes is usually discussed by constitutional theorists in the broader context of world history, and relatively to other waves of constitution-making around the world. See Elster, *supra* note 1, at 368-73; Arjomand, *supra* note 30. By contrast, I refer here to the question of timing in the particular context of the history of the state in question, and relatively to the development of its own governmental institutions.

32. ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 8, at 266-94.

33. See GARY JEFFREY JACOBSON, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE (2006); RAJEEV BHARGAVA, THE PROMISE OF INDIA'S SECRET CONSTITUTION (2010); R. E. Elson, *Another Look at the Jakarta Charter Con-*

embrace contradicting constitutional provisions (e.g., Ireland in 1922),³⁴ or avoid writing a constitution altogether (as in the Israeli case). Other, less democratic alternatives include the imposition of one of the competing visions of the state as happened, for example, in the former Yugoslav republics which in 1990 adopted exclusionary constitutional nationalistic structures,³⁵ or in Turkey, where constitutional secularism and state-driven national homogeneity were imposed through authoritarian means in the 1920s as well as following military coups in 1961 and 1982.³⁶

Analyzing and evaluating these different alternatives requires a detailed conceptual and empirical work that goes beyond the scope of this article.³⁷ Rather, this article seeks to highlight the misleading expectations generally posed by constitutional theorists and experts and their view that a thin constitution is the ultimate solution for the types of conflicts and tensions that characterize many contemporary divided societies. Under such intricate conditions, replicating an ideal “Philadelphia moment” of political reconstruction is difficult to achieve. Existing tensions on both ideational and institutional levels affect the way constitutions are crafted and must be taken into account.

III. POLITICAL AND INSTITUTIONAL IMPEDIMENTS TO THE THIN CONSTITUTIONAL IDEAL

Almost all countries in the world are heterogeneous in the sense that they include members of various national, religious, or linguistic identity groups. However, not all heterogeneous and multicultural societies are divided in the same way. As a subset, the analysis here focuses on those multinational or multi-religious societies characterized by conflicts between groups with competing visions of their state *as a whole*. The conflict in these cases is not about allocation of power or redistribution of resources, but between clashing societal norms and values—most notably, issues that involve the national or religious identity of the entire state.

trovsky of 1945, 88 *INDONESIA* 105 (2009); DOUGLAS RAMMAGE, *POLITICS IN INDONESIA: DEMOCRACY, ISLAM AND THE IDEOLOGY OF TOLERANCE* (2002).

34. BILL KISSANE, *NEW BEGINNINGS: CONSTITUTIONALISM AND DEMOCRACY IN MODERN IRELAND* (2011); LERNER, *supra* note 4, at 172-73.

35. See Robert M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, 51 *SLAVIC REV.* 654, 661-62 (1992).

36. ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 273 (1997); see ERGUN ÖZBUDUN & ÖMER FARUK GENÇKAYA, *DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY* 3-4 (2009); WILLIAM HALE & ERGUN ÖZBUDUN, *ISLAMISM, DEMOCRACY AND LIBERALISM IN TURKEY: THE CASE OF AKP* 55-79 (2010); Murat Akan, *The Infrastructural Politics of Laikik in the Writing of the 1961 Turkish Constitution*, 13 *INT'L J. OF POSTCOLONIAL STUD.* 190 (2011).

37. See LERNER, *supra* note 4, for some preliminary work on the topic.

Albert Hirschman referred to such conflicts as “either-or” or “non-divisible” since they are typically characterized by absolute unwillingness to compromise. In contrast, “divisible” or “more-or-less” conflicts are easier to settle because antagonists can agree to “split the difference” or compromise.³⁸ This is the case, for example, in the debate over the nature of secularism in Turkey that is symbolized by the headscarf debate. Similarly, this is the type of conflict that exists between Orthodox and secular Jews in Israel.

When such divided societies engage in drafting a constitution, the foundational aspects typically attract intense political attention and the lack of shared norms becomes one of the central obstacles to the writing of the constitution. This is because each side expects the constitution to express its aspirations and goals and seeks to impose its political vision of the entire state.

Under such divisive conditions, writing a thin constitution seems to be the most rational solution as it merely seeks to establish the institutional mechanism of a democratic government and leaves the controversial ideational conflicts to be resolved in the future. However, the proposal to draft a thin constitution in contemporary divided societies encounters two fundamental problems that are elaborated in the following pages. The first problem stems from the tendency of thin constitutions to represent a liberal-democratic world view and thus “take a side” in conflicts over a state’s fundamental values and norms, such as those that characterize deeply divided societies. The second problem is related to the timing of constitution-making and the effects of existing institutional legacies on the political inability of distinguishing between constitutional debates on institutional and foundational questions.

A. Not-So-Thin Constitutions

As we have seen above, supporters of thin constitutions criticize attempts to utilize constitution-drafting processes in order to resolve value-ridden conflicts and reject the inclusion of provisions concerning controversial identity or ideological issues. However, many of them overlook an inherent incoherence in their ideal of thin constitutions, which in fact have a strong symbolic content. Thin constitutions are usually identified with a particular form of liberal democracy and in that sense they appear to be much less thin than their advocates would acknowledge.

38. Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 POLITICAL THEORY 203, 213-14 (1994).

In the political and constitutional theory literature, the ideal of a thin constitution was often presented as a quintessential component of liberal political thinking. According to the liberal argument, constitutions should not be expected to interfere in value-ridden conflicts or to settle fundamental societal controversies, but rather provide a framework within which conflict resolution can be advanced. For that reason, constitutions should refrain from including any illiberal controversial elements such as religious or ethnic identifications. This “bracketing” paradigm is shared, in various nuances, by Jürgen Habermas’s understanding of *constitutional patriotism*,³⁹ John Rawls’ notion of *overlapping consensus*,⁴⁰ as well as Jeremy Webber’s suggestion for *constitutional reticence* in regard to all divisive questions.⁴¹ According to this liberal approach, instead of enshrining the shared values of the nation, constitutions create a “feeling of commonality” through a public “conversation”⁴² by ensuring participation of all members of society in public debates. Moreover, liberal constitutionalists oppose the introduction of illiberal elements into the constitutional discussion because this tends to distort rational arguments. Thus, they prefer to isolate the domain of constitutional deliberation from any illiberal viewpoints that might undermine the harmony of its participants.⁴³ Indeed, the desire to rid constitutional debates of contentious substantive dispute is attractive. It is difficult to object to the idealism that encourages “[c]ommunities [to] be open to their members holding a broad range of beliefs, and to revising those beliefs through discussion over time,” and which holds that constitutions should “express a similar openness.”⁴⁴

39. HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 500 (William Rehg trans., 1998); Jürgen Habermas, *Why Europe Needs a Constitution*, NEW LEFT REV., Sept.-Oct. 2001, at 5, 23. Habermas’ constitutional patriotism may be seen as standing between the two Rawlsian conceptions, since he seems to value constitutional agreement on democratic procedures more than Rawls does, but at the same time believes that a formal search for deeper normative consensus is not required. For a thicker conception of Constitutional Patriotism, see JAN-WERNER MÜLLER, *infra* note 41.

40. RAWLS, *supra* note 7, at 134. Rawls distinguished between constitutional and overlapping consensus. *Id.* at 133-72. He claimed that the former is a consensus regarding democratic procedures and principles, while the later expresses an agreement over the basic structure of society, and therefore includes “great values.” *Id.* He viewed constitutional consensus as merely a *modus vivendi* and as a step towards what he referred to as “overlapping consensus,” which he considered to be a deeper and wider form of consensus than constitutional consensus. *Id.*

41. See generally Jeremy Webber, *Constitutional Reticence*, 25 AUSTL. J. LEGAL PHIL. 125 (2000). For a thicker conception of Constitutional Patriotism, see generally JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM (2007).

42. Webber, *supra* note 41, at 131-32; cf. JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION 183-228, 316-19 (1994).

43. Webber, *supra* note 41, at 132.

44. *Id.* at 153.

However, such liberal ideal is often at odds with political reality. Liberal constitutionalists tend to draw their inspiration from multicultural societies that adhere to the basic principles of political liberalism (e. g., the United States, Canada, Switzerland). Constitutions function in such pluralistic societies as neutral mechanisms of conflict resolution. Yet playing this role is extremely difficult when the constitution is written in divided societies, where there is no consensus regarding normative principles (liberal or otherwise) that should underpin the state.

Interestingly, a similar underlying liberal paradigm is also shared by scholars of comparative constitutional design who have recently published a growing number of works in an effort to identify the most appropriate democratic institutional solutions for multiethnic, multicultural, and multinational societies. This research has produced a wide range of alternative institutional mechanisms for enhancing democracy and stability in divided and post-conflict societies, including such arrangements as federalism, devolution, consociationalism, power-sharing, a variety of electoral systems, and granting special group rights.⁴⁵ Yet these works tend by and large to pay limited attention to constitutional conflicts over the overall vision of the state, such as those that characterize the deeply divided societies discussed in this article. The underlying assumption shared by these studies is that determining the correct “rules of the game” will enable divided societies to further deliberate and ultimately resolve their internal differences through political—rather than violent—means. However, many of the institutional mechanisms proposed as useful tools in mitigating conflicts between identity groups are only applicable in certain geographical or societal circumstances. For example, federal solutions and various forms of devolution may be effective when various ethnic, national, or linguistic groups are territorially concentrated, as in the case of Belgium, India, and Canada, but less useful when the populations in question are geographically dispersed.⁴⁶ Similarly, institutional solutions such as power-sharing

45. See SUJIT CHOUDHRY, *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES* (Sujit Choudhry ed., 2008); LARRY JAY DIAMOND & MARC F. PLATTNER, *ELECTORAL SYSTEMS AND DEMOCRACY* (Larry Jay Diamond & Marc F. Plattner eds., 2006); Arend Lijphart, *Constitutional Design in Divided Societies*, 15 *J. OF DEMOCRACY* 96 (2004); FROM POWER SHARING TO DEMOCRACY: POST CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES MONTREAL (Sid Noel ed., 2005) [hereinafter *POWER SHARING TO DEMOCRACY*]; ANDREW REYNOLDS, *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* (2002); GOREN HYDEN & DENIS VENDER, *CONSTITUTION-MAKING AND DEMOCRATIZATION IN AFRICA* (2001).

46. See ALFRED STEPAN, *ARGUING COMPARATIVE POLITICS* 315-61 (2001); *IDENTITY AND TERRITORIAL AUTONOMY IN PLURAL SOCIETIES* (William Safran & Ramón Máiz eds., 2000); *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* (George Alan Tarr, et. al. eds., 2004); *FEDERALISM AND POLITICAL PERFORMANCE* (Ute Wachendorfer-

or various models of electoral rules are relevant when the conflict is between different identity groups competing for power. These procedural mechanisms are less relevant when the disagreements are over normative principles that apply to the state *as a whole*, for example in regard to the role of religion in the state's public life.⁴⁷ A good example of a recent failure of such rational institutional design is what commentators refer to as the "constitutional disaster" in Iraq.⁴⁸

In contrast to many advocates of liberal constitutionalism, this article acknowledges that not all types of disagreements can be resolved by the same means. Ideational disputes in divided societies that touch upon the citizen's deepest beliefs and commitments cannot be "taken off the political agenda," to use Rawls' terminology,⁴⁹ because they are at the core of the societal divisions and constitutional debates. Competing perspectives in such societies often clash in respect to the adoption or rejection of political liberalism principles. That is, tension exists between those who distinguish between private identities and shared civic identity, on the one hand, and those who reject this distinction, on the other hand. In multicultural societies such as the United States or Canada, the fundamental principles of political liberalism are shared by the entire society, by and large. In contrast, in divided societies such as Turkey, Egypt, Indonesia and Israel, at least one of the competing groups is hostile to basic liberal principles.⁵⁰ As Nathan Brown stressed, the "hope of basing constitution writing on the higher plane of politics" is a misleading one because "distinctions between public and private interest and between passion and rationality . . . are extremely difficult to make in practice."⁵¹

Schmidt ed., 2000); AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES (Yash Ghai ed., 2000).

47. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977); Lijphart, *supra* note 45; DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (2d ed. 2000); IAN O'FLYNN ET AL., *POWER SHARING: NEW CHALLENGES FOR DIVIDED SOCIETIES* (2005); SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS (Philip G. Roeder & Donald S. Rothchild eds., 2005); GHAI, *AUTONOMY AND ETHNICITY*, *supra* note 46; POWER SHARING TO DEMOCRACY, *supra* note 45; BENJAMIN REILLY, *DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT* (2001).

48. ARATO, *supra* note 2, at 231.

49. RAWLS, *supra* note 7, at 151.

50. A somewhat similar distinction has been made by Yael Tamir between "thin" and "thick" multiculturalism. Yael Tamir, *Two Concepts of Multiculturalism*, 29 J. PHIL. EDUC. 161, 161-72 (1995).

51. Brown, *supra* note 30, at 677.

B. The Problem of Institutional Legacy

The second problem of drafting a thin constitution stems from the fact that the legacy of existing institutions play a significant role in constitution-making processes, and thus the timing of constitutional drafting—whether it occurs at the state-building stage or decades later—is of great importance. The underlying assumption of the thin constitution argument is that it is possible to distinguish between two aspects or functions of constitutions—the institutional/procedural and the ideational/foundational. As mentioned above, this distinction is taken for granted first by most scholars of comparative constitutional design, who focus their attention on the governmental mechanisms established by the constitution, as well as by liberal political theorists who advocate a thin constitution in which shared constitutional procedures and democratic principles provide the basis of a common civic identity of the people.

Distinguishing between the institutional and foundational/symbolic parts of the constitution may be possible when writing a new constitution at the moment of the “new beginning” in the life of the state. At the time of independence, for example, when state institutions are being formed, constitutional drafters may separate debates regarding, on the one hand, the structure of government and democratic procedures from, on the other hand, those that address issues of national identity or religion. However, in the decades after independence, when inter-institutional relations have been established—particularly the constitutional dialogue between the judicial and legislative branches of government—it becomes increasingly more difficult to separate constitutional disputes regarding institutional issues (e. g., the Supreme Court’s authority or procedures for Judges nomination) from those regarding foundational issues (e. g., national identity or the public role of religion). As Kim Lane Scheppele observed, while new constitutions are often envisioned as “great opportunities for progress . . . [and] as platforms for launching new futures[,] . . . constitution drafters invariably look even more toward a past than they do toward a future.”⁵² Most particularly, they look toward the institutional past. Having evolved over many years, the institutional legacy impedes the isolation of institutional design from intricate ideological conflicts that divide society. For all of these reasons, I argue that the difficulties of adopting a thin constitution do not diminish but rather increase over the years.

52. Kim Lane Scheppele, *A Constitution between Past and Future*, 49 WILLIAM & MARY L. REV. 1377, 1379 (2008).

In the remainder of this article, I demonstrate how the two problems described above—the tendency of thin constitutional to represent liberal ideology and thus “take a side” in the conflict over the vision of the state, and that of institutional legacy, in general, and the patterns of legislature-judiciary relations, in particular—hindered the adoption of a thin written constitution in Israel, six decades after independence.

IV. 2003-2006 ISRAELI CONSTITUTIONAL DEBATES

The Constitution, Law, and Justice Committee of the Israeli Knesset (“the Committee”) initiated the *Constitution in Broad Consent Project* in May 2003. The declared goal of the project was to consolidate a single constitutional document that would “enjoy wide support among Israelis and Jews worldwide.”⁵³ It was the most comprehensive endeavor to draft a constitution for the State of Israel since 1950, when the Israeli Knesset decided to postpone adopting a formal constitution. The Committee held over eighty meetings between 2003 and 2006. In addition to the seventeen Committee members, nearly 400 experts, advisors, public figures, and political leaders participated in the discussions. Hundreds of documents were submitted to the Committee, relating to all aspects of constitution design. In February 2006, the Committee presented the Knesset with its final report, containing a draft proposal and over 10,000 pages of detailed protocols and background material.

The report did not present a coherent constitutional draft; rather, it contained several versions and suggestions for further deliberation and decision. Instead of resolving the disputes that arose during the constitutional debates, the draft incorporated all the competing positions. The Committee charged the Knesset with the task of transforming this multi-versioned document into a comprehensive constitutional formula. At the end of one session discussion, the Knesset passed a declaratory resolution stating that after the coming elections it would “continue this effort, aiming at presenting a proposed constitution, based on broad consent, for Knesset decision and the people’s ratification.”⁵⁴

53. CONSTITUTION, LAW AND JUSTICE COMMITTEE, CONSTITUTION IN BROAD CONSENT: REPORT OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE REGARDING PROPOSALS FOR THE CONSTITUTION OF THE STATE OF ISRAEL (2006) [hereinafter THE COMMITTEE], available at <http://huka.gov.il/wiki/index.php>. All translations from primary sources and archival material in Hebrew (including Knesset debates, Minutes of Constitution, Law and Justice Committee meetings, Supreme Court rulings, newspaper articles, etc.) are by the author.

54. DK (2006) 70 (Isr.). This resolution was voted by a majority of thirty against nineteen (with one abstainer).

Nevertheless, the constitutional question disappeared from the political and public agenda in the years that followed.

These recent Knesset constitutional debates echoed those that took place in the formative years of the state in two important ways. First, constitutional discussion ended in both cases with a decision to defer the process of constitution writing. In 1950, following a constitutional debate of only nine sessions, the Israeli Knesset (which was initially elected as a constituent assembly) decided to avoid drafting a formal constitution. Known as “the Harari resolution” after its initiator, the decision stated that the Israeli constitution would be composed in a gradual manner through a series of individual Basic Laws.⁵⁵ The resolution did not specify what should be the content of the Basic Laws or the procedure for their enactment and amendment relative to ordinary legislation. In addition, the resolution did not set or propose a timetable for the consolidation of the Basic Laws into a single constitutional document.

The second similarity between the two rounds of constitutional debates was that in both cases the avoidance of drafting a formal constitution was attributed to the inability of the framers to bridge deep disagreements regarding the foundational aspect of the constitution.⁵⁶ These disagreements represent the conflict between religious and secular-national definitions of Israel’s identity as a Jewish state in 1950. The core of the foundational dispute revolved around the relationship between the law of the state and laws of *Halacha*, the comprehensive system of Jewish traditional rules of conduct, which, from the perspective of the Orthodox Jew, take precedence over the law of the state whenever there is a contradiction between the two systems. Orthodox Knesset members objected to drafting a secular constitution that would define the Jewish state in national, rather than religious, terms and warned this would inflame a *Kulturkampf*.⁵⁷ Threats to destabilize the political order were not taken lightly by the political leadership given

55. DK (1950) 1743 (Isr.).

56. This was not the only reason for postponement of constitution-drafting. Nevertheless, many of the other arguments related to deep disagreements over secular and religious visions of the state, LERNER, *supra* note 4, at 58-59—for example, the pragmatic argument regarding the need to address the urgent tasks of the young state rather than delve into philosophical discussions regarding the identity of the state, see *id.* at 68, and the need to await the ingathering of the future citizens of the state from Jewish diaspora to make decisions in such controversial questions, *id.* at 66. David Ben-Gurion played a central role in the decision to postpone the constitution. *Id.* at 57, 61, 69.

57. DK (1950) 744 (Isr.). Israel’s first Minister of Justice, Pinchas Rosen, who was one of the fiercest advocates of a written constitution, admitted that “there is only one serious justification for the rejection of constitution writing now, which I don’t ignore, and that is the danger of division.” *Government Meeting Minutes*, STATE OF ISRAEL ARCHIVES, Dec. 13, 1949.

various challenges to the state's authority by pre-state paramilitary organizations and underground groups of zealous believers.⁵⁸

Similarly, the protocols of the February 2006 Knesset discussion on the *Constitution in Broad Consent Project*, as well as the extensive Committee deliberations throughout 2003-2006, reveal that intense division over religious issues remains the central axis around which the Israeli constitutional debate revolves.⁵⁹ Knesset members from both Orthodox and liberal-secular polar positions acknowledged the depth of their vast disagreement and admitted that no consensus could be achieved on issues such as personal law—particularly marriage and divorce, conversion to Judaism, and the “who is a Jew?” question; as well as the public preservation of Sabbath.⁶⁰

The conflict over the foundational aspect of the constitution was different in 2006 than in 1950 in one respect. The Palestinian minority, which comprised around 18% of the country's population in 1950, did not take part in the constitutional drafting. Since the foundation of the state, the non-Jewish minority in Israel has been excluded from Israeli nationhood, which was understood in terms of “the Jewish people.”⁶¹ However, in recent years, the Israeli Palestinian minority has strengthened the demand to participate in the redefinition of the identity of the State of Israel, calling for the transformation of the state from its definition as “Jewish and democratic,” into a liberal-democratic state “for all its citizens”—one in which Palestinians will be recognized as a national minority.⁶² This position was advocated in a series of constitutional proposals published by leading Israeli-Arab intellectuals and

58. EHUD SPRINZAK, *BROTHER AGAINST BROTHER: VIOLENCE AND EXTREMISM IN ISRAELI POLITICS FROM ALTALENA TO THE RABIN ASSASSINATION* 17-86 (1999); MENACHEM FRIEDMAN, *THE HAREDI (ULTRA-ORTHODOX) SOCIETY: SOURCES, TRENDS AND PROCESSES* 55-65 (The Jerusalem Inst. for Israel Studies ed., 1991).

59. As stressed by Abraham Ravitz, Deputy Minister of Welfare and member of the Orthodox *Yahadut Hatorah* party, during the Committee discussions: “The main reason that we could not make any progress towards a constitution for fifty years is that . . . first, the Jewish people already has a constitution and we should implement it in our daily life[.] . . . and second, we cannot compromise on the most fundamental issues that are, from our perspective, essential to our existence as a people.” THE COMMITTEE, *supra* note 53, at Protocol 658.

60. THE COMMITTEE, *supra* note 53, at Protocol 658.

61. See Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 434, 434-35 (1992); see Baruch Kimmerling & Dahlia Moore, *Collective Identity as Agency and Structuration of Society*, in BARUCH KIMMERLING, *CLASH OF IDENTITIES: EXPLORATIONS IN ISRAELI AND PALESTINIAN SOCIETIES* 25, 25-57 (2008); YONATHAN SHAPIRA, *POLITICIANS AS A HEGEMONIC CLASS: THE CASE OF ISRAEL* 33 (Sifriat Hapoalim eds., 1996).

62. GERSHON SHAFIR & YOAV PELED, *BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP* 161 (2005); Amal Jamal, *Strategies of Minority Struggle for Equality in Ethnic States: Arab Politics in Israel*, 11 CITIZENSHIP STUD. 263, 271 (2007).

NGOs.⁶³ While Israeli-Arab representatives participated in the discussions, by and large Palestinian efforts to increase their influence on the question of the constitution have not had a significant impact on Knesset deliberations, which remain focused on the Jewish religious-secular divide. Moreover, the Palestinian constitutional proposals were published, for the most part, as a reaction to the Knesset's constitutional deliberations and, thus, were not discussed by the Committee.⁶⁴

A. *The Proposal for a Thin Constitution*

Given the divisive nature of Israeli society—particularly with regard to the question of religion-state relations—a proposal to draft a thin constitution seemed most appropriate and, indeed, this view was shared by many legal experts in Israel.

The suggestion to draft a thin constitution sought to resolve three central problems in Israeli existing constitutional structure. First, it was meant to address the limited protection of basic rights under the existing constitutional conditions. A limited number of basic rights have been constitutionally entrenched in the 1992 Basic Law: Freedom of Occupation⁶⁵ and Basic Law: Human Dignity and Liberty.⁶⁶ Other rights, such as freedom of speech, freedom of press, and gay rights, have been advanced through judiciary precedents,⁶⁷ while some—such as equality for women—have been enacted in ordinary legislation.⁶⁸ Law professor Mordechai Kremnitzer argued that a minimalist liberal constitution is required in order to guarantee protection of human rights.⁶⁹ He criticized the attempt to draft a constitution based on wide

63. THE NATIONAL COMMITTEE FOR THE HEADS OF THE ARAB LOCAL AUTHORITIES IN ISREAL, *THE FUTURE VISION OF THE PALESTINIAN ARABS IN ISREAL* (2006), available at <http://www.adalah.org/newsletter/eng/dec06/tasawor-mostaqbali.pdf>; MADA AL-CARMEL, *THE HAIFA DECLARATION* (2007), available at <http://mada-research.org/en/files/2007/09/haifaenglish.pdf>; THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL (ADALAH), *THE DEMOCRATIC CONSTITUTION* (2007), available at http://www.adalah.org/Public/files/democratic_constitution-english.pdf.

64. See Amal Jamal, *The Political Ethos of Palestinian Citizens of Israel: Critical Reading in the Future Vision Documents*, 23 ISR. STUD. F. 3, 12-15 (2008).

65. Basic Law: Freedom of Occupation, 5752-1992, SH No. 1387 p. 102 (Isr.).

66. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 150 (Isr.).

67. See, e.g., HCJ 73/53 Kol Ha-am v. Minister of the Interior 7(2) PD 871 [1953] (freedom of speech); HCJ 721/94 El Al Airlines v. Danilowitz 58(5) PD 749 [1994] (gay rights).

68. For example, the Women's Equal Rights Law, 5711-1951, SH No. 82 p. 248 (Isr.) explicitly specifies that the law is not valid with regard to matters of marriage and divorce. In 1991, Israel even added two reservations addressing this issue when it signed the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979).

69. Professor Mordechai Kremnitzer was one of the authors of the constitutional draft proposed by Israel Democracy Institute, 2005.

consensus among the various factions of the population, arguing that such an expectation would make the process of constitution writing practically impossible: "There is no sense in overburdening the constitution with what cannot or should not be included in it, and then considering it as a reason for rejecting a constitution altogether."⁷⁰

The second problem that a thin constitution was meant to solve was the inconsistencies and disparities in the existing Basic Laws legislated over the years.⁷¹ The shortcomings of the existing eleven Basic Laws were rooted in the vague instructions of the 1950 Harari Resolution.⁷² Most Basic Laws, for example, were passed by a regular majority of Knesset members. They differ in level of entrenchment and style of writing, and many claim that they are too detailed; they often include directives that should be included in ordinary laws, while many ordinary laws that were enacted over the years should have been passed as Basic Laws due to their content and importance.⁷³ Some of the Basic Laws resulted from short-term political circumstances, rather than long-term constitutional vision.⁷⁴ It was time, many argued, that the various Basic Laws should be reorganized and unified into a single constitutional document.⁷⁵

The third problem was the need to clarify the allocation of authority among various branches of government (the "rules of the game") in order to allow for better mitigation of controversies about basic rights and shared values that divide Israeli society. Law professor Eli Zalsberger argued that, given the vast ideological disagreements, it is virtually politically impossible to adopt a comprehensive constitution "by broad consent."⁷⁶ Rather, it would

70. Mordechai Kremnitzer, *Between Progress towards and Regression from Constitutional Liberalism: On the Need for Liberal Constitution and Judicial Review of Knesset Legislation*, in ITZHAK ZAMIR BOOK: ON LAW, GOVERNMENT AND SOCIETY 709 (Yoav Dotan & Ariel Bendor eds., 2005) [Hebrew].

71. MORDECHAI KREMNITZER, DAVID KRETZMER & AVISHAI BENISH, BASIC LAWS AS INFRASTRUCTURE OF CONSTITUTION: REORGANIZING THE BASIC LAWS ON THE WAY FOR COMPREHENSIVE CONSTITUTIONAL DOCUMENT (Isr. Democracy Inst. ed., 2002).

72. DK (1950) 1743 (Isr.).

73. *E.g.*, The Law of Return, 5710-1950, SH No. 51 p. 159 (Isr.); Nationality Law, 5712-1952, SH No. 95 p. 146 (Isr.); The Women's Equal Rights Law, *supra* note 68.

74. A telling example of the ambivalent nature of Israeli basic laws is the enactment of Basic Law: The State Budget for the years 2009-2010 (special instructions) (ordinance), 5760-5769, SH No. 2245 p. 550 (Isr.). In June 2010, this basic law was amended to include a two year budget for the years 2011-2012. In 2011 the Supreme Court addressed the question of the constitutional status of this Basic Law, as well as the inherent difficulties in the Israeli constitutional system in the absence of Basic Law on Legislation, and given the fact that most Basic Laws are not entrenched. See H CJ 4908/10 MK Roni Bar-On v. The Israel Knesset [2011] (Isr.), available at <http://elyon1.court.gov.il/files/10/080/049/n08/10049080.n08.pdf> [Hebrew].

75. KREMNITZER ET AL., *supra* note 71.

76. THE COMMITTEE, *supra* note 53, at Protocol 320.

be wiser to first entrench the institutional provisions in a thin constitution and then, when the institutional principles were clearer, it would be easier to decide on the controversial ideational questions.⁷⁷ Further, Zalsberger claimed that entrenching the structure of government would strengthen the stability of the Israeli regime because it would prevent “changes in the rules of the game from becoming part of the political game.”⁷⁸ A good example is the lack of a Basic Law on legislation that is required in order to clarify the allocation of authority between the various branches of government.

The perception of a thin constitution as the most appropriate model to address intricate Israeli social, political, and legal circumstances was adopted at the early stages of constitutional discussion by the Chairperson of the Constitution, Law and Justice Committee, Michael Eitan, a Knesset member representing the Likud party. As Eitan stated during the Committee debates, his initial goal was to draft “a constitution that would be hung on the wall . . . the size of the Proclamation of Independence that students could learn by heart.”⁷⁹ However, despite its theoretical advantages, the proposal for a thin constitution did not receive much political support and Eitan admitted a year after the beginning of the discussions that a constitution for the State of Israel must include a principles chapter that would delineate the fundamental values upon which the state is founded, particularly in regard to the most controversial issues related to Israel’s definition as “Jewish and democratic.”⁸⁰

The failure of this attempt to advance a thin constitution raises a number of interesting questions. Given the presence of substantial political support for the project of constitution drafting, why did the promise to enact a formal constitution for the State of Israel fail to materialize? Why did the Committee fail to produce a comprehensive draft proposal? More precisely, why did the Committee fail to propose a thin constitution or even to reorganize the existing basic laws into a single document?

A close reading of the transcriptions/protocols of the 2003-2006 Committee debates and the Knesset constitutional discussion in February 2006, as well as interviews with committee members and other participants of the discussions, provide insights into these questions. This investigation revealed that it was practically impossible for drafters of the would-be constitution to ignore foundational and symbolic issues and to distinguish between them and

77. *Id.*

78. *Id.* at Protocol 189.

79. *Id.* at 30.

80. *Id.* at Protocol 464.

the institutional aspect of constitution writing. To begin with, the existing constitutional arrangement already linked institutional and foundational elements.⁸¹ For example, the override clause included in Basic Law: Human Dignity and Liberty⁸² and in Basic Law: Freedom of Occupation⁸³ formally defined the character of the state as “Jewish and democratic.” Similarly, Israeli election law restricts political parties from negating the character of the state as both Jewish and democratic.⁸⁴

More importantly, the Knesset’s inability to separate between disputes over the foundational and institutional/procedural aspects of the constitution stemmed from an irresolvable disagreement that dominated the constitutional discussion regarding Supreme Court powers. Dominance of this issue in the constitutional debates should be analyzed in the context of the inter-institutional tension between the legislative and the judiciary branches of Israeli government, and its growing overlap with the religious-secular conflicts in Israeli society.

B. Roots of the Judiciary-Legislature Conflict

Some tension between the legislative and the judicial branches of government is common—even healthy—in any democratic system. However, in a situation of an incomplete constitution-making process, when there is a deep division within society over basic norms and values, as in the Israeli case, inter-institutional tension can be much more problematic and even create conflict. The absence of a written constitution makes it unclear which branch has the higher authority to decide on the state’s fundamental norms and values. As the religious-secular schism in Israeli society has intensified, this issue has become the focus of the clash between the Supreme Court and the Knesset.

Following the Likud victory over the Labor party in 1977, the Israeli political setting was transformed from a dominant-party system to a competition between two similarly sized, competing blocs, divided mainly between a hawkish and a dovish perspective regarding Israeli security issues. Under these new political conditions, religious parties had large impact on the balance of power, largely determining formation of coalitional governments in Isra-

81. Ruth Gavison, *Constitution for Israel: Lessons from the Constitutional Process in the 16th Knesset*, in CONSTITUTION IN BROAD CONSENT: REPORT OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE REGARDING PROPOSALS FOR THE CONSTITUTION OF THE STATE OF ISRAEL 9, 9 (2006).

82. 5747-1992, SH No. 1454 p. 90 (Isr.).

83. 5754-1994, SH No. 1454 p. 289 (Isr.).

84. Basic Law: Knesset, 5747-1987, SH No. 1215 p. 120, §7 (Isr.).

el.⁸⁵ Given the growing parliamentary powers of the religious camp, the liberal-secular population sought support through the increasingly more activist Supreme Court,⁸⁶ and, indeed, many considered the Court to be the central arena for promotion of the liberal-secular Jewish agenda.⁸⁷ The conflict between the Knesset and the Supreme Court reached its climax during the 1990s, following Knesset legislation of two basic laws on human rights in 1992. On the one hand, Supreme Chief Justice Aharon Barak supported and, indeed, celebrated this legislation as evident in a series of academic articles and published speeches in which he argued that a “constitutional revolution” had taken place. While the Basic Laws included a limitation clause that did not explicitly grant the Court the power of judicial review, Barak argued that “the Supreme Court in Israel perceives the entrenched Basic Laws as constitutionally supreme—enacted by a constituent authority There is no longer any doubt that Israeli courts are authorized to overrule any statute that infringes upon an entrenched Basic Law.”⁸⁸ Barak’s constitutional revolution was firmly asserted in a Supreme Court ruling in *United Mizrahi Bank*.⁸⁹

For its part, the political system reacted harshly to the Court-declared constitutional revolution. The case that incited some parliamentarians was the Supreme Court’s ruling in the case of *Meatrael v. Prime Minister* (1994),⁹⁰ where the Court approved importation of non-Kosher meat to Israel on the basis of Basic Law: Freedom of Occupation. This ruling was perceived by religious parties to violate the religious status quo. In response, the Knesset amended the Basic Law: Freedom of Occupation by adding a clause that allowed for the enactment of laws conflicting with the

85. ASHER COHEN & BERNARD SUSSER, *ISRAEL AND THE POLITICS OF JEWISH IDENTITY* 39-48 (2000).

86. Whether the Israeli Supreme Court is truly “activist” is a question intensely debated by legal academics. For a sample of leading works on the topic, see Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 *IYUNEI MISHPAT* 503, 577-78 (1993); Gad Barzilai, *Judicial Hegemony, Party Polarization and Social Change*, 2 *POLITICA* 31, 31-51 (1998). See generally RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, *JUDICIAL ACTIVISM: FOR AND AGAINST, THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY* (2000).

87. Menachem Mautner, *The 1980s: The Years of Anxiety*, 26 *TEL. AVIV. U. L. REV.* 645, 645 (2002) [Hebrew]; see HIRSCHL, *supra* note 18, at 163-63, 174, 202-05; GAD BARZILAI ET AL., *THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC* 141-42 (1994).

88. Aaron Barak, *The Constitutional Revolution: Protected Human Rights*, 1 *L. & GOV'T IN ISR.* 9, 16-17 (1992).

89. CA 6821/93 *United Mizrahi Bank v. Migdal Collective Vill.* 49(4) PD 221 [1995] (Isr.). The decision was approved by eight out of a rare panel of nine justices, with one minority opinion.

90. HCJ 3872/93 *Meatrael v. Prime Minister* 47(5) PD 485 [1993] (Isr.).

Basic Law, if they include an explicit provision stating they are valid in spite of what is stated in the Basic Law.⁹¹

The *Meatrael* case reinforces the overlapping of the religious-secular dispute and clash between the political and judicial branches of government in Israel.⁹² The Orthodox sector's attacks on the Supreme Court escalated as secular solidarity with the Supreme Court grew. In 1999, Orthodox leaders called for civil disobedience against Supreme Court decisions and organized a massive demonstration in which about 250,000 to 400,000⁹³ members of the Orthodox community marched against the Supreme Court.⁹⁴ Orthodox attacks on Supreme Court judges included inflammatory statements by religious leaders and journalists, such as references to "judicial dictatorship," "the fourth Reich," "the persecutors of Israel," and "Isra-Nazis."⁹⁵ Rabbi Porush, one of the leaders of the Orthodox Agudat-Israel party, declared that he would be "willing to 'sacrifice his life against Justice Barak.'"⁹⁶ For the first time in Israeli history, this demonstration united the leaders of all subgroups in the religious camp—from the religious-Zionist (including the Chief Rabbis of the State) to fanatical, anti-Zionist, ultra-Orthodox fringe factions.⁹⁷

Faced by intense political and societal reactions, the Supreme Court moderated its revolutionary rhetoric. Moreover, under Chief Justice Barak, the Supreme Court used its authority sparingly to overrule Knesset legislation.⁹⁸ Nevertheless, the so-called *constitu-*

91. Basic Law: Freedom of Occupation, 5754-1994, SH. No. 1454 p. 90, §8. The amendment of the Basic Law raised a major debate among jurists and legal theorists concerning the question how "revolutionary" the constitutional revolution really was. See generally Hanna Lerner, *Democracy, Constitutionalism, and Identity: The Anomaly of the Israeli Case*, 11 CONSTELLATIONS 237 (2004).

92. There were other cases in which the Supreme Court violated the religious status quo. For example, in 1989 and 1994, the Supreme Court ruled against local authorities' refusal to appoint women or non-Orthodox Jews to local religious councils. HCJ 699/89 Hoffman v. Municipal Council of Jerusalem 48(1) PD 678 [1989] (Isr.); HCJ 4733/94 Naot v. Haifa City Council 49(1) PD 678 [1994] (Isr.).

93. According to varying estimation, this range represents between five and eight percent of the Jewish population of the country at the time. See, e.g., Population Statistics, Israeli-Palestinian Conflict, <http://israelipalestinian.procon.org/view.resource.php?resourceID=000636>.

94. See Rebecca Trounson, *Ultra-Orthodox Protest Israel High Court Rulings*, L.A. TIMES, Feb. 15, 1999, <http://articles.latimes.com/1999/feb/15/news/mn-8386>.

95. See, e.g., Samuel G. Freedman, *Israel, Up Against the Wall*, SALON, June 22, 2000, http://www.salon.com/2000/06/22/israel_13/.

96. T.M. Tenenbaum, *No to a HCJ Which Contradicts the Halacha!*, HAMODIA, Jan. 22, 1999; COHEN & SUSSER, *supra* note 85, at 93-94.

97. Neri Horowitz, *The Haredim (Ultra-Orthodox) and the Supreme Court: Breaking the Tools in Historical Perspective*, 5 KIVUNIM HADASHIM 22, 66 (2001).

98. Between 1995 and 2006, the Supreme Court struck down Knesset legislation in five cases. HCJ 1715/97 Israel Investment Managers Association v. Minister of Finance 51(4) PD 367 [1997] (Isr.) (overruling the requirement of examination for investment managers who had less than seven years of professional experience); HCJ 6055/95 Tzemach v. Minister of Defense 53(5) PD 241 [1999] (Isr.) (overruling legislation that allowed for deten-

tional revolution was perceived by the nationalist-religious camp to be a threat to the Knesset's sovereignty and it had a paralyzing effect on the constitution-making process. Indeed, given this camp's control of recent Israeli governments, the fear of future activist Supreme Court interpretation of any Basic Law has prevented the Knesset from advancing any further Basic Law legislation. In particular, religious parties' opposition has been staunch and unanimous. Knesset member David Tal of the Orthodox Shas party stated: "We will oppose the legislation even if the Ten Commandments would be proposed as Basic Laws . . . because if I accept the Ten Commandments as Basic Laws, . . . the Supreme Court may interpret them and overturn them."⁹⁹

Although since 1992 the Knesset has discussed over thirty bills for enactment of new Basic Laws, it has only succeeded in passing Basic Law: the State Budget for the Years 2009-2010, which is limited for two years.¹⁰⁰ None of the other proposals that concerned either institutional or foundational issues (e.g., Basic Law: Equality, or Basic Law: Legislation) have been passed.

The recent attempt to draft a constitution through the *Constitution in Broad Consent Project* referred to above must be seen as an attempt to break this impasse.¹⁰¹ However, the desire to keep constitutional deliberations "above" politics and to use the consti-

tion of soldiers for ninety-six hours before judicial hearing); HCJ 1030/99 Oron v. Knesset Speaker 56(3) PD 640 [2002] (Isr.) (striking down an amendment to a telecommunications law which legalized certain illegal radio stations); HCJ 8276/05 Adalah et al. v. Minister of Defense et al. [2006] (Isr.) (English translation in 2006-2 ISR. L. REP. 352, available at http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf) (overruling an amendment to Israeli Civil Tort Law that prevented Palestinians from claiming compensation from Israeli defense forces in conflict zones); HCJ 1661/05 Gaza Coast Local Council v. Knesset Israel 59(2) PD 481 [2005] (Isr.) (overruling clauses in the 2005 Disengagement Law that limited the settlers' right for compensation). Between 2006 and 2010, under the presidency of Chief Justice Dorit Beinisch, the Supreme Court overruled Knesset legislation in three additional cases, two of them significantly more substantial: HCJ 8823/07 Anonymous v. The State of Israel [Feb. 11, 2010] (Isr.) (ruling that a suspect charged with security offenses must be allowed to attend judicial detention hearings); HCJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. Ministry of Finance [2009] (Isr.) (English translation available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf) (overruling the privatization of prison in Israel); HCJ 4124/00 Yekutieli et al. v. The Minister of Religious Affairs & The Minister of Finance [2010] (Isr.) (English translation available at http://elyon1.court.gov.il/files_eng/00/240/041/n43/00041240.n43.pdf) (annulling guaranteed-income allowances to Orthodox Yeshiva students).

99. DK (1999) 537 (Isr.).

100. See Basic Law: the State Budget for the years 2009-2010, *supra* note 74.

101. Not only was the Knesset motivated: Several NGOs led campaigns for the promotion of constitutional drafting. The most influential of those was the Israel Democracy Institution (IDI), which assembled a public council chaired by former Supreme Court Chief Justice Meir Shamgar and drafted a constitutional proposal, titled 'Constitution by Consensus'. THE ISRAEL DEMOCRACY INSTITUTION, CONSTITUTION BY CONSENSUS (2005). Another attempt of a consensual constitutional draft was sponsored by the "Rabin Center" and is known as the "Kineret Contract." THE GAVISON-MEDAN COVENANT, <http://www.gavison-medan.org.il/english> (last visited Jan. 23, 2012).

tution as a neutral mechanism of conflict-resolution by taking controversial issues "off the agenda" was bound to fail. The attempt to focus on the institutional aspect of the constitution, leaving aside the grave disagreements on the character of the state, failed due to the drafters' difficulties in disconnecting between the two overlapping conflicts: the religious-secular foundational conflict on the one hand, and the legislative-judiciary inter-institutional conflict on the other.

As the next section demonstrates, this interlink between the ideational conflict regarding the identity of the state and the institutional conflict regarding power allocation between the judiciary and the legislature underpinned the Committee's discussions on the *Constitution in Broad Consent Project*.

C. Entangled Debates: Institutions and Identity

A close reading of the Committee's minutes reveals that questions regarding Supreme Court authority, judicial appointment procedures, and Israel's definition as a Jewish state were discussed, by and large, in tandem during Committee sessions,¹⁰² as acknowledged in this statement by Knesset member, Yitzhak Klein:

For two years I have been participating in this process [of constitutional drafting], and I am convinced that it is impossible to distinguish between the governmental and the normative parts of the constitution. . . . Even if we decide on the values, the question remains who is authorized to enforce these values and in what level of entrenchment.¹⁰³

During the Committee sessions, any discussion that touched upon judicial authority ignited harsh debates regarding controversial religion-state issues, such as Orthodox monopoly on family law and on conversion to Judaism or the prohibition of public transportation on Shabbat. At the same time, sessions devoted to foundational provisions in the draft constitution raised intense disputes regarding, for example, the procedure for justices' appointment, as well as, the role of the Supreme Court as the chief interpreter of the constitution.¹⁰⁴ A good example of this interlinkage was the dispute over the question of which constitutional

102. To name few examples, see THE COMMITTEE, *supra* note 53, at Protocols 180, 271 (discussing Basic Law: Judicature); THE COMMITTEE, *supra* note 53, at Protocols 320, 464 (discussing issues of religion and state).

103. THE COMMITTEE, *supra* note 53, at Protocol 320.

104. *Id.* at Protocols 189, 199, 320, 464.

article should include the provision regarding the authorities of religious courts: Should it appear in the article on the judiciary or in the article on family values to be included in the Principles Chapter?¹⁰⁵

Predictably, representatives of the religious camp were most wary of judicial constitutional interpretation. In light of the secular-liberal approach reflected in the Supreme Court's rulings during the past decade, they explicitly expressed their opposition to Court intervention in issues that concern the Jewish character of the state.¹⁰⁶ MK Avraham Ravitz openly stated the Orthodox camp's political reservations:

I would like to tell you what the Orthodox fear stems from. . . . Our problem is where do we have a greater chance to promote our agenda? Since our experience shows that it is not done in the court, we prefer to leave these issues to the Knesset. For us, the rules of the game are much easier in the Knesset because we are present there.¹⁰⁷

Religious parties were not alone in expressing their concerns regarding an activist Supreme Court led by Chief Justice Barak. Right-wing Likud representative Gidon Sa'ar voiced criticism against the Supreme Court's liberal decisions in issues concerning the Arab minority: "The Court does not have a heterogeneous enough range of world views . . . and does not include representatives of the Right-wing worldview."¹⁰⁸

Eventually, the Committee did not endorse the procedural approach to constitution-making manifest in the proposal for a thin constitution. At the same time, it also refrained from adopting a thick constitution that would have incorporated decisive declarations on the character of the state. While the final report, entitled *The Constitution in Broad Consent Project*, did include a proposed Bill of Rights and a basic Principles Chapter containing the foundational provisions of the constitution (such as the national

105. *Id.* at Protocol 199.

106. Religious National Party representative Yitzhak Levi admitted in concluding the Committee's discussion that writing a constitution "is a little bit frightening . . . because eventually it will entail choices. . . . A constitution cannot exist without choices, . . . and the power of a constitution is enormous. . . . As we have seen in the 1992 Basic Laws, one can always use Basic Laws as constitutional documents and influence other issues." *Id.* at Protocol 658. Similar comments were made by Moshe Gafni, *id.* at Protocol 658, as well as during Knesset discussion. DK (2006) 59 (Isr.).

107. THE COMMITTEE, *supra* note 53, at Protocol 320.

108. *Id.* at Protocol 271. Sa'ar referred to several cases, including HCJ 6698/95 Kaadan v. Israeli Land Administration 54(1) PD 258 [2000] (Isr.), HCJ 316/03 Bakri v. Israel Fil Council 58(1) PD 249 [2003] (Isr.), and HCJ 4112/99 Adalah v. Tel Aviv Municipality 56(5) PD 393 [2002] (Isr.).

language, symbols of the state, provisions related to state-religion relations), the constitution proposed included several alternatives for constitutional arrangements that reflected the competing perspectives of all participants in the constitutional deliberations regarding both foundational and institutional issues.¹⁰⁹

During the Knesset plenum discussion on the Committee's final report, religious representatives explicitly expressed their opposition to the enactment of a written constitution that would empower the Supreme Court. For example, MK Yizhak Levi from the National Religious Party bluntly stated:

We will object, as forcefully as we can, the enactment of a constitution at one stage. First we would like to regulate the relationship between the Knesset and the Court, because this, in our view, is the key to any further constitutional drafting. Many of the speakers expressed their concerns regarding judicial interpretation, judicial activism. . . . Some of these concerns may be unjustified, but the concern exists.¹¹⁰

The effect of the interlink between, on the one hand, the ideational-foundational debate over the character of the state and, on the other hand, the institutional tension between the legislature and the judiciary on the constitution writing processes was recently recognized by the Supreme Court. In a recent ruling Justice Elyakim Rubinstein explained the Israeli failure to adopt a complete formal constitution in these terms:

I concur with my colleague the Supreme Court Chief Justice with regard to the completion of the constitutional project. I will state it somewhat bluntly and unequivocally: the main reason for the incompleteness [of the constitution] so far, in my view—and we should recall that in the past two decades not a single basic law had been enacted, despite attempts to do so—is not the content of the constitution but rather the issue of who should interpret it. The last basic laws were created in 1992, yet in 1995 the constitutional authority was established in the *United Mizrahi Bank* case and since then, while various proposals for Basic Laws have

109. For detailed analysis of the constitutional proposals and the ways they limited future reform of the religious status quo by the Supreme Court, see generally Hanna Lerner, *Entrenching the Status Quo: Religion and State in Israeli Constitutional Proposal*, 16 CONSTITUTIONS 445 (2009).

110. *Plenum Discussion of Feb. 13, 2006*, THE KNESSET 45, available at <http://www.knesset.gov.il/plenum/data/00469106.doc> [hereinafter *Plenum Discussion*].

been presented, a “constitutional silence” has existed in the practical sense. It seems that some sectors in the Knesset are not happy with the constitutional authority of this court, and are concerned that additional constitutional texts would increase its powers.¹¹¹

Eventually, the Knesset reaffirmed the incrementalist constitutional approach adopted by the first Knesset in 1950. The perpetuation of the incrementalist approach was supported by religious, as well as secular, Arab Knesset representatives. Recognizing the lack of consensus regarding the foundational aspects of the constitution, Knesset members across the political spectrum called for preservation of the existing, ambiguous, informal constitutional arrangements, rather than enact a constitution reflecting the worldview of one sector of the population.

This position was expressed by religious representatives such as MK Meir Porush of Orthodox Agudat Israel Party, who declared during the Knesset discussions: “A constitution under circumstances of disagreement is a recipe for deepening divisions. Therefore, Israeli society should be allowed a few more years of internal discussions until a general consensus crystallizes that may be anchored in a constitution.”¹¹² MK Zehava Galon, representative of secular-left wing Meretz, reached a similar conclusion: “In light of the current political forces in the country and in the Knesset, I fear that enactment of a constitution would not fortify the fragile protection of human rights in Israel, but rather fracture it and create large and dangerous breaches that will deepen the rotten compromise. Hence, it is better to leave us without a constitution, rather than use the term constitution in vain.”¹¹³

A similar position was taken by MK Abed el-Malech Dahamsha of the Arab party Ra’am: “We have lived for fifty-seven years without a constitution. It is better to wait for better days when a constitution will be enacted that guarantees entrenched rights of minority groups.”¹¹⁴

As was the case in the 1950 Knesset decision, the 2006 Knesset resolution left Israel’s future constitution in doubt. It did not specify what provisions should be included in the constitution or what would be the procedure for its adoption. As with the 1950 resolution, the 2006 Knesset’s declaratory resolution had no legal

111. HCJ 4908/10 MK Roni Bar-On v. The Israel Knesset [2011] (Isr.), available at <http://elyon1.court.gov.il/files/10/080/049/n08/10049080.n08.pdf> [Hebrew].

112. *Plenum Discussion*, *supra* note 110, at 38.

113. *Id.* at 22.

114. *Id.* at 54.

significance, but only symbolic meaning, “which hopefully will lead to practical implications.”¹¹⁵

D. Israeli Constitutional Impasse

Israeli constitutional politics involves a paradoxical situation. On the one hand, the severe disagreements in Israeli society regarding the most fundamental norms and shared values that underpin the state require a clear and entrenched constitution, which would allow the distinction between ordinary political debates and constitutional disputes that challenge “the rules of the game.” On the other hand, these same intense conflicts over the character of the state are what prevent adoption of a complete constitutional document and motivate many political actors to prefer existing ambiguous arrangements over unequivocal foundational choices.¹¹⁶ The adoption of a thin constitution—which would merely delineate the balance of power between branches of government while remaining silent on controversial foundational issues—is difficult to achieve because legislature-judiciary relations in Israel are associated with ideational tensions that revolve not only on questions of power but also on foundational issues that touch upon the most fundamental values and goals of the state. This paradoxical situation pushed Israeli leaders to maintain the incrementalist constitutional approach that was adopted at the early years of the state.¹¹⁷

While the incrementalist constitutional approach has many advantages, particularly in enhancing political stability and by circumventing potentially explosive conflicts at the fragile moment of state-building, this approach involves great risks. These risks are apparent in the Israeli case, and I will very briefly mention two of them here.¹¹⁸ To begin with, incrementalist constitutional arrangements tend to preserve conservative principles, particularly in the area of religion. They thus allow for the infringements of basic rights, especially of women who tend to be discriminated against by religiously-based personal law. In the Israeli case, the Orthodox monopoly on marriage and divorce violates individual

115. Michael Eitan, Chair of the Constitution, Law and Justice Committee, during the Committee’s final discussion on the *Constitution in Broad Consent Project*. THE COMMITTEE, *supra* note 53, at Protocol 658.

116. See RUTH GAVISON, *THE CONSTITUTIONAL REVOLUTION: A REALITY OR A SELF-FULFILLING PROPHECY?* 93 (Isr. Democracy Inst. ed., 1998) [Hebrew].

117. Incrementalist constitutional arrangements may also be included in a written constitution, in a form of ambiguous, ambivalent or even contradictory provisions. See LERNER, *supra* note 4, at 30-46.

118. For an elaborated discussion, see *id.* at 208-29.

rights for women,¹¹⁹ but also for non-Orthodox religious Jewish groups, such as Reforms and Conservatives, and for non-believers.¹²⁰ The right to marry is limited, for example, for an estimated 300,000 immigrants from former Soviet Union, who are not recognized as Jews by the orthodox authorities, yet are not associated with any other religion.¹²¹ Second, in the absence of clear foundational constitutional principles, a long-lasting debate over the character of the state may overburden the democratic institutions and may weaken their legitimacy and public support. In Israel, the overlap between the religious-secular ideological conflict on the one hand, and the judiciary-legislature institutional tension on the other hand, had affected the level of public trust in both institutions. On the one hand, the Supreme Court's identification with one particular normative viewpoint in the struggle over the character of the State of Israel has undermined its legitimacy in the eyes of the groups holding different views. On the other hand, the constitutionally passive Knesset is perceived to be too weak to promote the interests of the secular majority of Israeli citizenry.¹²² According to on-going polls, trust in the Supreme Court dropped from seventy percent of respondents in 2003 to forty-nine percent in 2008.¹²³ Trust in the Knesset dropped during these years from fifty-two percent of respondents to twenty-nine percent.¹²⁴

119. According to Jewish religious law, husbands are granted veto power over divorce. For a recent report women's rights violations in the area of marriage and divorce, see Orit Lotan, 'Mesoravot Get' (*Denied of Divorce*) in Israel, Report Presented to the KNESSET COMMITTEE ON THE STATUS OF WOMEN (2005); see also WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY 21 (Frances Raday et. al. eds., 1995) [Hebrew]; Barbara Swirsky & Marilyn P. Safir, *Living in a Jewish State: National, Ethnic and Religious Implications*, in CALLING THE EQUALITY BLUFF 7, 13-14 (Barbara Swirski & Marilyn P. Safir eds., 1991); Yuksel Sezgin, *The Israeli Millet System: Examining Legal Pluralism Through Lenses of Nation-Building and Human Rights*, 43 ISR. L. REV. 631, 644-47 (2010); RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 227-62 (2004); PINCHAS SHIFFMAN, CIVIL OR SACRED: MARRIAGE AND DIVORCE ALTERNATIVES IN ISRAEL—A NECESSARY AND FEASIBLE CHALLENGE (Ass'n of Civil Rights in Isr. ed., 2001) [Hebrew].

120. See MICHAEL CORINALDI, STATUS, FAMILY AND SUCCESSION: LAW BETWEEN STATE AND RELIGION 25 (2004).

121. SHIFFMAN, *supra* note 119, at 7. A political attempt to introduce a civil marriage bill failed in 2010 due to coalitional considerations. Hanna Lerner, *Consociationalism v. Twin Tolerations: Religion and State in Israel*, in INSTITUTIONS AND DEMOCRACY: ESSAYS IN HONOR OF ALFRED STEPAN (Charles Chalmers & Scott Mainwaring eds., 2012).

122. See BARZILAI ET AL., *supra* note 87; GAVISON, *supra* note 116, at 99.

123. ASHER ARIAN ET AL., AUDITING ISRAELI DEMOCRACY—2009: TWENTY YEARS OF IMMIGRATION FROM THE SOVIET UNION 71-72 (Isr. Democracy Inst. ed., Batya Stein, trans., 2009), available at <http://en.idi.org.il/media/1354408/Index2009-Eng.pdf>.

124. *Id.*

V. CONCLUSION: LESSONS FOR TURKEY AND
OTHER CONSTITUTION-DRAFTING PROJECTS

The adoption of a thin constitution is inherently difficult in societies characterized by long-lasting controversies over fundamental norms and values or over national identity. Constitutional drafters tend to refrain from adopting a thin liberal constitution at the formative stage of the state and prefer enactment of ambiguous constitutional formulations that enhance political stability.¹²⁵ Yet, as the Israeli constitutional trajectory illustrates, if a thin constitution is not adopted in the early years of the state, when governmental institutions are shaped, the ability to enact one in later decades diminishes over time as debates over procedural-institutional issues (e.g., power relations between various branches of government) become more difficult to separate from foundational and identity issues (e.g., religion-state relations).

This lesson, drawn from a close analysis of the Israeli case, may be instructive for explaining other cases of constitutional impasses in societies divided over the identity of the state. For example, the political infeasibility of drafting a thin constitution in Turkey was evident in the dispute over the draft civilian constitution in 2007. Following an electoral victory in the fall of 2007, the AKP initiated the drafting of a civilian constitution intended to replace the 1982 military-written authoritarian constitution. Prime Minister Erdoğan appointed a five-member committee of the country's leading constitutional law scholars headed by Ergun Özbudun. The committee presented the draft constitution to AKP ministers and parliament members in August 2007. In accordance with the AKP electoral manifesto, the draft provided a democratic constitution that retained the basic principles of Kamelism while strengthening individual freedoms and minority rights, eliminated the tutelary prerogatives of the military-bureaucracy, reduced the powers of the presidency while empowered the legislature, and liberalized rules of party closure. All of these proposals were in conformity with the European Convention of Human Rights and

125. In addition to Israel, this was also the case in India (1950) and Indonesia (1945) with regard to issues of religious identity. For example, the *Pancasila* in Indonesia was designed as ambiguous constitutional formula that defines Indonesia's religious identity. For discussion on Indonesia, see generally Elson, *supra* note 33; RAMMAGE, *supra* note 33; Mirjam Künkler, Constitutionalism, Islamic Law and Religious Freedom in Post-independent Indonesia, Presented at the Workshop on Constitution Writing, Human Rights, and Religion, Bellagio Center (July 2012). For discussion on India, see generally BHARGAVA, *supra* note 33; GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1999).

other international human rights convention.¹²⁶ Already before a finalized draft was officially presented for public debate, the proposed thin constitution evoked a major public, political, and legal dispute and soon, the project was “silently shelved.”¹²⁷

As in the Israeli case, the Turkish dispute and the final elimination of the constitutional draft¹²⁸ reflect the grave difficulties involved in separating the institutional and foundational aspects of constitutional debate. The objections to the new constitution voiced by the opposition to the AKP included criticism for alleged undermining of secularism and Atatürk’s principles, as well as the accusation that it was intended to weaken judicial independence and politicize the judiciary, thus creating a system of majority rule that would allow for the strengthening of an Islamic government.¹²⁹ Similarly, the constitutional crises that erupted in the next months, following the AKP attempt to break off the amendment regarding the headscarf ban (Articles 10 and 42) from the broader package of constitutional reforms, illustrate the inseparability between, on the one hand, the debate over Turkey’s governmental institutions and the power relations between the various branches and, on the other hand, deep ideological divisions regarding the religious identity of the state.¹³⁰ In 2008, the Constitutional Court of Turkey overturned the constitutional amendments meant to permit religiously observant university students to wear headscarves on campus,¹³¹ which was passed in the parliament by an overwhelming majority of eighty percent.¹³² Moreover, in its ruling the Court held that certain constitutional provisions that are related to a particular conception of secularism

126. ÖZBUDUN & GENÇKAYA, *supra* note 36, at 104-05; Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT’L L. 235, 291-92 (2011).

127. ÖZBUDUN & GENÇKAYA, *supra* note 36, at 105.

128. Nevertheless, it is argued that parts of the constitutional draft proposed by the Ozbudun committee were introduced, as have been passed, as part of the 2010 constitutional referendum. *See generally* Bali, *supra* note 126.

129. ÖZBUDUN & GENÇKAYA, *supra* note 36, at 105.

130. Ergun Özbudun, Op-Ed., *New Constitution is Now a Must*, TODAY’S ZAMAN, Oct. 26, 2008, http://www.todayszaman.com/news-156932-reasoning-for-headscarf-decisionnew-constitution-is-now-a-must-by-ergun-ozbudun*.html; Levent Köker, *Turkey’s Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court*, 7 CONSTELLATION 328, 328 (2010); Bali, *supra* note 126, at 239-62.

131. Judgment of June 5, 2008, E:2008/16, K:2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.); *see also* Sabrina Tavernise, *Turkey’s High Court Overrules Government on Head Scarves*, N.Y. TIMES, June 5, 2008, http://www.nytimes.com/2008/06/05/world/europe/05iht-turkey.4.13505875.html?_r=0.

132. Law No. 5735 of Feb. 9, 2008, Resmî Gazete [R.G.] No. 26796 (Feb. 23, 2008) (Turk.); *see also* Selcan Hacaoglu, *Turkish Lawmakers End Head Scarf Ban*, USA TODAY, Feb. 9, 2008, http://usatoday30.usatoday.com/news/world/2008-02-09-3972140132_x.htm. The amendment passed by the required procedural majority. *Id.* Four hundred and eleven members voted in favor, while 103 opposed. *Id.*

foreclosed the possibility of attaining broad constitutional reform through the elected branches of government.¹³³ The constitutional impasse created by the overly activist Constitutional Court led the AKP to introduce a package of twenty-six constitutional amendments in 2010 that was supported by a majority of the voters in a public referendum, including a significant reform of the judiciary.¹³⁴

Despite the different constitutional trajectories of Israel and Turkey, there is a growing recognition in both countries in recent years of the need to draft a new formal constitution in order to advance liberal and democratic principles.¹³⁵ The AKP victory in the June 2011 elections generated high expectations for a constitution-making process that would replace the existing 1982 military-written authoritarian constitution. Similar to Israel in 2003, calls for crafting a thin constitution, clear of any illiberal nationalistic or religious elements, have been voiced by leading Turkish legal scholars.¹³⁶ However, as the analysis of the Israeli case counsels, such proceduralist constitutional proposals are not viewed by their opponents as neutral grounds aimed for allowing future political deliberation, but rather as representing a particular liberal-secular vision of the state's identity.¹³⁷ Given the intense divisions within Turkish society over the role of religion in public life, as well as debate over national identity and Kurdish minority rights, it seems that the expectation that a thin constitution would bracket these foundational issues from the allegedly more urgent institutional issues of power allocation between governmental branches would be difficult to fulfill.

133. Judgment of June 5, 2008, *supra* note 131. During October 2008, the Constitutional Court of Turkey published its ruling in a second, related case, which discussed the possible closure of the ruling AKP party on the grounds that it had become a "focal point" for anti-secular political activities in Turkey. Judgment of July 30, 2008, E:2008/1(SPK), K:2008/2, *Anayasa Mahkemesi [Constitutional Court] Resmi Gazete [R.G.] No. 27034 (Oct. 24, 2008) (Turk.)*. The court ruled against party closure. *Id.*

134. See generally OZAN ERÖZDEN ET AL., A JUDICIAL CONUNDRUM: OPINIONS AND RECOMMENDATIONS ON CONSTITUTIONAL REFORM IN TURKEY (Serap Yazici ed., 2010), available at http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/ENG/EngYargi1WEB.pdf; Bali, *supra* note 126.

135. In recent poll, 69.4 percent of the respondents stated that Turkey needs a new constitution. *Poll Shows Huge Public Support for New Constitution*, TODAY'S ZAMAN, Apr. 26, 2011, <http://www.todayszaman.com/news-242059-poll-shows-huge-public-support-for-new-constitution.html>. In a similar Israeli poll, sixty-five percent of the respondents claimed that it was important for them that Israel will have a written constitution. ARIAN ASHER & TAMAR HERMANN, AUDITING ISRAELI DEMOCRACY—2010: DEMOCRATIC VALUES IN PRACTICE 97, 114 (Isr. Democracy Inst. ed., Karen Gold trans., 2010).

136. See Köker, *supra* note 130, at 341-42; OZAN ERÖZDEN ET AL., *supra* note 134.

137. Such criticism was voiced by representatives of various NGOs currently involved in drafting constitutional proposals at the Conference on Justice at Times of Democratic Transition: Constitution Making, Judicial Reform and Confronting the Past, TESEV, Ankara, Turkey (Apr. 2011).

The inability to separate between issues of institutional design and foundational question of religious and national identity characterizes other recent and current constitutional debates. This was evident, for example, during the writing of the new constitution in post-Mubarak democratizing Egypt, where intense disputes over the role of Islam concerned both symbolic issues (whether Sharia should be mentioned in the constitution) and institutional questions (e.g. who will interpret Islamic law).¹³⁸ Similarly, in New Zealand, tensions concerning the Maori minority may hinder the enactment of a thin constitution.¹³⁹ Nevertheless, the infeasibility of a thin constitution should not discourage us from searching for alternative feasible constitutional solutions. Indeed, this article was not meant to generate a pessimistic conclusion, but rather to re-direct our attention to the importance of politics rather than abstract legal theory in processes of constitution writing that define the state's ultimate goals and shared vision. When not only institutional reconstruction but also ideological and symbolic issues are at stake, a rational constitutional procedure is inherently difficult to achieve. When the struggle is between competing norms and values, the right solution cannot be defined a priori, but may surface through a long and constant process of political discussions and negotiations.¹⁴⁰ Under such complex circumstances, perhaps there is no right "thin" constitutional solution but rather a set of reasonable "thick" constitutional options. Greater conceptual and empirical work is still very much required in order to allow political scientists and constitutional theorists to support such processes and to enrich politicians' understanding and skills in their search for workable solutions under conditions of deep disagreements over the identity of their state.

138. In the final constitution, Article 2 defines the principles of Sharia as the main source of legislation, while Article 4 gives an interpretive role to Al-Azhar. Clark Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution*, FOREIGN POLICY (Dec. 13, 2012), http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

139. In December 2010, the New Zealand Cabinet initiated a three-year process of constitutional review in reaction to growing Maori-Crown tensions and increasing Supreme Court intervention in Maori property rights issues. See Pita Sharples, *Announcement of Constitutional Review*, THE BEEHIVE (Dec. 8, 2010), <http://www.beehive.govt.nz/release/announcement-constitutional-review>; Bill English & Pita Sharples, *Govt Begins Cross-Party Constitutional Review*, THE BEEHIVE (Dec. 8, 2010), <http://www.beehive.govt.nz/release/govt-begins-cross-party-constitutional-review>. The New Zealand Cabinet listed among its objectives both institutional and foundational goals: revisit of governmental arrangements such as the size of parliament or length of electoral term, alongside consideration of Maori representation and the role of the Treaty of Waitangi within New Zealand's constitutional arrangements. CABINET PAPER AND MINUTE: CONSIDERATION OF CONSTITUTIONAL ISSUES para. 8 (2010) (N.Z.), available at [http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/consideration-of-constitutional-issues-1/d/Cabinet paper and minute 6 Dec 2010.pdf](http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/consideration-of-constitutional-issues-1/d/Cabinet%20paper%20and%20minute%206%20Dec%202010.pdf); see also NEW ZEALAND HERALD, *supra* note 4, at 5.

140. Tamir, *supra* note 50, at 171.

**CAN GOOGLE BOMB CHINA?
PRIVATE SECTOR SELF-HELP
AND THE NEUTRALITY ACT**

CHRISTOPHER J. FALLON*

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I. INTRODUCTION

In 2011, the Office of the National Counterintelligence Executive reported to Congress that China is the number one threat of economic espionage to U.S. private sector firms.¹ The now famous Chinese attack on Google, dubbed Operation Aurora,² did much to

* J.D. Candidate, The Florida State University College of Law, 2013; National Security Law LL.M. Candidate, Georgetown University, 2014; former U.S. Army officer, 1995-2005.

1. OFFICE OF THE NAT’L COUNTERINTELLIGENCE EXEC., FOREIGN SPIES STEALING US ECONOMIC SECRETS IN CYBERSPACE: REPORT TO CONGRESS ON FOREIGN ECONOMIC COLLECTION AND INDUSTRIAL ESPIONAGE, 2009-2011 (Oct. 2011).

2. Michael Joseph Gross, *Enter the Cyber Dragon*, VANITY FAIR, Sept. 2011, <http://www.vanityfair.com/culture/features/2011/09/chinese-hacking-201109>. This article is a detailed account of Operation Aurora and other attacks and is one of the more thorough

raise awareness of this national security concern.³ Could Google have launched a counter attack against China? Scholars, including Professor Paul Rosenzweig, have suggested that such conduct would run afoul of 18 U.S.C. § 960 (The Neutrality Act),⁴ which prohibits persons from engaging in or supporting “military expeditions” against foreign states with whom the U.S. is at peace.⁵ The question of whether offensive corporate cyber activities belong to that class of conduct that Congress intended to prohibit has never been presented to the courts and has not been sufficiently addressed by academia. The Pentagon recently adopted an effects-oriented test to determine when cyber conduct constitutes an act of war.⁶ When this test is applied to a Neutrality Act inquiry the following rule emerges: the cyber conduct of a U.S. firm is a “military expedition” within the meaning of the Neutrality Act if it damages the critical infrastructure of a foreign state. It follows from this rule that cyber espionage, intellectual property theft and cyber attacks that damage only noncritical infrastructure do not expose the corporation to liability under this particularly narrow piece of legislation.

First, we look at the text and legislative intent of 18 U.S.C. § 960 and offer a brief history of how courts have determined whether certain conduct is a “military expedition” and therefore a violation of the Act. This review shows that a new rule is needed because the Judiciary has only analyzed kinetic military activity and has never analyzed cyber activity under this statute. Then, we summarize the effects-oriented approach currently used by the U.S. Department of Defense to analyze cyber attacks against the United States. We then use the Pentagon’s test as an overlay and place it on top of a hypothetical cyber fact pattern in a Neutrality Act inquiry. This application shows that the Pentagon’s analytical framework can be applied symmetrically, while remaining faithful to the purpose of the Act, thereby filling the gap we identified in our domestic law. Finally, we conclude by addressing three counter

public reports published in 2011 regarding the cyber tension between the U.S. and China at that time. Michael Gross covers topics including politics, technology, and national security and has written extensively for the *New York Times*, the *Boston Globe*, and other publications.

3. OFFICE OF THE NAT’L COUNTERINTELLIGENCE EXEC., *supra* note 1, at 5. The intelligence report to Congress named five incidents of confirmed economic espionage in 2010 in which the Chinese Government was the aggressor. The attack on Google, which resulted in the theft of its “source code,” was one of these five named incidents. *Id.*

4. Paul Rosenzweig, *The Organization of the United States Government and Private Sector for Achieving Cyber Deterrence*, in NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS: INFORMING STRATEGIES AND DEVELOPING OPTIONS FOR U.S. POLICY 245, 260-61 (2010).

5. 18 U.S.C. § 960 (2006).

6. See DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE STRATEGY FOR OPERATING IN CYBERSPACE (2011).

arguments to our proposed rule. First, that our rule is inconsistent with existing cyber laws.⁷ Second, that our rule grants quasi-war powers to U.S. corporations for which there is no basis in the Constitution. Third, that cyber activity can never be equated with or characterized as a “military expedition.” We answer these objections by emphasizing the purpose of the 18 U.S.C. § 960, clarifying the legal framework of our rule, and illustrating that private sector cyber actions can be defined as “military expeditions” under the Act in the unlikely event they cause war-like devastation and loss of life.

II. THE ACT AND THE COURTS

The Constitution of the United States grants war powers to the President and Congress.⁸ At the bidding of George Washington in 1793 Congress passed the Neutrality Act to protect the war powers by making it a violation of U.S. federal law for a person, or more specifically for our purposes a corporation, to embark upon or support a military expedition against a foreign state with whom the United States is at peace.⁹ In its current form the statute provides,

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.¹⁰

The purpose of 18 U.S.C. § 960 is to protect the war powers of Congress.¹¹ Military intervention or provocation against a foreign state by private individuals could lead to a war against the United

7. We do not discuss international law in this Comment but instead focus on domestic law. This Comment focuses on the narrow question of what private sector cyber conduct is a “military expedition” under 18 U.S.C. § 960 and we set aside the separate issue of how corporate cyber attacks against foreign states might be analyzed under international law.

8. U.S. CONST. art. I, II. We refer to “the war powers” only generally in this Comment. It is sufficient to simply observe, for the purposes of this Comment, that war powers have been granted to the federal government, and therefore private individuals and private corporations have no war powers and that any encroachment upon or usurpation of these powers is a federal crime under 18 U.S.C. § 960.

9. *Wiborg v. United States*, 163 U.S. 632, 647 (1896).

10. 18 U.S.C. § 960 (2006).

11. *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806)

States.¹² Thus the purpose of the legislation is to avoid international incidents by prosecuting individuals who participate in such activity.¹³ Although the statement in *Wiborg v. United States* that the statute was designed to “secure neutrality in wars” is the one most frequently cited by the courts,¹⁴ District Judge Judson of the Southern District of New York in 1851 offered a particularly articulate and compelling exposition of the purpose of the Neutrality Act in *United States v. Sullivan*, declaring that:

Its great object—the all-pervading object of this law—is peace with all nations—national amity—which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source of wealth and prosperity—in short, to prevent war, with all its sad and desolating consequences.¹⁵

It is plain from the language of the statute that in order for a person to violate the Act there must be a “military expedition.”¹⁶ The task of interpreting “military expedition” has been left to the courts because the statute does not provide a definition. In a recent case, the court applied the statute to a group of defendants who provided combat training in Virginia to persons preparing to join with the Taliban in violent jihad in Pakistan against India and Russia, states with whom the U.S. was and is at peace.¹⁷ The court held that their conduct was a “military expedition” and thus a violation of the Neutrality Act.¹⁸ During the Cuban War of Independence from Spain during the last several years of the nineteenth century, U.S. federal courts decided seven cases under the Neutrality Act.¹⁹ All seven involved men taking up arms in this

12. *United States v. Yasith Chhun*, 513 F. Supp. 2d 1179, 1184 (C.D. Cal. 2007).

13. *Id.*

14. *Wiborg*, 163 U.S. at 647.

15. *United States v. Sullivan*, 27 F. Cas. 380, 381 (S.D.N.Y. 1851)

16. Courts have held that, according to the language of the statute, both “military expeditions” and “military enterprises” are violations, but have made a distinction between the two. Enterprise is understood more broadly than expedition. For instance, in *United States v. Sander*, 241 F. 417 (S.D.N.Y. 1917), the court held that American journalists who went to England during WWII to spy for the German military had conducted a “military enterprise” rather than a “military expedition.” Either would have violated the Act, but the defendants’ behavior amounted to one and not the other. *Id.* at 419-20. Because even the broadest interpretation of either expedition or enterprise in each of the forty Neutrality Act cases have involved a direct connection with kinetic military activity, as was the case in *Sander*, we determined that exploring the distinction which the courts have made between expedition and enterprise and applying it to the cyber environment was irrelevant to our inquiry.

17. *United States v. Khan*, 309 F. Supp. 2d 789, 823 (E.D. Va. 2004).

18. *Id.* at 823-24.

19. *Wiborg*, 163 U.S. at 632; *Hart v. United States*, 84 F. 799 (3d Cir. 1898); *United States v. Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896); *United States v. O’Brien*, 75 F. 900

country, travelling to Cuba and assisting the Cubans' efforts to free themselves from the Spanish.²⁰ Half a century earlier a similar set of cases came before the courts due to a series of lawless military incursions into Canada by private individuals.²¹ The defendants in these cases organized militias, gathered arms and munitions, trained and held planning meetings at various lodges across the northern regions of the U.S. and carried out raids across the border into Canada. Their conduct easily fell within the courts' definition of "military expeditions."

Only forty cases have been decided in the United States under the Neutrality Act. Thirty-nine of them are federal cases and the Supreme Court of California decided one. The U.S. Supreme Court granted certiorari only once to a Neutrality Act case.²² In *Wiborg*, the Court resolved an inconsistency among the lower courts regarding the interpretation of the term "military expedition."²³ Some of the courts were strictly defining it as traditional military activity, while other courts were including conduct less traditionally military in character. The *Wiborg* Court adopted the latter construction and declined the invitation to define "military expedition" narrowly.²⁴

Although the Judiciary has broadened the scope of what is meant by "military expedition," an examination of the forty cases reveals that the defendants' conduct has always been somewhat military in character. In some cases, the underlying alleged activity involved wearing uniforms, carrying arms, appointing officers, and massing forces on U.S. soil in preparation for an attack on another country.²⁵ In other cases, the conduct was less traditionally military: logistical or financial support of personnel who intend to attack another country.²⁶ There has not yet been a case where the alleged conduct was completely unrelated to kinetic

(C.C.S.D. N.Y. 1896); *United States v. Murphy*, 84 F. 609 (D. Del. 1898); *United States v. Pena*, 69 F. 983 (D. Del. 1895); *United States v. Hughes*, 70 F. 972 (C.C.D. S.C. 1895).

20. *Id.*

21. *In re Charge to Grand Jury*, 30 F. Cas. 1018 (C.C.D. Ohio 1838); *In re Charge to Grand Jury*, 30 F. Cas. 1017 (C.C.N.D. N.Y. 1866); *United States v. O'Sullivan*, 27 F. Cas. 367 (S.D.N.Y. 1851).

22. *Wiborg*, 163 U.S. at 632.

23. *Id.*

24. *Id.* at 639-40.

25. *United States v. O'Sullivan*, 27 F. Cas. 367 (S.D.N.Y. 1851); *Ex parte Needham*, 17 F. Cas. 1274 (C.C.D. Pa. 1817); *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807); *United States v. Black*, 685 F.2d 132 (5th Cir. 1982); *United States v. Quitman*, 27 F. Cas. 680 (C.C.E.D. La. 1854); *United States v. Ybanez*, 53 F. 536 (C.C.W.D. Tex. 1892).

26. *Hart v. United States*, 84 F. 799 (3d Cir. 1898); *United States v. Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896); *United States v. O'Brien*, 75 F. 900 (C.C.S.D.N.Y. 1896); *United States v. Tauscher*, 233 F. 597 (S.D.N.Y. 1916); *United States v. Murphy*, 84 F. 609 (D. Del. 1898); *United States v. Pena*, 69 F. 983 (D. Del. 1895); *United States v. Rand*, 17 F. 142 (E.D. Pa. 1883); *United States v. Hughes*, 75 F. 267 (D.S.C. 1896).

warfare. We are faced with a difficulty when we look to the law for help in determining what cyber conduct constitutes a “military expedition” because the courts have never addressed the issue.

Brief mention of the technology involved in “cyber” activity may be helpful to appreciate the vastness of the difference between cyber attacks and kinetic military attacks. Cyber generally describes computer network activity²⁷ and includes but is not limited to activity on the public Internet. Computer networks, or simply “networks,” are collections of computer hardware interconnected by communication channels for the purpose of sharing resources and information.²⁸ These communication channels can be “telephone lines, fiber optic cables, microwave transmission links, cellular networks, communications satellites, and undersea telephone cables.”²⁹ Computer networks are the core of modern communication and are typically managed by the organizations that own them. The U.S. Department of Defense makes a distinction between computer network attacks and computer network exploitation.³⁰ Network attacks are “[a]ctions taken through the use of computer networks to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.”³¹ Network exploitation, on the other hand, is described as “[e]nabling operations and intelligence collection capabilities conducted through the use of computer networks to gather data from target or adversary automated information systems or networks.”³² The distinction between damaging attacks and those that are mere exploitation or espionage proves to be a critical one in our analysis of cyber conduct under 18 U.S.C. § 960.

In addition to a basic understanding of cyber technology, it is also important to appreciate who controls this technology. In June 2010, at the request of the Office of the Director of National Intelligence, the National Research Council undertook a project to articulate questions that can drive research regarding effective ways to prevent hostile activity against important U.S. infor-

27. See MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/cyber> (defining cyber as “of, relating to, or involving computers or computer networks [as the Internet]”).

28. See ATIS TELECOM GLOSSARY, <http://www.atis.org/glossary/definition.aspx?id=6555> (defining computer network as “a network of data processing nodes that are interconnected for the purpose of data communication A communications network in which the end instruments are computers.”)

29. *Public Switched Telephone Networks*, WIKIPEDIA, http://en.wikipedia.org/wiki/Computer_network.

30. See DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (AS AMENDED THROUGH 15 NOVEMBER 2012) (2010).

31. *Id.* at 60.

32. *Id.*

mation systems.³³ George Rattray and Jason Healey, two of the cyber experts commissioned to contribute to this national security effort, explained that cyber space is predominantly used, owned, and controlled by the private sector.³⁴ Because of this, future conflicts in cyber space are very likely to be either won or lost in the private sector.³⁵ This underscores the importance of the task we undertake here: clarifying the legal framework within which private sector actors operate.

We saw from our review of Neutrality Act case law that when courts analyze a civilian defendant's conduct in order to determine if it can be classified as a "military expedition," the question that the courts ask is whether the person's conduct was military in character. In other words, did this person's actions look like military actions? Can we ask that same question about a hacker?³⁶ Can we meaningfully evaluate the military character of a hacker's conduct or determine whether her actions in cyber space look like military cyber actions? That does not seem to work. How will a jury be able to determine the point at which her electronic contact with a foreign government computer network is equivalent to picking up a gun, going to Cuba, and fighting the Spanish? There is no judicially manageable standard for cyber conduct. This Comment proposes a solution: analyze the effects, not the conduct. This is precisely how the Pentagon analyzes cyber attacks. It is probably also the only way to meaningfully evaluate the military character of a person's activity in cyber space.

III. THE EFFECTS-ORIENTED APPROACH

President Barack Obama's International Strategy for Cyberspace, which he signed in May 2011, makes clear that the United States will treat cyber threats the same way it treats any other threat, reserving the right, under the laws of armed conflict, to respond to serious cyber attacks with a proportional and justified military response.³⁷ Two months later, armed with this guidance

33. NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS: INFORMING STRATEGIES AND DEVELOPING OPTIONS FOR U.S. POLICY (2010).

34. George Rattray & Jason Healey, *Categorizing and Understanding Offensive Cyber Capabilities and Their Use*, in NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS: INFORMING STRATEGIES AND DEVELOPING OPTIONS FOR U.S. POLICY 79 (2010).

35. *Id.*

36. See ATIS TELECOM GLOSSARY, <http://www.atis.org/glossary/definition.aspx?id=5099> (defining hacker as a "person who breaks into, or attempts to break into, or use, a computer network or system without authorization . . .").

37. See PRESIDENT BARACK OBAMA, INTERNATIONAL STRATEGY FOR CYBERSPACE 9-13 (2011).

from the Commander in Chief, the U.S. Department of Defense unveiled its first-ever Strategy for Operating in Cyberspace.³⁸ This policy position is a further development of the Equivalence Doctrine.³⁹ The U.S. used this doctrine during the Cold War to justify a nuclear response to a conventional military attack. The U.S. now uses this doctrine to justify a kinetic military response to a cyber attack.⁴⁰

What type of cyber attack would trigger a military response? This is the one aspect of the Pentagon's new cyber strategy that concerns our present inquiry. It happens to be the same aspect that was of most concern to the media when Deputy Secretary of Defense William J. Lynn unveiled the strategy at the National Defense University on July 14, 2011.⁴¹ An examination of the unclassified version of the strategy and the remarks of various defense officials and commentators reveal a simple answer: cyber attacks that damage critical infrastructure may warrant a military response.⁴²

The strategy describes a continuum of hostile cyber conduct ranging from espionage and intellectual property theft to disruptive and destructive attacks on critical infrastructure. The strategy makes clear that destructive cyber activity with effects analogous to physical hostilities are more serious and more likely to warrant a military response than cyber conduct on the softer end of the spectrum. The determination of whether a particular instance of malicious cyber activity crosses this threshold is focused on two elements: damage and critical infrastructure.⁴³

38. See generally DEPARTMENT OF DEFENSE, *supra* note 6, at 5-6.

39. Chris Carrol, *DOD: Cyberattack on U.S. Could Warrant Deadly Response*, STARS & STRIPES, May 31, 2011, www.stripes.com/news/dod-cyberattack-on-u-s-could-warrant-deadly-response-1.145183; Austin Bay, *Cyberwarfare—the Doctrine of Equivalence*, REAL CLEAR POL., June 1, 2011, www.realclearpolitics.com/articles/2011/06/01/cyberwarfare_-_the_doctrine_of_equivalence_110044.html.

40. Noah Shachtman & Peter W. Singer, *The Wrong War: The Insistence on Applying Cold War Metaphors to Cybersecurity Is Misplaced and Counterproductive*, BROOKINGS, Aug. 15, 2011, <http://www.brookings.edu/research/articles/2011/08/15-cybersecurity-singer-shachtman>.

41. William J. Lynn, Deputy Sec'y of Def., Remarks on the Department of Defense Cyber Strategy, National Defense University (July 14, 2011) (transcript available at <http://www.defense.gov/speeches/speech.aspx?speechid=1593>).

42. See Siobahn Gorman & Julian E. Barnes, *Cyber Combat: Act of War: Pentagon Sets Stage for U.S. to Respond to Computer Sabotage With Military Force*, WALL ST. J., May 30, 2011, <http://online.wsj.com/article/SB10001424052702304563104576355623135782718.html>; Julian E. Barnes & Siobhan Gorman, *Cyberwar Plan Has New Focus on Deterrence*, WALL ST. J., July 15, 2011, <http://online.wsj.com/article/SB10001424052702304521304576446191468181966.html>; David E. Sanger & Elisabeth Bumiller, *Pentagon to Consider Cyberattacks Acts of War*, N.Y. TIMES, May 31, 2011, http://www.nytimes.com/2011/06/01/us/politics/01cyber.html?_r=0.

43. Lynn, *supra* note 41; DEPARTMENT OF DEFENSE, *supra* note 7.

Deputy Secretary Lynn describes damage as disruption or destruction of critical networks, causing physical damage, or alteration of the performance of key systems.⁴⁴ Lynn also explicitly mentions that conduct causing loss of life or damage similar to what would result from physical hostilities would rise to the level of serious cyber attack.⁴⁵ Espionage or theft of intellectual property, however, is less serious and fails to cross the threshold. Critical infrastructure includes sources of electricity, private sector voice and Internet communications networks, public transportation systems, commercial fuel refineries, the financial industry, crucial defense systems and hardware, and military readiness.⁴⁶

In February 2012, General Martin Dempsey, Chairman of the Joint Chiefs of Staff, endorsed this effects-based approach. He testified before the Senate Armed Services Committee that if cyber conduct consisted of theft of intellectual property, like hacking into defense systems and carrying off information about technology, he would consider it a crime rather than an act of war.⁴⁷ If the attack targeted critical infrastructure, however, he would consider it a more serious attack that might warrant a response in kind.⁴⁸ The Pentagon's new cyber policy has received support from national security scholars as well. Air Force General Charles Dunlap, law professor at Duke University School of Law and Executive Director of Duke's Center on Law, Ethics and National Security, joins the military planners' belief that the proper approach to determining when a cyber attack becomes an act of war is focused on the effects of the attack.⁴⁹

The Department of Defense Strategy for Operating in Cyberspace is similar to the Neutrality Act in that both focus on national security rather than crime prevention. Deputy Secretary Lynn's statement on the underlying purpose of the strategy, which was included in his prepared remarks at the National Defense University when he formally unveiled the Pentagon's new plan, is strikingly similar to what courts have said regarding the purpose of 18 U.S.C. § 960. "[W]hile identifying criminal activity in cyberspace is of concern, this is not the Defense Department's primary concern. Rather, our concern is specific to activities that

44. *Id.*

45. *Id.*

46. *Id.*

47. U.S. Senate Committee on Armed Services, Hearing to Receive Testimony on the Defense Authorization Request for Fiscal Year 2013 and the Future Years Defense Program, at 40, Feb. 14, 2012, available at <http://www.armed-services.senate.gov/Transcripts/2012/02%20February/12-02%20-%202012-14-12.pdf> [hereinafter Transcript].

48. *Id.*

49. Gorman & Barnes, *supra* note 42.

threaten our mission to protect the security of the Nation.”⁵⁰ This similarity of purposes allows us to symmetrically apply the Pentagon’s effects-based analysis of cyber attacks against the U. S. to our analysis of when an American corporate cyber attack against another country becomes a “military expedition” under the Neutrality Act.

IV. ARTICULATION, APPLICATION, AND ANALYSIS
OF THE PROPOSED EFFECTS-ORIENTED RULE
UNDER 18 U.S.C. § 960

The U.S. Defense Department’s critical infrastructure approach, used as a metric to evaluate the military character of private sector cyber attacks, fills the gap we identified in our domestic law. Applying the Pentagon’s analysis to an inquiry under 18 U.S.C. § 960 results in the following rule: the cyber conduct of a U.S. firm is a “military expedition” if it damages the critical infrastructure of a foreign state. We will apply this proposed rule to the hypothetical below, which is based on the events surrounding Operation Aurora,⁵¹ to determine if Google’s cyber responses to the attack by the Chinese government violate the statute. Applying the Defense Department’s critical infrastructure test results in finding that not all hostile corporate cyber responses to foreign electronic incursions violate the Act. Specifically, espionage and cyber activity that damages non-critical infrastructure does not subject the victim corporation to liability under this legislation. This result is consistent with the statute’s war-prevention purpose.

A. The Hypothetical

Google realizes that a cyber attack originating from China has resulted in the theft of its source code,⁵² which was used to hack into the Gmail accounts of several Chinese human rights activists.

50. Lynn, *supra* note 41.

51. John Markoff & David Barboza, *2 China Schools Said to Be Tied to Online Attacks*, N.Y. TIMES, Feb. 18, 2010, <http://www.nytimes.com/2010/02/19/technology/19china.html>.

52. Source code is critically sensitive intellectual property. Generally, it consists of computer programming statements that give instructions to a computer. Source code grants access to and the authorization to modify a computer.

1. Response #1: Cyber Espionage against a Foreign State

In order to confirm its suspicions regarding the identity of the aggressor, Google hacks into the email accounts of several Chinese Politburo members in order to read their communications. Google discovers that a member of the Chinese Politburo directed a Ukrainian computer scientist, a faculty member of the Lanxiang Vocational School in Shanghai, to conduct the attack against Google. Google then reports this information to appropriate U.S. governmental authorities.

2. Response #2: Temporarily Crashing a Governmental and Quasi-governmental Website

As a reaction to this information, Google launches a "denial of service"⁵³ attack which directs a flood of traffic to the Chinese government website controlling the email service of the Politburo members and temporarily crashes it by overwhelming its servers.⁵⁴ The effect is that the Politburo members and their staff are unable to access their official government email accounts for twenty-four hours. Google also launches a denial of service attack against the Lanxiang Vocational School computer network, which causes a temporary crash of the school's webpage. The effect is that the school's faculty, including the Ukrainian computer scientist, are unable to access their school email accounts for twenty-four hours.

B. Analysis of the Two Responses

In order for private sector conduct to violate the Neutrality Act it must be a "military expedition." Our proposed rule, which we apply to this hypothetical, is that the cyber conduct of a U.S. firm is a "military expedition" within the meaning of the Neutrality Act if it damages the critical infrastructure of a foreign state. The two elements of this rule, which must both be satisfied, are (1) damage and (2) critical infrastructure. Both responses fail both elements and therefore neither of them is a "military expedition." We use Response #1 as an opportunity to analyze the damage requirement

53. "Denial of service" attacks overwhelm networks with streams of high quantities of data until the networks fail. David McGuire & Brian Krebs, *Large Scale Attack Cripples Internet Backbone*, WASH. POST, Oct. 23, 2002. ATIS Telecom Glossary, available at <http://www.atis.org/glossary/definition.aspx?id=7096>, defines a "denial of service" attack as "the prevention of authorized access to resources or the delaying of time-critical operations."

54. ATIS Telecom Glossary, available at <http://www.atis.org/glossary/definition.aspx?id=1827>, defines "server" as "a network device that provides service to the network users by managing shared resources." In other words, a server is a computer designed to process requests and deliver data to other (client) computers over a local network or the Internet.

and we use Response #2 to analyze the critical infrastructure requirement.

Response #1, cyber espionage, is not a “military expedition” because it is not destructive and therefore does not violate the Act. This attack is similar to ones suffered by the U.S. in 2009 when cyber spies from China hacked into the Pentagon's \$300 billion Joint Strike Fighter project and the U.S. Air Force's air traffic control system and carried off several terabytes of sensitive information without damaging either target.⁵⁵ This Chinese act of cyber espionage failed to rise to the level of *casus belli*.⁵⁶ Similarly, Google's hypothetical Response #1 is not a “military expedition” because it did not damage the target but rather carried off information gleaned from reading confidential communications. Espionage does not violate the Act.

Response #2, temporarily crashing a governmental and quasi-governmental website, is not a “military expedition” because it only minimally damages noncritical infrastructure. The Politburo network is important because it allows China's leaders to communicate with each other but it is not critical infrastructure as the term is used in the Pentagon's new cyber strategy. Examples of critical infrastructure are regional power grids, mass transportation systems, and commercial fuel refineries. An email service, even between a nation's top leaders, does not belong to that class of infrastructure imagined by the Pentagon planners when they designed this analytical tool. The school's webpage is even less critical to China as a whole than is the Politburo email service. This is not to say that a computer network is never critical infrastructure. A network would fit into this category if it controlled critical physical resources. For instance, the network managing the air traffic control system at Beijing Capital International Airport is critical infrastructure. A cyber attack that causes that network to fail could in turn cause loss of life and damage to property. However, a network that merely provides a method of communication between national leaders is not critical infrastructure, especially when alternate methods of communication remain

55. Siobahn Gorman, August Cole, & Yochi Dreazen, *Computer Spies Breach Fighter-Jet Project*, N.Y. TIMES, Apr. 21, 2009, <http://online.wsj.com/article/SB124027491029837401.html>.

56. An attorney in the Office of the Secretary of Defense (OSD) revealed the opinion that the Chinese cyber incident referenced here failed to provide the United States legal justification to respond with an act of war. The Pentagon lawyer corrected our initial impression that one may infer from a lack of U.S. military response that an incoming hostile act was not *casus belli*. He pointed out that many provocations might go unanswered for a variety of reasons besides lack of legal authority to respond. However, the OSD attorney agreed with us that the Chinese cyber attack of the Joint Strike Fighter project and the U.S. Air Force air traffic control system was not *casus belli*. Email from Attorney, Off. of the Sec'y of Def. to author (June 23, 2012, 13:40 EST) (on file with author).

available. Therefore, this response fails to rise to the level of “military expedition.” Cyber attacks against noncritical infrastructure, even if they cause damage, do not violate the Act.

*C. First Counterargument: Both of Google’s Responses
Should Violate the Act because They are
Attacks against a Foreign State*

At a national security law conference held in April 2012 at Duke University’s Center on Law Ethics and National Security, I asked Craig Silliman, Senior Vice President for Legal and External Affairs and General Counsel for Verizon’s consumer and business groups, if our proposed “damage to critical infrastructure” rule was workable. Mr. Silliman stated that my question touches on sensitive areas that he is not at liberty to discuss. His opinion, generally, is that 18 U.S.C. § 1030 (the Computer Fraud and Abuse Act or CFAA), more than the Neutrality Act, is the federal statute that would govern a U.S. corporate cyber attack against the Chinese government.⁵⁷ This legislation prohibits, among other things, unauthorized access to computer networks.⁵⁸ We acknowledge that cyber espionage, intellectual property theft and cyber attacks that damage noncritical infrastructure are allowed by our rule but are not allowed by the CFAA. We argue, however, that a plaintiff who alleges that a U.S. corporation committed such offenses against a foreign state may not also allege a Neutrality Act violation absent a showing of damage to critical infrastructure.

Why not simply say that anything that violates the CFAA also violates the Neutrality Act? Our proposed “damage to critical infrastructure” rule is deeply anchored to the purpose of the Neutrality Act in that it limits corporate liability to only that cyber conduct which threatens the peaceful relations between the United States and a foreign state and encroaches upon the war powers of the President and Congress. The rationale underlying the distinctions between damaging and non-damaging attacks and critical and non-critical infrastructure is that destructive cyber conduct is more likely to draw us into war than mere espionage or theft. Similarly, damage to a foreign state’s critical infrastructure is more likely to trigger a military response from a foreign state than damage to relatively insignificant infrastructure. General Dempsey explicitly acknowledged this reality in his testimony before the Senate Armed Services Committee earlier this year.⁵⁹

57. 18 U.S.C. § 1030 (2006).

58. *Id.* at (a)(1).

59. Transcript, *supra* note 47, at 40.

An advocate of the position that *any* corporate cyber attack against a foreign state is a violation of 18 U.S.C. § 960, regardless of the effect of the attack, has chosen to defend a rule that has become untethered from the intent of the legislation.

D. Second Counterargument: Both of Google's Responses Should Violate the Act Because Google Has No Powers to Attack a Foreign State

Those skeptical of the legal foundations of a position that essentially allows Google to launch small but not big cyber attacks against another country may ask, "What powers does Google have to do this?" To ask this question is to misunderstand the legal framework of our proposed rule. The Constitution places war powers in the hands of the President and Congress. A person violates 18 U.S.C. § 960 by attacking another country and thereby taking the war powers out of the hands of the federal government. Therefore, the question is not whether Google has the powers to do this; the question is whether Google's conduct usurps the powers given to another. To determine whether that usurpation has occurred in a kinetic traditional military set of facts, courts have analyzed the military character of the person's conduct. To determine whether that usurpation has occurred in a cyber fact pattern, the effects of the attack must be analyzed under a two-pronged approach: damage and critical infrastructure.

E. Third Counterargument: Neither of Google's Responses Should Violate the Act because Private Sector Cyber Activity Cannot be a "Military Expedition"

There may also be those, on the other end of the public policy spectrum who are still uneasy about the generally novel proposition that private sector cyber activity can be equated to traditional kinetic military activity. These critics may argue that neither of Google's responses should violate the Neutrality Act because, realistically, electronic contact between a company and a country might be criminal but would never be construed as an act of war and would certainly never warrant a military response with troops or cruise missiles. The hypothetical set out above was designed to be somewhat realistic. One could imagine such a scenario actually happening. If the scenario changes to one that is less realistic and more dramatic, it becomes clear that a private sector cyber attack can and should be considered a "military expedition" and might be interpreted as an act of war. Let us say that one of Google's cyber

responses shut down the power grid in Beijing and Shanghai for a month during the winter causing 1350 deaths and a major humanitarian disaster. In that scenario, Google's conduct would seriously threaten the peaceful relations between the United States and China because of Google's strong American corporate identity. It would also seem possible for China to attribute the attack to the U.S. directly and accuse Google of being simply a quasi-governmental entity who acted at the behest of those in Washington. This hypothetical seems somewhat bizarre and unlikely, but because it is technologically possible, it must therefore also be possible for a U.S. firm to be guilty of engaging in a "military expedition." Technology has advanced such that "bits and bytes can be as threatening as bullets and bombs,"⁶⁰ even when "fired" by the keystrokes of a civilian corporate executive in an air-conditioned office in California. But in order to hold that this corporate conduct is the same as picking up a gun, going to Cuba, and fighting the Spanish, the keystrokes must cause war-like devastation. Short of that, a corporation need not worry about the Neutrality Act. Civil or criminal liability under other legislation, like the CFAA, or adverse effects to relations with critical international business partners is another story.

V. CONCLUSION

The Neutrality Act, contrary to the recent suggestion of several national security scholars, does not completely muzzle victim U.S. firms from taking actions against other countries who have trampled upon its intellectual property rights. Applying an effects-oriented analysis to the question of what private sector cyber conduct constitutes a "military expedition" results in a rule of law which allows the private sector a measure of freedom to actively protect its interests. From a policy standpoint, it would seem unfair to tie the hands of U.S. firms in the cyber environment when the federal government is not providing for the common defense. Progress has been made in this area, but we are not there yet. Deputy Defense Secretary William Lynn aptly described the Internet as the "wild wild West."⁶¹ Taking that image a bit further, even in the "wild wild West" common sense dictated that the private citizens who owned ranches and farms were able to actively defend their property against the attacks of hostile Indian nations. Such is the state of cyber space. The government interests protect-

60. Lynn, *supra* note 41.

61. William J. Lynn, Deputy Sec'y of Def., Remarks at Stratcom Cyber Symposium (May 26, 2010) (transcript available at <http://www.defense.gov/speeches/speech.aspx?speechid=1477>).

ed by the Neutrality Act are the war powers. Unless corporate conduct threatens this interest, it will not expose the corporation to liability under this legislation.

General Michael Hayden, former Director of both the Central Intelligence Agency and the National Security Agency, shared a sports analogy with us at a recent dinner regarding what he considers to be the necessary legal posture for today's U.S. national security law practitioners.⁶² His analogy is terribly consistent with the position of this Comment. "We will not be out of bounds, but we will have chalk dust on our cleats."⁶³ Such is required, General Hayden claims, of effective national security work.

62. Michael V. Hayden, Gen. USAF (Ret.), Speech at Duke Law Spring Conference (Apr. 13, 2012). General Hayden was the guest speaker at the national security conference held at Duke University School of Law, the same conference at which I spoke with Craig Silliman of Verizon's legal department regarding the premise of this Comment. I was privileged not only to attend the conference, but to join Mr. Silliman, Gen. Hayden and other conference attendees for dinner at the beautiful Washington Duke Inn.

63. *Id.*

**SHARING THE FLU:
SUGGESTED ALTERNATIVES IN
THE COMMUNICATION OF DUAL-USE RESEARCH**

JONATHAN T. BAKER*

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* J.D., *magna cum laude*, The Florida State University College of Law, 2012. I would like to thank my parents, John and Margot, for their unconditional love and support; my family's example of public service in global medicine; and Professor Frederick M. Abbott for inspiration from topics covered in the professor's seminar on Global Regulation of Pharmaceuticals (2012) at The Florida State University College of Law.

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I. INTRODUCTION

This is the question: When the improper use of scientific research can result in either a terrorist attack or an unchecked worldwide plague, how can the world balance the interests of global public health with national security? Recently, a U.S. government agency advised a scientific journal to restrict its research publication, which the agency deemed to be dual-use research (DR), i.e., life science research that is most likely to be misemployed against health or security interests.¹ The topic of the intended publication was a human-to-human susceptible form of “bird flu,” to which the world health community felt free access was critical in finding a vaccine for strains of influenza.² During the creation of this Article, the same U.S. agency retreated from its position by permitting full publication of the research in question.³ Yet, not all issues of DR dissemination lend themselves to an easy solution. As a result, this Article applies to the broader issues of proper international regulation of scientific research. At times the bird flu research case described above shall be analyzed as an example, while at other times the broader issues shall be addressed.

It may help in understanding the DR question by viewing it as the opposite issue to benefit-sharing. Instead of deciding how nations should share the *benefits* from research conducted on virus samples, this Article seeks to determine how to share the *burdens* arising from dissemination of pandemic research. Essentially, this Article analyzes two different legal suggestions: apply the law as it

1. Doreen Carvajal, *Security in Flu Study Was Paramount, Scientist Says*, N.Y. TIMES (Dec. 21, 2011), <http://www.nytimes.com/2011/12/22/health/security-in-h5n1-bird-flu-study-was-paramount-scientist-says.html>; Robert G. Webster, *Mammalian-Transmissible H5N1 Influenza: The Dilemma of Dual-Use Research*, 3 AM. SOC'Y FOR MICROBIOLOGY 1, 1 (2012), <http://mbio.asm.org/content/3/1/e00005-12.full.pdf>; Denise Grady & William J. Broad, *Seeing Terror Risk, U.S. Asks Journals to Cut Flu Study Facts*, N.Y. TIMES (Dec. 20, 2011), <http://www.nytimes.com/2011/12/21/health/fearing-terrorism-us-asks-journals-to-censor-articles-on-virus.html>; Office of Biotechnology Activities, *NSABB Frequently Asked Questions*, NAT'L INSTS. OF HEALTH, http://oba.od.nih.gov/oba/faqs/NSABB_FAqs_NEW_FINAL.pdf (last visited Feb. 15, 2013) [hereinafter *NSABB FAQs*].

2. Carvajal, *supra* note 1.

3. Kate Kelland & Sharon Begley, *UPDATE 1—Bird Flu Studies OK to Publish—U.S. Biosecurity Expert*, REUTERS (Apr. 2, 2012), <http://www.reuters.com/article/2012/04/02/health-birdflu-idUSL2E8F2E8F20120402>.

is, or forge a new international agreement on the topic of DR. The proposed agreement would be mandatory to the extent that it would specify rules for limited communication of DR while still assuring national governments of their security by burdens of proof and exceptions. As a result, this Article concludes that the better suggestion is a newly negotiated, comprehensive international agreement where all the stakeholders' interests can be balanced and ambiguities can be clarified for future generations.

II. DUAL-USE-RESEARCH: HISTORY AND TECHNICAL BACKGROUND

The use of biological agents against one's enemy is as old as time. As proof, the Tartar soldiers in 1346 engaged in biological warfare when they catapulted persons infected with bubonic plague over the walls of enemy cities.⁴

Understanding the concerns of pandemic influenza requires some technical explanations. The scientific name of "bird flu" is Orthomyxoviridae, Influenza Type A, subtype H5N1.⁵ This naturally occurring class of H5N1 is highly pathogenic, with death rates of sixty percent for persons infected in the last decade; H5N1 has also been known to mutate so that humans are susceptible even though in nature it is generally contracted by fowl.⁶ The first known H5N1 infection of humans was in Hong Kong SAR, China in 1997.⁷ The early 2000s presented still more outbreaks from Asia (once in 2003 from Hong Kong), which moved into other continents.⁸

Facts like these caused interested parties to refer to the situation as a pandemic. The definition of a pandemic is debated but sufficiently distinct for purposes of understanding DR risks. According to the National Institutes of Health (NIH), a pandemic means "occurring over a wide geographic area and affecting an

4. Ryan R. Kemper, *Responding to Bioterrorism: An Analysis of Titles I and II of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002*, 83 WASH. U. L. REV. 385, 386 (2005); Robert E. Armstrong & Jerry B. Warner, *Biology in the Battlefield*, DEFENSE HORIZONS, Mar. 2003, at 1.

5. *Microbes Species Profile on Avian Influenza*, NAT'L AGRIC. LIBRARY, <http://www.invasivespeciesinfo.gov/microbes/avianflu.shtml> (last visited Jan. 16, 2013).

6. *Fact Sheet on Avian Influenza*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/avian_influenza/en/ (last visited Feb. 16, 2013) [hereinafter *WHO Fact Sheet*]; Dan Vergano, *Scientists Engineer Bioterror Fears*, USA TODAY (Jan. 26, 2012, 10:36 AM), http://usatoday30.usatoday.com/NEWS/usaedition/2012-01-26-bird-flu-fight-splits-science_CV_U.htm.

7. *WHO Fact Sheet*, *supra* note 6.

8. *Id.*; Adam Kamradt-Scott & Kelley Lee, *The 2011 Pandemic Influenza Preparedness Framework: Global Health Secured or a Missed Opportunity?*, 59 POL. STUD. 831, 833 (2011).

exceptionally high proportion of the population.”⁹ Alternatively, the politically muddled, World Health Organization (WHO) phase-based definition declares that “Phase 6, the pandemic phase, is characterized by community level outbreaks in at least one country *in a different WHO region* [from which the initial outbreak occurred].”¹⁰ For reference, the H1N1 (swine flu) outbreak of 2009 met the WHO’s definition of a Phase 6 pandemic.¹¹

To put the WHO definition in perspective, there are only six WHO regions.¹² China and a portion of Southeast Asia comprise one region; India, Bangladesh, Myanmar, and Indonesia comprise another; while North and South America comprise a third.¹³ The WHO decided only that the degree of geographic spread, but not severity or mortality of a disease, be a requirement of a pandemic.¹⁴

From another perspective, the U.K. Health Protection Agency states that a “pandemic [*can*] arise when a new virus emerges which is *capable* of spreading in the worldwide population”¹⁵ but implicitly has not actually spread yet. In academia, the National Library of Medicine places pandemic under a subject heading with this description: “infectious disease that ha[s] spread to . . . more than one continent, and usually affecting a large number of people.”¹⁶

Finally, the Center for Disease Control (CDC) sees pandemic influenza as 1) a human-susceptible new viral subtype 2) that causes serious illness and 3) that spreads easily between humans.¹⁷ Thus, at its worst, a pandemic can produce large casualties for more than one region of the world. At its best, a pandemic may not necessarily be lethal even though it has already spread many miles beyond its origin. Nevertheless, by most pandemic

9. MedlinePlus, *Medical Dictionary on Pandemic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/medlineplus/pandemic> (last visited Feb. 16, 2013).

10. Peter Doshi, *The Elusive Definition of Pandemic Influenza*, 89 BULL. WORLD HEALTH ORG. 532, 533 tabl. 1 (2011), <http://www.who.int/bulletin/volumes/89/7/11-086173.pdf> (emphasis added).

11. *Id.* at 533.

12. See generally *WHO Regional Offices*, WORLD HEALTH ORG., http://who.int/about/brochure_en.pdf (last visited Jan. 16, 2013) (introducing background information on the World Health Organization).

13. *Id.*

14. Doshi, *supra* note 1010, at 533.

15. U.K. Department of Health on *Pandemic Influenza*, HEALTH PROT. AGENCY, <http://www.hpa.org.uk/Topics/InfectiousDiseases/InfectionsAZ/PandemicInfluenza/> (last visited Feb. 16, 2013).

16. Nat’l Insts. of Health., *Medical Subject Headings*, U.S. NAT’L LIBRARY OF MED., <http://www.nlm.nih.gov/cgi/mesh/2013/MB.cgi> (last visited Jan. 16, 2013).

17. U.S. Dep’t of Health and Human Servs., *ABCs of Influenza and Pandemics*, CTRS. FOR DISEASE CONTROL & PREVENTION, at 53, <http://influenzatraining.org/documents/s15473e/s15473e.pdf> (last visited Feb. 16, 2013).

definitions, the implication for substantial loss of human and animal life exists.

An NIH agency classifies DR as “[r]esearch yielding new technologies or information with the potential for both benevolent and malevolent applications.”¹⁸

To compound this definitional confusion, Indonesia in 2007 refused to share its H5N1 samples with the WHO, and thus the world’s research institutes.¹⁹ Indonesia reasoned that despite donating H5N1 samples to developed nations, the patented vaccines arising from those samples were unaffordable to Indonesia as a developing country.²⁰

Indonesia’s refusal prevented vaccine development for up-and-coming strains of influenza; these were the same vaccines that wealthier countries secured through contract with the suppliers.²¹ As a result of Indonesia’s claim to sovereignty over its H5N1 samples, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol) was spawned.²² The WHO Pandemic Influenza Preparedness Framework (PIP) also emerged as a result of Indonesia’s refusal.²³ Other instruments that touched on similar issues to DR were the Convention on Biological Diversity (CBD) in 1993, from which the Nagoya Protocol originated, as well as the Cartagena Protocol on Biosafety in 2003.²⁴

While H5N1 was gaining attention, the terrorist attacks of September 11, 2001, instigated the creation of a biosecurity oversight board within the U.S. government. In 2004, the National Science Advisory Board for Biosecurity (NSABB) was established as a federal committee for the purposes of merely recommending, not issuing, mandates in respect to federally funded research that may have dual uses.²⁵ The NSABB is located within the Office of Biotechnology (OBA), which is within the NIH; the NSABB also

18. NSABB FAQs, *supra* note 1.

19. Kamradt-Scott & Lee, *supra* note 8, at 831.

20. Arthur L. Caplan & David R. Curry, *Leveraging Genetic Resources or Moral Blackmail? Indonesia and Avian Flu Virus Sample Sharing*, 7 AM. J. BIOETHICS 1, 1 (2007).

21. Kamradt-Scott & Lee, *supra* note 8, at 834 (known as an advance purchase agreement); Caplan & Curry, *supra* note 20, at 2.

22. Jitesh Soares, *The Nagoya Protocol and Natural Product-Based Research*, 6 ACS CHEMICAL BIOLOGY 289 (2011).

23. *See infra* note 38.

24. *See About the Cartagena Protocol on Biosafety*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://bch.cbd.int/protocol/background/> (last visited Jan 16, 2013); Thomas A. Kurasar, *What Are the Implications of the Nagoya Protocol for Research on Biodiversity?*, 61 BIO-SCIENCE 256, 256 (2011).

25. Office of Biotechnology Activities, *About the NSABB*, NAT’L INSTS. OF HEALTH, http://oba.od.nih.gov/biosecurity/about_nsabb.html (last visited Jan. 16, 2013); NSABB FAQs, *supra* note 11; Kerry Boyd-Anderson, *U.S. Creates Advisory Board for Biosecurity*, 34 ARMS CONTROL TODAY 36 (2004).

advises the Director of the NIH and the Secretary of the U.S. Department of Health and Human Services.²⁶ As a balanced representative of both public health and national security,²⁷ the NSABB refers to national security concerns rather broadly by stating that those concerns include “threats to public health and safety, agricultural crops and other plants, animals, the environment, and/or materiel . . . as well as manmade resources.”²⁸

The NSABB was the agency that initially advised against the publication of the two H5N1 DR manuscripts, one from Erasmus Medical Center and the other from the University of Wisconsin.²⁹ The NSABB finally permitted publication of the H5N1 DR because 1) the manuscripts did not “*immediately enabl[e]*” misuse, 2) communicating information about viral mutation can encourage “international surveillance and public health [and safety] efforts,” and 3) the international practice of the free sharing of information was key to pandemic preparedness.³⁰

As for the international perspective, the WHO generally attempts to represent a balanced stance on public health. For example, at its meetings, the WHO includes participants from both sides of an issue: research interests as well as national security interests.³¹ Therefore, in early 2012, when the WHO met to decide whether to extend a moratorium on H5N1 research, representatives included *Nature*, a science journal, the WHO-collaborating Center for Surveillance, NIH, the Influenza Research Institute of the University of Wisconsin (one of the research institutes that created the H5N1 DR), the NSABB, and other WHO Collaborating Centres for the study of influenza.³²

The WHO is an agency of the United Nations (UN) established in 1948 to make recommendations on global public health regard-

26. NSABB FAQs, *supra* note 11; National Science Advisory Board for Biosecurity Findings and Recommendations March 29-30, 2012, NAT'L INSTS. OF HEALTH, http://oba.od.nih.gov/oba/biosecurity/PDF/03302012_NSABB_Recommendations.pdf (last visited Jan. 16, 2013) [hereinafter *NSABB Statement 2012*].

27. NSABB FAQs, *supra* note 1 (explaining that the NSABB is composed of persons on both ends of the DR spectrum, both life scientists and national security experts).

28. National Science Advisory Board for Biosecurity, *Responsible Communication of Life Sciences Research with Dual Use Potential*, NAT'L INSTS. OF HEALTH, at 14, http://oba.od.nih.gov/biosecurity/pdf/Communication_Tools%20Dual_Use_Potential.pdf (last visited Jan. 16, 2013) [hereinafter *Responsible Communication*].

29. Carvajal, *supra* note 1; *NSABB Statement 2012*, *supra* note 26.

30. *NSABB Statement 2012*, *supra* note 26.

31. See *Technical Consultation on H5N1 Research Issues*, WORLD HEALTH ORG., http://www.who.int/influenza/human_animal_interface/list_participants/en/index.html (last visited Jan. 16, 2013).

32. *Id.*; *Public Health, Influenza Experts Agree H5N1 Research Critical, but Extend Delay*, WORLD HEALTH ORG. (Feb. 17, 2012), http://www.who.int/mediacentre/news/releases/2012/h5n1_research_20120217/en/index.html (last visited Jan. 16, 2013).

ing infectious diseases.³³ The WHO carries a positive history of positively impacting world health.³⁴ Unlike some UN agencies, the WHO did not previously engage in security issues; however, given the last decade's global anthrax experience, Severe Acute Respiratory Syndrome (SARS), and swine flu, the WHO's concerns have expanded into biosecurity.³⁵

In 2011, the PIP emerged from the WHO, and the World Health Assembly approved it shortly thereafter.³⁶ In essence, the PIP governs the sharing of viruses and vaccines among developed and developing nations within the WHO Global Influenza Surveillance Network (GISN).³⁷ In 2007, the PIP negotiations were launched partially due to Indonesia's refusal to share samples; a refusal to share virus samples could have crippled the GISN.³⁸ As a result, the PIP emerged with recommendations for 1) required financial payments from the pharmaceutical industry to the GISN and 2) e-tracking of certain transferred materials.³⁹ Incidentally, Indonesia claimed the right of sovereignty over virus samples isolated in its territory based on the CBD and the International Health Regulations (2005).⁴⁰

33. Jiyong Jin & Joe Thomas Karackattu, *Infectious Diseases and Securitization: WHO's Dilemma*, 9 BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRAC. & SCI. 181, 181 (2011).

34. See generally *Archives of the Smallpox Eradication Programme*, WORLD HEALTH ORG., http://www.who.int/archives/fonds_collections/bytitle/fonds_6/en/index.html (last visited Jan. 16, 2013) (offering background information on the Smallpox Eradication Programme); FRANK FENNER ET AL., WORLD HEALTH ORG., SMALLPOX AND ITS ERADICATION 421, 430 (1988), available at [http://whqlibdoc.who.int/smallpox/9241561106_chp10_\(p421-p442\).pdf](http://whqlibdoc.who.int/smallpox/9241561106_chp10_(p421-p442).pdf) (last visited Jan. 16, 2013) (describing the eradication of smallpox within several years of WHO involvement, successfully financially administered in part by Alistair Taylor in the sensitive WHO region of Southeast Asia).

35. Jin & Karackattu, *supra* note 33.

36. *Landmark Agreement Improves Global Preparedness for Influenza Pandemics*, WORLD HEALTH ORG. (Apr. 17, 2011), http://www.who.int/mediacentre/news/releases/2011/pandemic_influenza_prep_20110417/en/index.html (last visited Jan. 16, 2013); European Centre for Disease Prevention and Control, *Agreement on a Pandemic Influenza Preparedness Framework for the Sharing of Viruses and Benefit Sharing*, EUROSURVEILLANCE (Apr. 21, 2011), <http://www.eurosurveillance.org/images/dynamic/EE/N16N16/art19847.pdf> (last visited Jan. 16, 2013) [hereinafter *ECDC on the PIP*].

37. *ECDC on the PIP*, *supra* note 36.

38. *Pandemic Influenza Preparedness - Significant Agreement on Sharing of Influenza Viruses Samples and Benefit Sharing at a Global Open Ended Working Group*, EUR. CTR. FOR DISEASE PREV. & CONTROL, http://www.ecdc.europa.eu/en/activities/sciadvice/Lists/ECDC%20Reviews/ECDC_Dispatch.aspx?List=512ff74f-77d4-4ad8-b6d6-bf0f23083f30&ID=1064#table (last visited Jan. 16, 2013) [hereinafter *PIP Significant Agreement*]; Caplan & Curry, *supra* note 20.

39. *PIP Significant Agreement*, *supra* note 38; *Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits*, WORLD HEALTH ORG., http://whqlibdoc.who.int/publications/2011/9789241503082_eng.pdf [hereinafter *PIP Framework*] (last visited Jan. 16, 2013).

40. Lawrence O. Gostin & David P. Fidler, *WHO's Pandemic Influenza Preparedness Framework: A Milestone in Global Governance for Health*, 306 JAMA 200, 200 (2011) [hereinafter Fidler & Gostin, *Milestone*]; David P. Fidler, *Influenza Virus Samples, International*

Finally, some other WHO programs include the Global Alert and Response (GAR),⁴¹ International Health Regulations (IHR),⁴² and the Global Influenza Pandemic Action Plan (GAP).⁴³

III. SUGGESTIONS

The following part contains suggestions for balancing the interests in DR disputes. There are two primary suggestions: form a new multilateral agreement, or apply the law as it currently stands. Generally, each suggestion shall include proposed rules for a fair resolution, and the advantages and disadvantages of each. The final conclusion shall comprehensively review the various positions reached in each suggestion part and summarize the best resolution to the initial question posed by this Article.

A. Form a New Multilateral Agreement

One suggestion is to form a new multilateral agreement. This agreement should memorialize rules that have previously been unclear, overbroad, or not yet recognized. Basically, a new agreement would include duties on the international community to heighten their surveillance of pandemics, declarations and definitions to make the international law of biosecurity more comprehensive, rules authorizing the communication of DR only to qualified institutions, a presumption that would arise in favor of publication based on the presence of certain factors, and an exception. Such an agreement would primarily apply to the communication of DR, but may be broad enough to cover other biological disputes as they appear.

To understand any set of rules that balance the interests of at least two parties, it is prudent to first properly comprehend those interests. The national security perspective is primarily interested in guarantying less misuse of life science research with due regard

Law, and Global Health Diplomacy, 14 EMERGING INFECTIOUS DISEASES 88, 88-90 (2008) [hereinafter Fidler, *Diplomacy*].

41. See generally *Global Alert and Response (GAR), Responsible Life Sciences Research for Global Health Security*, WORLD HEALTH ORG., http://www.who.int/csr/bioriskreduction/lifesciences_research/Responsible_lifescience_epr_project_Keyactivities/en/index.html (last visited Jan. 16, 2013) (providing background information on responsible life sciences research).

42. See generally World Health Org., *Biorisk Management: Laboratory Biosecurity Guidance*, WHO/CDS/EPR/2006.6 (Sep. 2006), available at http://www.who.int/csr/resources/publications/biosafety/WHO_CDS_EPR_2006_6.pdf (last visited Jan. 16, 2013) [hereinafter IHR Biosecurity] (introducing the subject of biosecurity in laboratories).

43. See generally *Global Action Plan for Influenza Vaccines: GAP Objectives*, WORLD HEALTH ORG., http://www.who.int/influenza_vaccines_plan/objectives/en/ (last visited Jan. 16, 2013) (providing general information about the GAP).

for the global availability of useful research.⁴⁴ Indeed, one U.S. agency holds that a limitation on DR publication ought to be the “rare exception.”⁴⁵ From these principles it can be gathered that the national security perspective is not absolutely opposed to global public health interests. To further illustrate the proximity of the parties’ interests, consider that the WHO, as a public health representative, has expressed a desire that virus research be shared, but with due respect for the possible exacerbation of an already-uncontrolled disease.⁴⁶

Yet not all of the interests are perfectly aligned. Other voices in public health would say restrictions that “prevent the free exchange of scientific information” should not exist at all.⁴⁷ Still, these advocates are balanced by peers, such as Clifford W. Houston of the University of Texas Medical Branch, who would reach conclusions along the more moderate lines of the WHO.⁴⁸ Therefore, an initial examination suggests that the two interests (national security and public health) are aligned well enough that an agreement on DR is likely feasible.

Since there is a possibility of striking a middle ground between national security and public health, a new agreement may increase the world’s mutual understanding of biosecurity.⁴⁹ In other words, negotiations on DR may aid the parties, private and public, to understand each other better, which in turn will permit them to more quickly reach agreements on future biosecurity problems.

Turning to the alternative of a new agreement, the following paragraphs shall analyze its efficacy in more detail.

44. *E.g.*, Press Release, Office of the Press Sec’y, Exec. Office of the President, President Obama Releases National Strategy for Countering Biological Threats (Dec. 9, 2009) [hereinafter President’s Release], available at <http://www.whitehouse.gov/the-press-office/president-obama-releases-national-strategy-countering-biological-threats> (last visited Jan. 16, 2013).

45. *Responsible Communication*, *supra* note 28, at 5.

46. *WHO Concerned that New H5N1 Influenza Research Could Undermine the 2011 Pandemic Influenza Preparedness Framework*, WORLD HEALTH ORG. (Dec. 30, 2011) http://www.who.int/mediacentre/news/statements/2011/pip_framework_20111229/en/index.html (last visited Jan. 16, 2013) [hereinafter *WHO Concerned*].

47. See National Institutes of Health, *Dual Use Research: A Dialogue*, OFFICE OF BIOTECHNOLOGY ACTIVITIES (May 12, 2010), <http://oba.od.nih.gov/biosecurity/biosecurity.html> [hereinafter *A Dialogue*] (expressing the views of Samuel Kaplan, Professor and Chair of Microbiology and Molecular Genetics at the University of Texas Medical School at Houston).

48. *Id.* at time 3:10 (“[G]overnment ultimately should have some overall say in the rules of conduct among scientists. If they [scientific institutions] are going to be funded with government money, then they should adhere by the rules.”) (expressing the views of Clifford W. Houston, Associate Vice President and Professor of Microbiology and Immunology at the University of Texas Medical Branch at time 4:29).

49. See President’s Release, *supra* note 44.

1. A General Rule: DR is Only Communicable in the Presence of Sufficient Factors

Because the last decade has already produced two false alarms in biosecurity precautions,⁵⁰ and more importantly because the value of influenza DR is doubtful,⁵¹ a new agreement should state that DR is only communicable if a sufficient amount of liberal factors are present. To support the contention that certain DR is of lesser value, the director of the Oxford University Clinical Research Unit in Ho Chi Minh City, Jeremy Farrar, indicates that H5N1 research is unlikely to expedite a pandemic vaccine.⁵²

Core language reflecting these facts in a new agreement might include the following: *After sufficient factors are proved by clear evidence, life science research shall be communicable except for circumstances that raise an immediate national security risk to one of the Parties.* This implied presumption first places the burden on the representatives of public health to show the reasons for overriding a state's national security interest. After enough factors are established, the burden shifts to the government to show why research that it probably funded is too risky to communicate. Overall, public health advocates should have to prove their case first because it would be a grim enterprise to ask a nation to impose on itself a requirement to communicate dangerous information without some articulated justification. In other words, if new negotiations are to be viable, there must be some concessions made in favor of national security.

As for the exception for immediate national security risks, the government is best able to bear the burden of suggesting to the life science community (and the public) why a national security risk is immediately present. National governments are in the business of apprising themselves of national security after all, not research institutes. Therefore, the government should carry such a burden. The use of "*immediately*," instead of a mere *likelihood* of risk, comfortably tracks the NSABB's current practice for resolving DR disputes.⁵³ A new agreement would likely be more feasible if it paralleled the relevant pre-existing national standards in this way, provided such standards are not unduly one-sided.

50. One false alarm was swine flu, and the other was the recent case of H5N1 DR., Eur. Parl. Ass., *The Handling of the H1N1 Pandemic: More Transparency Needed*, Doc. No. 12283 (2010), available at http://assembly.coe.int/CommitteeDocs/2010/20100329_MemorandumPandemie_E.pdf (explaining the world's flawed reaction to swine flu).

51. Declan Butler, *Lab Flu May Not Aid Vaccines*, 482 NATURE 142, 142-43 (2012) (arguing that a pandemic is more likely to result from natural mutations than from laboratory-modified versions of a particular virus).

52. *Id.*

53. See NSABB Statement 2012, *supra* note 26.

The general rule that best balances the issue is to allow DR to be communicated only after sufficient factors are shown to exist. Indeed, the WHO agrees that using highly thorough factors is the proper approach to DR communication.⁵⁴ This presumption may cause a research institute to take care to learn of world events related to bioterrorism and act accordingly when choosing a research path. In other words, if a research institute realizes it must ultimately present a justification for publication, it is natural to assume it shall work harder to prepare its case in the earlier clinical stages.

2. Factors of a New Agreement

As for the factors themselves, they should be 1) the identity of the country from which publication would first occur, 2) the feasibility of restraining the proposed form of communication, 3) the scope of the potential threat,⁵⁵ 4) the nature of the benefit derived from communication,⁵⁶ 5) whether a different strain of the disease can be used as a substitute,⁵⁷ 6) the extent of the novelty involved in the DR,⁵⁸ and 7) whether a pandemic currently exists. Their varying levels of benefits shall now be analyzed.

One factor may be the identity of the particular country from which the DR is intended to be published. If the country from which the publication will occur has heavy restrictions on free speech, then there may be a need to encourage publication through the international consensus that a new agreement could provide.

On the other hand, if the country from which publication were to occur had liberal laws regarding free speech, then there would be less need to encourage publication by invoking an international agreement. Put another way, the government of a free country would find it more difficult to censor communication in light of its constitution or other laws. The case of H5N1 research is a helpful example. The DR on H5N1 was conducted and intended to be published from the United States, a nation with guaranteed free speech.⁵⁹ In that case, one reason the research journals may have won the NSABB's blessing was because the NSABB potentially

54. *E.g.*, *WHO Concerned*, *supra* note 46.

55. *Responsible Communication*, *supra* note 28, at 7.

56. *Id.*

57. *Id.* at 8.

58. *Id.* at 9.

59. U.S. CONST. amend. I; Vergano, *supra* note 6; Grady & Broad, *supra* note 11; Carvajal, *supra* note 1.

recognized that the journals, under their freedom of speech, could publish in spite of the U.S. government's stance.⁶⁰

A second factor can be the type of restraints available on communication. The greater the ability to redact the dangerous portions of the DR from view, the more deserving it is of publication. For instance, whether the DR could be limited in communication to classified researchers within an international surveillance system, like the GISN, should be a consideration.⁶¹ Such a mechanism involving qualified individual recipients is examined further below. Simply because certain DR is not amiable to the qualified recipient approach does not mean it could not be disseminated. If the dangerous parts of the DR can be redacted, this weighs in favor of publication as well. However, a heavy reliance on redaction is also a disadvantage since, in many situations, redaction would decrease the novelty of the research necessary for a new discovery.⁶² Thus, the factor of available restraints is one factor that is less likely to make a new agreement feasible.

Next, a new agreement should include a consideration for the scope of the potential threat.⁶³ This factor grants high flexibility. The NSABB states that the nature of a bioterrorist threat should include aspects of "econom[y], agricultur[e], public health, and/or . . . terror."⁶⁴ By including a provision in a new agreement that permits consideration of the risk to a nation's economy, the individual interests of each nation would be more fully involved. As a result, such an agreement would be that much more attractive during negotiations. For example, an H5N1 pandemic could cause monetary losses of almost "600 billion dollars in the United States alone."⁶⁵

One study claims the short-term effects in the United States of a severe pandemic (one in which a 2.5 percent mortality rate is used) would yield a 4.25 percent decrease in GDP overall.⁶⁶ Further, the hardest hit sectors would be those based on services,

60. See Boyd-Anderson, *supra* note 25; NSABB Statement 2012, *supra* note 26; see generally Carvajal, *supra* note 1 (containing statement by Dr. Fouchier that the H5N1 DR is technically publishable).

61. See *Responsible Communication*, *supra* note 28, at 10.

62. See *Experts Extend Delay*, *supra* note 32 (finding redaction was not feasible since doing so would make the publication of little use to the scientific community); Carvajal, *supra* note 11.

63. *Responsible Communication*, *supra* note 28, at 7.

64. *Id.*

65. Harvey Rubin, *Future Global Shocks: Pandemics*, ORG. FOR ECON. CO-OPERATION & DEV. (Jan. 14, 2011), <http://www.oecd.org/gov/46889985.pdf> (last visited Jan. 16, 2013).

66. ROBERT ARNOLD ET AL., U.S. CONG. BUDGET OFFICE, A POTENTIAL INFLUENZA PANDEMIC: POSSIBLE MACROECONOMIC EFFECTS AND POLICY ISSUES, 11-12 (2005, rev. 2006).

such as “entertainment, arts, recreation, lodging, and restaurant[s].”⁶⁷ A malleable factor that analyzes the scope-of-the-threat would permit Western participants, such as the United States and others, to better protect their economic stability from a pandemic.

Furthermore, economic considerations are not entirely adverse to the interests of public health. A hampered economy could likely reduce the ability of a government to spend. Public health may thereby be harmed by a government’s reduction in scientific research funding. Thus, it is reasonable to think that public health representatives would embrace an economic aspect within a list of factors.

In addition, a scope-of-the-threat factor should examine agricultural consequences.⁶⁸ Including an agricultural consideration in a new agreement may indeed encourage some developed nations to agree in negotiations. For example, the United Kingdom has expressed an interest in reducing DR-based threats to its livestock, not simply its citizens.⁶⁹

Of course, a factor which weighs the scope of the threat should also consider public health.⁷⁰ The H5N1 DR case provides another valuable example. In that case, the NSABB found after reexamining the mortality rate contained in the specific manuscripts that the estimated lethality to humans was less than naturally occurring H5N1.⁷¹ This realization impacted the “benefits of this research” which caused the “balance . . . to change,” according to Paul Keim, the chairman of the NSABB panel.⁷² Hence, a threat factor that encompasses public health concerns would parallel some national principles already in practice.

The next factor is the nature of the benefit derived from communication.⁷³ This factor, like the scope-of-the-threat, draws its value from its flexibility. In the H5N1 example, the NSABB’s recommendation to publish could have been based in part on the following fact: the NSABB felt that if researchers in other countries could access the DR, then world H5N1 surveillance would receive an enhancement.⁷⁴ Although the NSABB’s motive may not have been completely altruistic (increased world surveillance can pre-

67. *Id.* at 12; *cf. Pandemic Flu–Workplace Guidance April 2008*, HEALTH & SAFETY EXECUTIVE, <http://www.hse.gov.uk/biosafety/diseases/pandflu.htm> (last visited Jan. 16, 2013) (stating general advice for avoiding infections during social interactions at work).

68. *Responsible Communication*, *supra* note 28, at 7.

69. *See Biosecurity and Good Hygiene*, DEP’T FOR ENV’T, FOOD & RURAL AFF., <http://www.defra.gov.uk/animal-diseases/biosecurity> (last modified Jan. 4, 2013).

70. *Responsible Communication*, *supra* note 28, at 7.

71. Kelland & Begley, *supra* note 33.

72. *Id.*

73. *Responsible Communication*, *supra* note 28, at 7.

74. Kelland & Begley, *supra* note 33.

vent foreign pathogens from entering the United States' borders), global health is nonetheless served by a benefits-derived factor. One need not look past the NSABB's H5N1 resolution to see the potential for public health and national security interests to align here.

The next factor inquires whether the organism in question can be substituted for a less risky one.⁷⁵ This factor requires the life science community and the relevant government agencies to engage in more discussion, which can advance mutual understanding between the two sides. A substitutability factor also puts the burden of publication on the party most able to bear it: if scientists wish to communicate possibly dangerous research which they created, they should carry the burden of locating a safer substitute, if one exists.

The extent of the novelty of a certain DR manuscript is another consideration.⁷⁶ The more novel the DR, the less likely there will be effective countermeasures in the event of its misuse. However, an opponent of this factor may argue that it cuts both ways because the more novel the DR, the greater its value in the advancement of public health; therefore, an opponent may assert that a novelty factor provides minimal guidance. Overall, after DR has been conducted, this factor likely produces an ambiguous result and therefore should be rejected. Yet, in the pre-research stages, a novelty factor may still have value in assisting research institutes in deciding whether to proceed with a particular research project.

The final factor is whether a pandemic currently exists. A definition of a pandemic should be included in the new agreement, specifying whether the definition is intended to be identical to the WHO's current phase-based definition or instead an entirely new one.

Incidentally, a new and unitary definition of pandemic would significantly reduce costs to national governments in preparing for false-alarm pandemics.⁷⁷ For example, the WHO declared the swine flu a pandemic in 2009 after the WHO had removed from its pandemic definition the words "enormous numbers of death and illness."⁷⁸ The swine flu did not pose absolute certainty of high death tolls, but as a result of the WHO's pandemic declaration,

75. *Responsible Communication*, *supra* note 28, at 8.

76. *Id.* at 9.

77. See Elizabeth Cohen, *When a Pandemic Isn't a Pandemic*, CNN (May 4, 2009) <http://edition.cnn.com/2009/HEALTH/05/04/swine.flu.pandemic/index.html> (last visited Jan. 16, 2013).

78. *Id.* See generally Doshi, *supra* note 10 (discussing the debate surrounding the changed definition of pandemic).

many nations incurred large costs in preparing for the expected deaths, which never materialized; the world demonstrated that it viewed a pandemic as an apocalyptic event, such as the 50 million deaths caused by the 1918 Spanish influenza.⁷⁹ If the nations show by their conduct that a pandemic necessarily carries apocalyptic attributes, then international standards should conform to this reality.

If the WHO intends to project international credibility when issuing declarations, it must shy away from “crying wolf,” regardless of whether it is epidemiologically justified in doing so. Therefore, a factor requiring the parties to agree upon a definition for pandemic is an overall benefit when included in a new agreement.

Primarily, a factor that considers whether a pandemic currently exists would add a large brick in the wall toward determining the proper time and manner to publish DR. By way of example, if a pandemic is presently causing massive deaths (e.g., hundreds of thousands), and publication of some particular DR might permit a cure to be discovered in a short time, the interests begin to weigh in favor of expediting communication. Overall, this valuable factor accounts for actual and current needs of the world and not merely what security or health experts may speculate about the future.

To resolve ambiguity, the provision containing the pandemic factor should designate which bodies have the credibility to declare a pandemic for purposes of determining a DR dispute. The WHO seems to be the likely candidate, once its pandemic definition has been extricated from its present murkiness.

Of course, this factor should not be viewed alone; the existence of a pandemic should be viewed alongside the nature of the threat as well as the other acceptable factors mentioned above.

In general, most of these factors serve to clarify the current body of law on the issue of biosecurity. Although the factors are imperfect and some of them are already included in the NSABB’s policies, negotiating a new international agreement would permit the international community to make the rules on biosecurity more uniform and clear.

3. Exceptions

Given that the benefits of free communication may extend not only to the world, but also to specific states individually, exceptions to free communication should exist when the equities substantially tilt in favor of national security.

79. Cohen, *supra* note 77; *The Handling of the H1N1 Pandemic*, *supra* note 50.

One exception was mentioned *infra* in Part III.A.1, which is the immediate national security risk exception.

A second exception would inquire into the amount and degree of technological advances needed before the DR could be used for any purpose.⁸⁰ In other words, is the benefit from communication likely to be realized before a terrorist misuse occurs? If so, then this balance weighs in favor of publication. For example, if the scientific community is on the edge of establishing a vaccine, in six months, while the technology needed for a rogue group to misuse the DR is decades away, then these facts favor publishing that specific DR.

Hence, this second exception provides a check valve to fairly accommodate health and security interests. The balance is struck by requiring both sides to present some facts in order to reach their respective goals.

4. Obligations

A feasible agreement—and one superior to the present corpus of law—should impose delineated obligations on the states party.

A prime lesson from this Article is that balanced powers can generate a just result. For example, the NSABB recently endorsed the H5N1 publication because condemning the publication would have ruptured the delicate network of international surveillance (i.e., information-sharing).⁸¹ That is to say the U.S. agency was likely encouraged to concede because it recognized developing nations had bargaining power over other biological situations that might arise. The NSABB may have wished to avoid another Indonesian-like refusal to share in retaliation for America's refusal to publish influenza DR.⁸² The bargaining power that might permit a low-income nation to withhold its biological samples stems from the PIP and Nagoya Protocol's emphasis on viral sovereignty.⁸³

The promise of developing nations to share their virus information could encourage developed nations to obligate themselves to publish under certain circumstances.

Under a new agreement, if a developed nation sought to withhold DR, then it would need to do so in *good faith*, knowing it must answer to other nations who may be entitled to withhold their own biological samples in retaliation. Thus, balanced obligations may yield justice in this unique life science issue.

80. *Responsible Communication*, *supra* note 28, at 10.

81. Kelland & Begley, *supra* note 3.

82. *See id.*

83. *See infra* Part II (discussing the PIP and the Nagoya Protocol in detail).

Developed nations may also be willing to impose upon themselves a duty to publish under certain circumstances because doing so would make the continued cooperation of the scientific community more likely. Not surprisingly, life scientists see themselves as a pivotal element to the determination of DR disputes.⁸⁴ For instance, Dennis L. Kasper, Professor of Medicine, Microbiology and Molecular Genetics at Harvard Medical School, states, “[Responsibility] starts with the scientists.”⁸⁵ In addition, Jonathan B. Tucker, Senior Fellow at the Monterey Institute of International Studies, states that “[i]t’s . . . the scientific community that has to . . . address the security implications of certain types of life science research.”⁸⁶ Surely, without the voluntary participation of life scientists in epidemiological research, the amount of new life science discoveries would atrophy. As a result, national governments who wish to effectively solve DR issues should proceed with the consent of the life science community. An agreement that spells out an obligation to permit publication in certain instances can assure the continued participation of high-quality life scientists.

5. Refine the Concept of a Contributory Fund

The Pandemic Influenza Preparedness Framework (PIP) recommends a capacity-building system in which virus samples are shared; however, the PIP’s provisions are incomplete.⁸⁷ To supplement the PIP, a new agreement should follow in the footsteps of the so-called “health impact fund.”⁸⁸

Essentially, Banerjee, Hollis, and Pogge describe the fund as follows: the fund receives contributions from a portion of the GDP of certain countries; next, the fund distributes those monies to medical research and development (R&D) organizations who promise to discover vaccines; afterward the medical product is sold to needy nations at the lowest cost; and the amount of the award to the R&D organization is determined by the vaccine’s contribution to world health.⁸⁹ An additional term requires the granting of free licenses on the vaccines by the R&D organizations to generic companies.⁹⁰

In respect to DR, refinements to this funded-concept are necessary. There appear to be few means of determining the health

84. See *A Dialogue*, *supra* note 47.

85. *Id.* at time 5:12.

86. *Id.* at time 5:02.

87. See discussion *infra* Part II.B.1.

88. See Amitava Banerjee, Aidan Hollis & Thomas Pogge, *The Health Impact Fund: Incentives for Improving Access to Medicines*, 375 LANCET 166 (2010).

89. *Id.* at 166-68.

90. *Id.* at 167; Rubin, *supra* note 65, at 73.

benefits of a pandemic vaccine when it might only be used once, no doubt in an emergency. Consequently, refining the fund concept may include determining the safety and efficacy of a vaccine based on simulations conducted by a neutral third party. The WHO may potentially serve as such a third party.

Inherently, the weaknesses of a refined version of a DR fund are that 1) achieving consent from various governments is not automatic in respect to mandatory financial contributions, and 2) it is not certain that R&D organizations will agree to freely grant licenses to their property in favor of generics. Overall, these two barriers make it less possible to obtain obligations from the international and R&D communities in a refined fund program. However, it would not be detrimental to spell out these concepts as recommendations in a new agreement and retain the more substantial mandatory provisions, such as the general rule and factors.

6. The Qualified Recipients Approach

An additional clause in a new agreement may include the option for journals and governments to limit the release of DR to classified researchers. This approach attempts to remedy the situation presented when full communication of DR is not practical. However, this option produces essentially the same intended result, specifically the exchange of information among the *scientific* community.

To adapt this approach to DR, we should condition the receipt of certain research on an institute's compliance with the International Health Regulations (IHR). Compliance with these guidelines would show that an institute was serious about internal discipline among its employees.⁹¹ Other conditions for qualification could be expressed as objective criteria, such as the institute's security history (whether any valuable information was leaked from that establishment in the past) and the general security infrastructure of the country where the institute is located. Requiring such qualifications properly balances the parties' interests because doing so limits access to only the necessary persons. On the other hand, full-blown publication may permit access to members of the public who possess no legitimate way of manipulating the information, whether due to inferior purpose, technology, or expertise.

91. See IHR Biosecurity, *supra* note 42, at 31, 36-38 (setting forth a comprehensive biorisk management approach).

Of course, there are critics of a system that limits the free communication of scientific discoveries.⁹² Dr. Fouchier, one of the scientists who conducted the decade-long labors that led to the H5N1 DR, doubts that DR can be kept confidential after being communicated to as few as eleven qualified researchers.⁹³ Then again, Dr. Fouchier is not exactly neutral on this topic; he has devoted much of his life to conducting this research, which has been referred to as the “revised Fouchier manuscript.”⁹⁴

Overall, it seems the best balance is to embrace within a new agreement, at a minimum, the option for a certain item to be communicated under a qualified-researcher-approach. Doing so would permit the WHO and the government responsible for funding the research to be heard at yet another stage of the DR publication process. One fundamental purpose of a new agreement should be to nurture a healthy trust between national governments and the scientific community. Thus, the incorporation of government advisors and quasi-governmental bodies, like the WHO,⁹⁵ in international conversations will produce more long-term trust, and therefore a return to more effective conversations.

An agreement may also incorporate the following clauses recommended by the NSABB: a mandate that, if communication were limited to qualified researchers, an editor’s warning shall be set forth at the beginning of the document regarding 1) the benefits of safe research practices, and 2) the dangers of intentional misuse of that research.⁹⁶ To render the author credible, she should also be a trusted member of the relevant scientific community.⁹⁷

Yet another reason to include a qualified-recipients option in an agreement is that the researchers around the world are likely to already be in the habit of guarding confidential laboratory research from misuse. Many research institutes already observe the practices found in the IHR, which encourages adherence to certain standards of laboratory biosecurity.⁹⁸ For example, IHR practices currently play a role in preventing the “unauthorized access, loss, theft, misuse, . . . or intentional release” of *variola*

92. *E.g.*, *A Dialogue*, *supra* note 47 (announcing Professor Kaplan’s opinions on limiting free communication).

93. Carvajal, *supra* note 1.

94. *See id.*; *NSABB Statement 2012*, *supra* note 26, at 4.

95. *See WHO Donors (US, Gates Foundation, UK, Norway, Canada, EC, GAVI and Roche): Setting the Agenda for Global Public Health?*, KNOWLEDGE ECOLOGY INT’L (May 15, 2010, 5:25 PM), <http://keionline.org/node/839> (last visited Jan. 23, 2013).

96. *Responsible Communication*, *supra* note 2828, at 11.

97. *Id.*

98. *See generally* World Health Org., *International Health Regulations (2005)*, available at http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf (containing the WHO’s regulations on international health); *IHR Biosecurity*, *supra* note 42.

viruses in scientific facilities in the United States and Russia.⁹⁹ Therefore, because of routine practice, a qualified researcher may be more inclined to rely upon these IHR standards.

Moreover, under the current status of the law, although DR-communication can be limited to public health *officials*,¹⁰⁰ researchers do not receive such an exception.¹⁰¹ The new agreement that this Article envisions would allow, under a qualified-recipient option, the general researchers at the National Institute for Public Health and the Environment (RIVM), for instance, to access DR under realistic rules of confidentiality. As a result, scientific freedom will meet practicality in a relatively fair balance of the interests involved.

7. Borrow Certain Principles from Prior Agreements

A new agreement could begin where the Nagoya Protocol and the PIP left off, namely, the equitable sharing of research benefits. Indeed, even the NSABB took into account the principle of equitable sharing, which was likewise vital to surveillance and the Nagoya Protocol, when it blessed the publication of the H5N1 DR.¹⁰² Thus, it would behoove the negotiators of a new international agreement in the drafting process to consciously borrow fruitful principles from prior agreements. Of course, various adjustments should be built into these proposed provisions.

For example, the PIP advanced biosecurity by endorsing an electronic tracking (e-tracking) system for viruses.¹⁰³ While the PIP tracking system appears to record only whether a virus sample has been properly used, a newly drafted tracking system may record whether the DR recipient was even qualified to receive the research in the first instance; the current tracking system under the PIP may not be so exacting.¹⁰⁴ Any successful agreement would do well to extend the practice of e-tracking to DR in order to preserve a transparent record of which particular research has been communicated, and to whom.

As for the equitable sharing concept in the Nagoya Protocol (which shall be explained below), recitals in a new agreement should explicitly state that a balanced practice of publishing DR is a cornerstone to benefit-sharing. Recitals would provide a clearer guide for future biosecurity conflicts. For example, a new agree-

99. IHR Biosecurity, *supra* note 42, *passim*.

100. See Fidler & Gostin, *Milestone*, *supra* note 40; Webster, *supra* note 11, at 1.

101. See Webster, *supra* note 11, at 1.

102. Kelland & Begley, *supra* note 3.

103. *PIP Significant Agreement*, *supra* note 38.

104. Fidler & Gostin, *Milestone*, *supra* note 40.

ment might recite that the equitable sharing of benefits arising from biological matter is a *driving force* or *substantial motivator* in the formation of the new rules in the agreement.

One can argue that a mere recital is not legally binding; that if a declaration on benefit-sharing were desirable, most international organizations could do so; and that therefore negotiating a new agreement would be unduly expensive if only to create recitals. Negotiating a new agreement would be unnecessarily expensive if only to create recitals. In response, the position of this Article is that a new agreement on DR need not necessarily remedy the separate issue of benefit-sharing. A DR agreement would more than pay its way by encouraging national governments to freely permit the publication of useful DR. The secondary topic of benefit-sharing can be left to the provisions contained in another instrument.

Therefore, from an overall feasibility perspective, the benefit-sharing issue should be limited to simple recitals in a new agreement to avoid unnecessary wrangling over language.

8. Refrain from a Complete Prohibition on Laboratory-Stage Research

The NSABB has implied that some DR should be terminated in the laboratory when scientists and government agencies foresee a threat of dual use.¹⁰⁵ This is not the NSABB's explicit policy.¹⁰⁶ Nevertheless, it would be wise to forego creation of an international norm whereby a government can advise against conducting whole types of research. The reason for this is that some consequences of research can be murky and undeterminable; for example, in the recent case of H5N1, the same agency that initially prevented DR publication and later spent two hundred hours reviewing the contents found it to be sufficiently safe for publication only several months later.¹⁰⁷ Hence, foreclosing research projects while they are still in the development phases could unduly stifle discovery.

On the one hand, surely, the squelching of free discovery is not a policy behind which life scientists will likely rally. Take, for instance, the statement of Maxine Singer of the Carnegie Institute of Washington: "You need the scientists involved in the discussions about the rules because they will be . . . sensitive about the nuanc-

105. Kelland & Begley, *supra* note 3 (noting that under the United States' new policy DR shall be viewed from the "cradle to grave" in order for the NSABB to make a recommendation before the research even reaches the publishable stage).

106. *Id.*

107. *Id.*

es, and will not allow for blanket statements that don't make sense."¹⁰⁸ As one can see, it will be difficult to encourage scientists to lend their expertise during negotiations if a prime table topic is the imposition of scrutiny at the research stages.

On the other hand, national governments take a harsh stance on DR for many reasons, such as being the primary donors of research funds. In general, however, government review of research before the research is conducted will likely raise more hurdles than hopes for a novel agreement.

Currently, the NSABB has banned research on certain toxins if they are known *already* to produce mass casualties, and if the research is conducted so as to "[d]isrupt immunity without clinical justification."¹⁰⁹ A standard like this one with qualifiers, prerequisites, and exceptions allows enough freedom for science while still striking a balance. Therefore, if there were a new rule that scrutinized research while yet in the laboratory, it should be qualified and properly acknowledge the particular circumstances of each case.

One who is opposed to the creation of a new agreement might assert that if the NSABB currently has a valid limitation that applies to early stage research, then the NSABB can properly address the majority of those issues, and therefore a costly new agreement is unnecessary. Nevertheless, not all future research may be conducted in the United States. Hence, the threat of a nation outside the United States stifling valuable research in the laboratory stage should be enough to justify a new agreement.

In summation, if a rule must target research in its early stages, that rule should be worded in a qualified manner which defers to scientific discovery, only imposing upon the laboratory when the dangers are already known.¹¹⁰

9. Define Pandemic; Define DR

The definition of DR in an innovative agreement should be broadly worded to avoid the need to amend the definition in the near future. An exemplary DR definition might be the following: *research susceptible to both positive and negative uses, the negative uses of which may impact human and animal health, the economy,*

108. *A Dialogue*, *supra* note 47, at time 3:23.

109. *United States Government Policy for Oversight of Life Sciences Dual Use Research of Concern*, OFFICE OF BIOTECHNOLOGY ACTIVITIES, http://oba.od.nih.gov/oba/biosecurity/meetings/Nov2012/United_States_Government_Policy_for_Oversight_of_DURC_FINAL_version_032812.pdf (last visited Jan. 16, 2013).

110. *See generally id.* (providing background on the protection of research that is sufficiently beneficial and safe).

or the terrorist threat level in a particular country or in the world. A definition such as this is broad enough to capture the most serious research situations while remaining cognizant of the positive uses for DR, so as to provide a voice to the life science community.

The definition of a pandemic should stand at the conceptual middle-ground and make sure to avoid the extremes. It should not lend itself to causing hysteria or wasting money by spurring developed nations toward wasted preparations. In short, the pandemic definition should not cover too many benign health situations that do not warrant costly national expenditures. Exemplary language for a balanced definition might be *a disease that 1) has spread beyond a WHO region, and 2) if a seasonal variety of the disease exists, then it threatens to cause a significant amount of human or animal deaths at a rate substantially greater than the seasonal variety; if no seasonal variety exists, then the disease must substantially threaten human life or valuable animal populations.*

A definition such as this limits the hysteria caused by false alarms. For instance, requiring that the pathogen have spread beyond a certain region would prevent the international community from declaring a pandemic simply based on its potential. Moreover, this definition limits costly national preparation by mandating that a pathogen jeopardize a noticeably greater amount of life than what is seen every season in which the disease occurs.

For these reasons, reformed definitions of both DR and a pandemic are prudent and desirable.

10. Advantages

Some advantages to forming a new agreement are 1) increased international understanding of biological concerns, 2) private donor encouragement, and 3) more clarity in the rules on widespread disease.

Mutual understanding can be leveraged to reach a binding agreement during negotiations on DR and other biological matters.¹¹¹ Since DR issues and bioterrorism are relatively new issues in the world,¹¹² the state-parties should be able to make exponential strides toward increasing their understanding of each other's perspectives. In other words, DR and bioterrorism are not

111. Kamradt-Scott & Lee, *supra* note 8, at 845.

112. The NSABB was first organized in 2004 and the U.K. Joint Terrorism Analysis Centre was first organized in 2003. *About the NSABB*, *supra* note 2525; see *Joint Terrorism Analysis Centre*, SECURITY SERVICE MI5, <https://www.mi5.gov.uk/home/about-us/who-we-are/organisation/joint-terrorism-analysis-centre.html> (last visited Jan. 16, 2013) (providing the date of establishment, roles, and activities of the Centre).

like the age-old topics of war and trade in which nations have been expressing their viewpoints for millennia. Instead, negotiations may launch a majority of nations toward a positive course regarding DR, which could last well beyond an initial agreement.

Likewise, the U.S. President acknowledges the value of interchange among nations in his National Strategy for Countering Biological Threats.¹¹³ A statement from the United States like this may provide the foundation for the international community to begin negotiations. Coincidentally, the President finds a “risk-based” approach conducive to a DR resolution as well.¹¹⁴ A DR risk-based approach is consistent with the scope-of-the-risk factor suggested above. The added benefit of inserting such a factor into an international agreement is the clout carried by world consensus, as opposed to the support of a single nation.

Further, the announcement that new negotiations have begun may encourage private donations for the resolution of DR problems. Undoubtedly, there are precedents for such charitable contributions.¹¹⁵ As recently as 2010, donors like The Bill and Melinda Gates Foundation, Rotary International, and the Global Alliance for Vaccine Immunization made multi-million dollar donations.¹¹⁶ In particular, private entities have now shown an interest in donating to influenza research, such as the contribution of \$84 million from Hoffman-LaRoche and Company Ltd. in response to the swine flu.¹¹⁷

Some of these donations may be invested toward *counter-terror research*, which may pacify DR disputes by increasing the world’s ability to cope with DR misuse. The reasons for such a donation include a donor’s taking credit for investing in 1) the protection of liberal democracies from bioterrorism, 2) the furtherance of scientific research, and 3) the free speech of scientific journals.

In addition, if a new agreement included a system where published DR and counter-terror research were electronically tracked, then a philanthropist may be more willing to donate. In effect, a philanthropist could tangibly point to the impact of her donation, such as by viewing a list of places and persons involved in an expansive research network.¹¹⁸

113. NATIONAL SECURITY COUNCIL, EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERING BIOLOGICAL THREATS (2009) [hereinafter *President’s Strategy*], available at http://www.whitehouse.gov/sites/default/files/National_Strategy_for_Countering_BioThreats.pdf, at 14 (last visited Jan. 16, 2013).

114. *Id.* at 14.

115. *WHO Donors*, *supra* note 95.

116. *Id.*

117. *Id.*

118. Rubin, *supra* note 65.

One may argue that the PIP has already encouraged the private sector to make vaccines accessible to developing countries,¹¹⁹ and therefore it is a waste to assemble diplomats merely to attract the attention of philanthropists. However, this argument fails to consider that negotiations are exciting and publicized events, which may be more likely to attract a donor's attention than a meager document, such as the PIP, that makes a general statement on vaccine stockpiling but may fall out of public consciousness after time.¹²⁰

Finally, a new agreement would have the advantage of clarifying the rules of wide-spread disease. Dr. Rubin of the University of Pennsylvania has commented that "there is a serious requirement for international harmonization of regulations across the pandemic spectrum."¹²¹ The aim of clarity and consistency cannot be overemphasized in a new agreement.

11. Disadvantages

One disadvantage in forming a new agreement is the uncertain degree of international understanding it may foster. Currently there are at least two international bodies who represent virtually all the major world actors; they are the WHO and the Global Health Security Initiative (GHSI), and they both meet to discuss biosecurity issues.¹²² Yet, international cooperation is still lacking. For example, the PIP announced recommendations, but it did not go as far as to impose obligations on the state-parties, which one might presume is due to a lack of international cooperation.¹²³ If every several years a potential pandemic surfaces, then an uncertain round of negotiations might delay the biosecurity resolution that the current body of the law might otherwise address. For example, the Indonesian virus-withholding case occurred in 2007, and subsequent negotiations produced the PIP only in 2011.¹²⁴ One may argue this period of time is unduly long for the resolution of possible pandemics.

119. *E.g.*, *PIP Significant Agreement*, *supra* note 38 (explaining that the PIP recommends the pharmaceutical industry make payments and grant intellectual property licenses to developing manufacturers in order to enhance world vaccine production).

120. *See* Kamradt-Scott & Lee, *supra* note 88, at 843 (discussing the fatigue that donors and the health community have experienced).

121. Rubin, *supra* note 65, at 63.

122. *GHSI Background*, GLOBAL HEALTH SECURITY INITIATIVE, <http://www.ghsi.ca/english/background.asp> (last visited Jan. 16, 2013) (describing the GHSI as an informal group of developed countries including Canada, the E.U., France, Germany, Italy, Japan, Mexico, the U.K., and the United States).

123. Kamradt-Scott & Lee, *supra* note 8, at 839.

124. *Id.*

Also, a new multilateral agreement shall not completely respond to all the future DR disputes; but few agreements are so perfect. Likewise, the processes of legal interpretation and construction may solve some unforeseen future circumstances. Nonetheless, there are disadvantages to negotiating a new agreement. Yet, these disadvantages must be compared to the potential benefits offered by the proposed agreement, as well as the disadvantages in the current body of law.

B. Apply the Law as It Currently Stands

The second suggestion to solving DR disputes is to apply the law as it currently stands without creating another international instrument. The current and applicable law includes portions of the Convention on Biological Diversity, the Nagoya Protocol, the Cartagena Protocol, the (U.S.) President's National Strategy for Countering Biological Threats, the regulations of the U.S. Department of Health and Human Services, as well as the PIP. These sources of law shall be analyzed for their efficacy in resolving conflicts like the H5N1 case described earlier.

1. The Frame That Does Not Work: The Pandemic Influenza Preparedness Framework (PIP)

The PIP is the most recent edition of international law to touch on DR. In spring 2011, the WHO adopted the PIP's recommendations on virus-sharing within the GISN as well as on increasing the access of developing nations to influenza vaccines.¹²⁵ The negotiations that led to the PIP were a response to the World Health Assembly (WHA) resolution 60/28, which urged the WHO to obtain a stockpile of H5N1 vaccines for future distribution.¹²⁶ But markedly, the PIP was spurred into existence during the 2010 swine flu by developing nations' re-assertion of sovereignty over viruses located in their territories.¹²⁷ The developing nations based their sovereignty claims on the Nagoya Protocol.¹²⁸ For this reason, and because the PIP is the most recent pronouncement by international public health authorities, the PIP symbolizes a fundamental element of the current biosafety regime. If the PIP fails to properly address the issue of DR communication, there

125. ECDC on the PIP, *supra* note 36.

126. Fidler, *Milestone*, *supra* note 40; W.H.A. Res. 2007/60, A/RES 60/28 (May 23, 2007) [hereinafter *WHA Res. 60/28*], available at http://apps.who.int/gb/ebwha/pdf_files/WHASSA_WHA60-Rec1/E/reso-60-en.pdf.

127. Fidler & Gostin, *Milestone*, *supra* note 40.

128. *Id.*

may very well be a need for an addition to the current biosafety landscape.

Likewise, the principle of the PIP, and a principle throughout the analysis of DR issues, is that the world values surveillance and the fair sharing of valuable nonpublic information.¹²⁹ The two go hand-in-hand. Recall that the NSABB's recommendation to publish—or share—the H5N1 DR was to ensure a viable international surveillance system.¹³⁰

a. Scope of the PIP

In general, the PIP encourages the sharing of influenza samples among countries, as well as increased vaccine availability.¹³¹ Yet, it applies only to pandemic-potential viruses, not seasonal influenza or non-influenza materials.¹³² Accordingly, the PIP is not a complete remedy for a DR issue. DR does not necessarily entail influenza but rather any research that meets the risk criteria.¹³³ If, for example, a research institute discovered a deadly bacterium, the characteristics of which were published by a journal and subsequently misused, the PIP would not apply nor meet the needs of victimized states. It would not suffice since it only prepares the world for *influenza*, nothing else. On the other hand, a new agreement could cover more scenarios than the PIP, not limiting itself to only influenza but instead lending its guidance to any biological research.

b. Sovereignty as a PIP principle

One key provision in the PIP prioritizes national sovereignty over biological resources.¹³⁴ Bio-sovereignty secured an apparent victory when the world formed the PIP framework. Yet, that victory, as embraced by PIP's provisions, can be unexpectedly turned against low-income nations. When developed nations raise PIP principles in the context of research publication, negative consequences can be forced upon low-income nations which the PIP's framers may have never intended.

129. *E.g.*, Fidler, *Diplomacy*, *supra* note 4040; Executive Secretary, *Report of the Meeting on the Impact of Avian Influenza on Wildlife*, U.N. Doc. UNEP/CBD/COP8/8/INF/47 (Mar. 22, 2006).

130. Kelland & Begley, *supra* note 33.

131. *PIP Framework*, *supra* note 39.

132. Fidler & Gostin, *Milestone*, *supra* note 40.

133. *See NSABB FAQs*, *supra* note 1 (expressing no requirement that DR include research on a subtype of influenza).

134. Fidler & Gostin, *Milestone*, *supra* note 40.

By way of illustration, a developed country may assert sovereignty over a viral subtype discovered in its territory by a research laboratory, claiming the right to withhold that information from the world. Obviously, this outcome would hinder international surveillance. On one hand, it can be argued that a general notion of viral sovereignty is fair because developed nations may have funded the scientific discovery. On the other hand, this argument contains glaring inequities when viewed alongside the larger principles of surveillance and virus sharing which are restated throughout the international documents noted in this Article.

Besides the fact that a developed nation's reliance on viral sovereignty may be inconsistent with the spirit of the Nagoya Protocol, the principle of *general* viral sovereignty is still a dangerous one. General viral sovereignty would permit developed nations to wield too much power over international surveillance. Even if a specific viral sovereignty claim were ultimately unsuccessful, the blanket principle in any international document would permit a nation to raise the argument in the first place. Simply raising the argument could delay surveillance efforts. This is not a preferred outcome.

In addition, the examples in this Article show that developed countries' withholding DR based merely on sovereignty never entered the mind of the international community. Of course, *security* may still be a valid justification for withholding. But this Article demonstrates that the nations of the world recognized bio-sovereignty in order to encourage sharing, not unsocial behavior, such as ferreting-away one's research.¹³⁵

Given the loopholes and confusion inherent in current bio-sovereignty, the international community must clarify the nature of this principle. Wise limitations may include provisions that favor bio-sovereignty's use primarily by *developing* nations and expressed principles stating that bio-sovereignty must be balanced with bio-surveillance. Specifically, the world should reach an agreement that viral sovereignty does *not* permit a developed nation to withhold DR from the world simply for the reason of territorial sovereignty; something more should have to be proven, such as a national security risk.

135. Preamble, *WHA Res. 60/28*, *supra* note 126 (stating the Assembly "[r]ecogniz[es] the sovereign right of States over their biological resources" in regard to low-income nations' withholding of virus samples from the WHO).

c. The Legal Nature of the PIP's Provisions

Other than the topic of financial partnership, the PIP is not legally binding.¹³⁶ For the most part, the PIP simply encourages free-market bargaining between states regarding the sharing of virus samples and vaccines.¹³⁷ For example, article 1.8 of the PIP, as a principle, states that “the benefits arising from the sharing of H5N1 and other influenza viruses . . . *should* be shared with all Member States.”¹³⁸ Some of the most important multilateral instruments are non-binding.¹³⁹ However, the PIP even fails to bind the Member States to real efforts on sharing, an underpinning of biosecurity. Thus, an agreement would be valuable in clarifying when exactly DR should and must be shared.

d. Electronic Tracking

In an attempt to promote virus sharing, the PIP establishes an e-tracking system to foster “transparency . . . [so] that virus transfer and use conform to framework principles.”¹⁴⁰ In essence, the PIP was intended for only one side of the international spectrum: for the country holding virus samples and refusing to share them. The PIP was not intended to cover sharing of DR; this much is evident from the PIP’s statement that in order for a nation to share virus samples with a foreign entity, it is required to also share the same samples with a GISN facility.¹⁴¹ In contrast, a nation deciding whether to allow publication might be delighted to give such research to a world-renowned GISN facility if it could only avoid that same dissemination to rogue entities. Therefore, the language of the PIP makes it seem unlikely that its e-tracking system was intended to cover DR publication.

Furthermore, the PIP operates its e-tracking system under two standard material transfer agreements.¹⁴² The first agreement governs transfers between GISN facilities, requiring those facilities to meet 1) the biosecurity regulations of the nation in which the facility is located and 2) the terms contained in the transfer agreement (which request the GISN facility to abstain from seeking intellectual property (IP) rights on the transferred

136. Fidler & Gostin, *Milestone*, *supra* note 40.

137. Kamradt-Scott & Lee, *supra* note 88, at 839.

138. *PIP Framework*, *supra* note 39, at 3 (emphasis added).

139. U.N. Charter, arts. 10, 11 (describing the advisory nature of one of the largest international bodies, the U.N. General Assembly, which only possesses, in some instances, the mere power to recommend).

140. Fidler & Gostin, *Milestone*, *supra* note 40, at 201.

141. *Id.* at 200.

142. *PIP Framework*, *supra* note 39, at 29-36.

material).¹⁴³ The e-tracking system operates by encouraging parties to a transaction to report their identities or the use to which the transferred material is put. In this way, the PIP's e-tracking is somewhat like the proposed e-tracking under the qualified-recipients approach stated above.

Within the context of the qualified-recipients approach, perhaps PIP's e-tracking system is sufficient. However, one success under the current body of law does not mean that a new agreement is futile. Quite the opposite, a new agreement still offers several worthwhile benefits, such as the international harmonization of sound standards and the added certainty of the factors in determining when publication is proper.

Even if the PIP's e-tracking system is sufficient, there is the question of whether the facility that receives the DR is in fact guided by sufficient *national* biosecurity research regulations. *National* regulations vary widely depending on which nation is in question. Such variance in national regulations does not assure the transferring nation of its own security once that DR has reached a foreign facility practicing under different regulations.

Beyond national biosecurity regulations, the terms of reference contained in the standard material transfer agreement otherwise encourage obedience to WHO standards.¹⁴⁴ WHO standards may carry a good reputation in the eyes of national governments based on the WHO's previous successes.¹⁴⁵ Yet again, given the WHO's pandemic swine flu declaration, which was only followed by disproportionately low fatality rates, WHO standards may lack trustworthiness in the eyes of the international community.¹⁴⁶

Thus, to return legitimacy to the WHO and international surveillance, as well as assure nations of the low risk in publishing DR, it is advantageous to form a new agreement that more clearly expresses the conditions upon which DR can be communicated to qualified recipients.

The second standard material transfer agreement governs transfers from the WHO to non-GISN facilities.¹⁴⁷ If the H5N1 case is typical, then an initial transfer of DR would likely emanate from a research laboratory, not the WHO. Therefore, the second material transfer agreement likely does not apply to most DR issues.

143. Fidler & Gostin, *Milestone*, *supra* note 40, at 201.

144. See *PIP Framework*, *supra* note 39, at 44.

145. *E.g.*, WHO Smallpox Eradication Archives, *supra* note 34 (discussing the successful eradication of smallpox worldwide).

146. Cohen, *supra* note 77.

147. *PIP Framework*, *supra* note 39, at 33; Fidler & Gostin, *Milestone*, *supra* note 40.

e. Financial Contributions

The PIP mandated financial contributions from the pharmaceutical industry to the GISN system, which were intended to cover half of the GISN's annual operating costs.¹⁴⁸ Persuading a private industry to make required payments is a feat, although it came at the cost of omitting any guidance whatsoever regarding the IP rights of developing nations that receive the manufacturers' vaccines.¹⁴⁹ When the PIP does indeed speak about technology transfer to developing nations, it is merely advisory in nature.¹⁵⁰ Therefore, the pharmaceutical industry does not presently need to transfer any technology to low-income nations under the PIP. Academics complain that the PIP changed nothing regarding the free market structure between the industry and those developing nations who seek to manufacture influenza vaccines.¹⁵¹ Also, nations are not technically required under the PIP to share virus samples, which is a glaring problem.¹⁵²

Another disadvantage of the PIP's required financial contributions is that by increasing the costs of conducting research on influenza, it discourages the private industry from entering what may already be a low-revenue arena.¹⁵³

Thus, it is doubtful that the PIP properly promotes vaccine research and development. Hence, more action is needed to properly foster pandemic research.

Overall, the PIP's lack of mandates, unsatisfying standards on the transfer of pandemic material, and overbroad principle of viral sovereignty make it an insufficient piece of law.

2. Match Never Made: The Convention on Biological Diversity (CBD)

The CBD was adopted in 1992 and became effective in 1993.¹⁵⁴ The CBD is the document from which the Nagoya Protocol and Cartagena Protocol both sprung. Consequently, an understanding of the principles and objectives of the CBD sheds light on whether those protocols can properly effectuate the relevant interests.

Article 1 of the CBD states its objectives are "the conservation of biological diversity, the sustainable use of its components and

148. *PIP Significant Agreement*, *supra* note 38.

149. Fidler & Gostin, *Milestone*, *supra* note 40.

150. Kamradt-Scott & Lee, *supra* note 88, at 839.

151. *Id.*

152. Fidler & Gostin, *Milestone*, *supra* note 40.

153. Kamradt-Scott & Lee, *supra* note 88, at 840.

154. JACQUES FOMERAND, HISTORICAL DICTIONARY OF THE UNITED NATIONS 41 (2007); Kursar, *supra* note 24.

the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”¹⁵⁵ The CBD defines genetic resources as “genetic material . . . containing functional units of heredity” that has “*actual or potential value to humanity*.”¹⁵⁶ Whether DR has potential value to humanity is not in question. The value in learning about a virus before it mutates so as to infect persons on multiple continents is obvious.¹⁵⁷ Nonetheless, applying the provisions of the CBD to DR communication would be absurd.

Specifically, when the CBD provisions are examined, the propriety of categorizing DR as a genetic resource becomes apparently unwarranted. The CBD provisions that recognize sovereignty over genetic resources seem unlimited: “[T]he authority to determine access to genetic resources rests with the national governments. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources.”¹⁵⁸ Ostensibly, the CBD’s bio-sovereignty provisions were intended to protect biological diversity and promote sustainable development for *developing nations* whose territories held valuable natural resources.¹⁵⁹

Hence, the CBD was the world’s attempt to place a developing nation in the best position to protect itself from biopiracy.¹⁶⁰ The circumstances in which the CBD was adopted prove that it would be absurd to extend this same level of protection, in the form of bio-sovereignty, to a nation that seeks to withhold DR and is likely well developed, such as the United States. The CBD’s purposes and DR issues are less than a match made in heaven; they are a match never made.

But there is more. David Fidler calls the type of resource intended to fall under the CBD’s provisions an “indigenous” resource in which governments invest to better understand a resource.¹⁶¹ In the H5N1 case, although the United States may have invested in H5N1 research to gain a deeper scientific understanding, if the initial virus sample had originated elsewhere, such as Indonesia, the CBD would not likely apply to an ensuing DR dispute. Simply put, the original material would not have been

155. Convention on Biological Diversity art. 1, June 5, 1992, 1760 U.N.T.S. 79, *available at* <http://www.cbd.int/doc/legal/cbd-en.pdf>; Fidler, *Diplomacy*, *supra* note 40.

156. Fidler, *Diplomacy*, *supra* note 40, at 90 (emphasis added).

157. *Cf.* Butler, *supra* note 51 (paraphrasing Farrar’s belief that DR conducted on H5N1 could possibly assist worldwide control of a pandemic).

158. Convention on Biological Diversity, *supra* note 155, at 9, 10.

159. Fidler, *Diplomacy*, *supra* note 40.

160. *Id.* See generally Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection*, 6 *IND. J. GLOBAL LEGAL STUD.* 11, 11 (1998).

161. Fidler, *Diplomacy*, *supra* note 40, at 90.

indigenous to the researching country, the United States. As we have established, the CBD's purpose was to defend weaker nations from unfair exploitation of *their* indigenous resources. Thus, it is unlikely when a developed nation conducts research on a foreign-harvested biological sample that the CBD's bio-sovereignty protection is afforded to the developed nation. Accordingly, the CBD proves inutile in resolving most DR disputes.

It is undisputed that a nation has a sovereign right over its territory, but the question remains whether the scope of sovereignty always extends as far as the CBD's generous recognition. Sovereignty should not and cannot extend so far as to permit every nation to always refuse dissemination of genetic material. Instead, a balanced set of sensitive factors should determine when the proper presumption is national sovereignty or rather the free communication of discovery.

To further support the argument that the CBD was not intended to govern DR, international discussions have categorized H5N1 "not as a biological resource subject to CBD but as a threat to biological diversity."¹⁶² When one looks to the preamble of the CBD in hopes of finding whether the CBD applies to DR, the CBD answers in the negative. For instance, the preamble states that sovereignty applies "over their own biological resources."¹⁶³ In this integrated world, one can hardly imagine enough virus samples originating from the same nation that wishes to withhold the finished research to justify continuing under the mis-fitted CBD. Rather, the international community deserves an agreement that accounts for the fact that research institutes may often be addressing a foreign-harvested specimen.

What is more, the substantive provisions of the CBD are ambiguous.¹⁶⁴ With ambiguous provisions, there is little hope in using the CBD to resolve a DR issue, even if the language and purpose of the CBD were contorted to apply. Perhaps because the terms of the CBD were so ambiguous, the CBD was never raised as an applicable source of law in the recent dispute regarding NSABB and the scientific journals.

In addition to the foregoing, the CBD has failed to encourage research partnerships like some had hoped.¹⁶⁵ As such, the CBD will probably be inadequate in encouraging the necessary funding for counter-terror research.

162. *Id.* at 91.

163. Convention on Biological Diversity, *supra* note 155, at 1.

164. Nicole Franklin, *Sovereignty and International Politics in the Negotiation of the Avian Influenza Material Transfer Agreement*, 17 J. L. & MED. 355 (2009).

165. Kursar, *supra* note 24.

In summation, the language and purposes of the CBD make it inapplicable to DR.

3. Noble Intentions, Unacceptable Outcomes: The Nagoya Protocol

Overall, the Nagoya Protocol's ultimate coverage and remedial mechanism are ill-suited to address the global realities of a DR dispute. In the unlikely event the biological matter that leads to some particular DR is covered by the CBD (i.e., if the resource was indigenous to the nation wishing to prevent publication), then the Nagoya Protocol may apply.¹⁶⁶ However, the following analysis shall demonstrate that the application of the Nagoya Protocol to a DR dispute is highly unlikely.

The Nagoya Protocol was adopted in 2010 as a supplement to the CBD.¹⁶⁷ It is an international agreement that seeks to secure to bio-diverse nations the benefits arising from the biological resources harvested in such nations; it is the arms and legs of the benefit-sharing prong of the CBD.¹⁶⁸ Simply put, this Protocol focuses on equitable sharing. Specifically, the Nagoya Protocol operates to protect biodiversity, especially in Southeast Asia where wildlife abounds.¹⁶⁹ In its scope, the Protocol addresses genetic resources governed under the CBD and the benefits arising from their use.¹⁷⁰

The Nagoya Protocol recommends a regime in which foreign researchers may harvest biological resources by compensating the origin country if a desirable product arises from those resources.¹⁷¹ The means to receive permission to harvest is a point-of-contact network whereby the country of origin grants permission to researchers and in exchange receives compensation proposals.¹⁷² Compensation can take the form of building the scientific capacity in the country of origin.¹⁷³

In our case, *if* the Nagoya Protocol applies and the genetic resource from which the DR arose came from a developing country, then the best compensation for the origin country would be to publish the DR and thereby permit the world to seek a cure for the

166. *See About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/abs/about> (last visited Jan. 16, 2013) [hereinafter *About the Nagoya*].

167. Soares, *supra* note 22.

168. *See generally* Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity art. 1, Oct. 29, 2010, U.N. Doc. UNEP/CBD/COP/DEC/X/1 (exhibiting the text of the protocol); *About the Nagoya*, *supra* note 166.

169. Soares, *supra* note 22.

170. *About the Nagoya*, *supra* note 166.

171. Soares, *supra* note 22.

172. *Id.*

173. *Id.*

specific disease. It is difficult to imagine how monetary compensation could reasonably capture the value of a genetic resource that may lead to a cure for a world pandemic.

Additionally, the Nagoya Protocol was drafted not with the purpose of promoting scientific discovery or national security, but rather to do justice in the harvesting process. It was intended to prevent unjust commercial exploitation of genetic resources, rather than purely scientific exploitation. Because of this, the Protocol's provisions do not provide publication of scientific research as a remedy. Instead of publication, the Nagoya Protocol encourages capacity-building and sharing research results with the origin country.¹⁷⁴ It is discussed above that capacity-building measures (such as the PIP's financial contribution requirements) may be insufficient, or actually discourage capacity-building because of warped incentives. In the same way, the compensatory sharing of research with *one* country, the origin country, may not sufficiently account for the larger interests of global health. For instance, the entire world, not only the origin country, may have a dire need for knowledge only certain DR can yield. A new agreement is necessary to account for *global* public health needs by recognizing a right to DR publication that might profit the whole world.

The PIP was intended to cover non-commercial exploitation of genetic resources; yet, as has been mentioned above, the PIP is insufficient in many areas related to DR. Also, it is the opinion of at least one commentator that the Nagoya Protocol needs to be expanded by new agreements even as regards its commercial reach.¹⁷⁵ If so, then the Nagoya Protocol surely is not suitable for resolving a DR conflict. In general, DR has not been based on commercial research.¹⁷⁶ In the case of H5N1 DR, there were no suggestions of biopiracy, and there may never be when research is conducted for merely public health purposes.

The lines between the different categories of research—such as basic, commercial or applied academic—is unclear in practice.¹⁷⁷ The Nagoya Protocol currently does not seek to separate these foggy areas. These three categories of researchers might benefit from an international pronouncement regarding the publication-potential of their finished products.

Furthermore, demarcation in a new agreement that DR biosafety rules cover all types of research, commercial and non-

174. *About the Nagoya*, *supra* note 166.

175. Kursar, *supra* note 24.

176. There are no sources known to this author that would show that 1) the H5N1 DR dispute was based on commercial research, or 2) any instances of commercial DR disputes have existed in the recent past.

177. Kursar, *supra* note 24.

commercial, is preferable to the current fog. Expressing clear rules may sew up the gap from which the Nagoya Protocol currently suffers. This way, researchers can monitor their laboratory work for hints that their labor might produce something ultimately shunned from publication.

On another note, one commentator indicates that the Nagoya Protocol did not clarify the ambiguities of the CBD but basically restated them.¹⁷⁸ The Nagoya Protocol does not instruct nations (or the relevant industries for that matter) on what it means to receive a genetic resource, or which country's permission is required when an intermediate transferee exists.¹⁷⁹

But more importantly than instructions or definitions, the Nagoya Protocol is not suited to resolve a DR dispute. The Nagoya Protocol sees only the perspective of one party: the country of origin. In contrast, a DR dispute involves the interests of *public* health, which necessarily entail the entire world. Hence, a new agreement is needed to encompass the broader health interests of *all* nations' as regards genetic resources and research.

Beyond the ambiguities in the document itself, the United States has not yet signed the Protocol.¹⁸⁰ If the United States does not sign the Protocol, then one of the few nations that has been involved in a DR conflict thus far shall not have bound itself to the provisions of the Protocol. This fact does not bode well for the utility of the Nagoya Protocol.

Thus, although the Nagoya Protocol may be well-intentioned and useful in other circumstances, its purpose, coverage and implementing mechanism are not tailored toward the interests involved in DR publication.

178. See Simon Crompton, *The Nagoya Protocol: A Disagreement Reduced to Writing*, MANAGING INTELL. PROP. (Nov. 2, 2010), available at <http://www.managingip.com/Issue/80071/Archive/November-2010.html>.

179. *Id.*

180. Convention on Biological Diversity, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8-b&chapter=27&lang=en (last visited Feb. 15, 2013); *Status of Signature, and Ratification, Acceptance, Approval or Accession*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/abs/nagoya-protocol/signatories/> (last visited Feb. 15, 2013).

4. The Cartagena Protocol on Biosafety and Its Redress Protocol: Food, Flu, or Simply Empty Words?

Before the PIP, the Cartagena Protocol on Biosafety (CP) entered effect in 2003.¹⁸¹ The CP provides a general template from which nations may elect to shape their biosafety regulations for genetically engineered plants and animals.¹⁸² Broadly speaking, the CP and its Redress Protocol are inapplicable by their contexts, largely based on hollow recommendations, and otherwise insufficient to resolve a DR dispute like the one encountered in the H5N1 case.

On the whole, the CP is intended to “protect biodiversity by ensuring that LMOs [living modified organisms] are handled, transported and used in a safe manner.”¹⁸³ The objective of the CP is similar to its scope, the “transboundary movement . . . and use of all [LMOs] that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.”¹⁸⁴

Significantly, the CP mainly addresses two kinds of LMOs, one of which is an LMO used for “food, feed or processing.”¹⁸⁵ This agriculture-based language tends to show that the CP’s purpose may not have been to cover viral vaccine research. Furthermore, under this instrument, LMOs used in laboratories are specifically left to the discretion of each nation.¹⁸⁶ Herein lies a startling inadequacy in the CP. To permit each nation the discretion to decide whether and how to implement its own biological safeguards does nothing to guarantee security. There may be a complete lack of uniformity among nations that choose to implement safeguards. These concerns detract from the CP’s power to prevent DR misuse and its facilitation of a DR resolution.

Another of the CP’s troubling aspects is its non-self-executing nature; each nation must implement national biosafety measures on its own, if it decides to do so at all.¹⁸⁷ Nor does the CP express

181. FOMERAND, *supra* note 154; Gregory Jaffe, *Implementing the Cartagena Biosafety Protocol Through National Biosafety Regulatory Systems: An Analysis of Key Unresolved Issues*, 5 J. PUB. AFF. 299, 300 (2005).

182. Jaffe, *supra* note 181.

183. *The Cartagena Protocol on Biosafety*, CONVENTION ON BIOLOGICAL DIVERSITY (at time 2:28), http://bch.cbd.int/protocol/cpb_media_video1.shtml (last visited Jan. 16, 2013).

184. Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 4, Jan. 29, 2000, 2226 U.N.T.S. 208 [hereinafter *Cartagena Protocol*]; *See also* Jaffe, *supra* note 181, at 301.

185. Jaffe, *supra* note 181, at 301.

186. *See id.* at 301-02.

187. *See id.* at 302.

any concrete biosafety standards when implementing national regulations.¹⁸⁸

Beyond this, the CP's operating mechanism relies on a system of disclosures that are posted to an international biosafety database.¹⁸⁹ More specifically, the CP requires the nation exporting an LMO to disclose both its plans to export and the related details to the importing nation.¹⁹⁰ The decision to export an LMO can be based on a risk assessment; yet, the CP does not give any guidance on what steps to take after the assessment.¹⁹¹ Neither does the CP delineate whether benefits, in addition to risks, may be considered by nations seeking to export LMOs.¹⁹²

As one can see, the CP leaves something to be desired as a source of international law. The CP was not likely framed to address the issue of DR communication because its inclusive language pertains to food, feed, or processing. A virus research manuscript is neither food nor feed. Also, the CP may have even been limited in its design to prevent harm to humans caused by "allergen," or merely to address agricultural concerns.¹⁹³ The thrust of this Article should make clear that DR communication requires more coverage than mere mishaps caused by allergens. As a result, the CP is insufficient to resolve DR issues.

On the other hand, one may argue that the CP applies to DR because the CP's scope technically includes the "use of all [LMOs] . . . taking also into account risks to human health."¹⁹⁴ Indeed, conducting research on previously published DR is a form of use. There is also a risk to human health in publishing DR because of the possibility of misuse. However, the definition of an LMO disproves these arguments because 1) DR is typically mere information that is shared in written form, not an actual living organism, and 2) the CP has left the question up to the various national governments as to management of LMOs used in laboratories. Dual-use-research conducted by professionals is, by its name, a thing used in a laboratory. As a result, the CP probably was not and cannot be applied to the issue of DR communication. Therefore, the CP continues to be an incomplete remedy for international DR issues.

188. *Id.*

189. *Information Sharing: The Biosafety Clearing-House*, CONVENTION ON BIOLOGICAL DIVERSITY, http://bch.cbd.int/protocol/cpb_art20.shtml (last visited Jan. 16, 2013). See generally *Cartagena Protocol*, *supra* note 184, at 15-16 (establishing the Biosafety Clearing-House).

190. FOMERAND, *supra* note 154.

191. Jaffe, *supra* note 181, at 304.

192. *Id.*

193. *Id.* at 299.

194. *Cartagena Protocol*, *supra* note 184, at 5.

For the sake of argument, *if* the CP applied, its system of redressability would be insufficient as well. CP Article 27 mandates a redress provision be framed for harms caused by LMOs. In 2010, a response arose in the shape of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress (Redress Protocol).¹⁹⁵ The Redress Protocol was limited to advisory language; the protocol merely requires that the LMO-handlers and the aggrieved nation cooperate in addressing the effects of misuse.¹⁹⁶

In our case, assuming the Redress Protocol could be interpreted to mandate liability for an LMO-related harm, monetary damages may not adequately compensate a nation aggrieved by bioterrorism. A misuse of DR entails a loss of human life, not simply a loss of indigenous knowledge or flora and fauna. Of course, the portion of a nation's economy which is linked to agriculture and biological resources may perish as a result of a bioterrorist attack. However, money cannot recoup the intrinsic value lost with a significant portion of a state's native population (and perhaps even the culture in a particular region). Thus, the Redress Protocol will likely be ineffective in compensating harm caused by DR misuse.

There is no after-the-fact remedy, such as an injunction or exclusionary rule, applicable to DR misuse. Instead, the proper approach is to look to a highly sensitive set of factors that would presume DR publication to be appropriate if the facts demonstrated a threshold level of safety and need.

In general, the CP and its Redress Protocol would insufficiently address the issue of DR communication if applied thereto.

5. Customary International Law

Customary international law crystallizes into a legal norm upon proof that nations generally and regularly conduct themselves in a certain manner based on a feeling of legal duty.¹⁹⁷ Since the PIP, CBD, Nagoya Protocol, and the CP are all of a general advisory nature, it is unlikely any previous publications of DR occurred based on a feeling of legal duty. Therefore, the practices (few that they are) of disseminating DR, as well as the instruments analyzed thus far, would not likely crystallize into a

195. *The Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress*, CONVENTION ON BIOLOGICAL DIVERSITY, at 2, <https://www.cbd.int/undb/media/factsheets/en/undb-factsheet-nkl-en.pdf> (last visited Jan. 16, 2013).

196. *Liability and Redress - Supplement to the Cartagena Protocol*, 40 ENVTL. POL'Y & L. 293, 295 (2010) (unsigned article).

197. Fidler, *Diplomacy*, *supra* note 40, at 90 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998)).

customary international law. Accordingly, a resort to customary international law is likely inadequate.

6. Practical Measures under the Current Body of Law

To accurately gauge the efficacy of the current body of law, we must analyze presently available practical measures.

One strategy to reduce the risks of DR publication is to intentionally conduct more research on an identified portion of DR before, during, and after its publication. This practice will be referred to as counter-terror research. If more research were conducted during publication, then the world may be better prepared for the misuse. Justice Brandeis coined a worthwhile statement in *Whitney v. California*, when he opined that “to avert the evil by the process of education, the remedy . . . is more speech, not enforced silence.”¹⁹⁸ Thus, one potential remedy for misuse is more research conducted shortly before its publication, not an enforced moratorium thereon.¹⁹⁹

If the current body of law is to be relied upon, then it would be wise to supplement influenza surveillance with a prophylactic. Therefore, in addition to intentionally increasing research on a particular type of DR, medical counter-measures may also be embraced in the timeframe surrounding publication. Learned physicians, under the auspices of the Organization for Economic Cooperation and Development (OECD), suggest increasing the capacity to manufacture vaccines, distributing relevant information about influenza to the public, and regulating travel and social gatherings in the event of a pandemic.²⁰⁰ Specifically, to effect these suggestions, the WHO-collaborative laboratories might conduct counter-terror research while the NIH institutes determine proper responses for developed nations in the event of an intentional misuse of DR.

Furthermore, Dr. Rubin suggests that developed nations are in the best position to prevent a pandemic from entering their borders.²⁰¹ Based on this observation, one may contend that counter-terror measures are sufficient to protect developed nations from DR misuse; for instance, developed nations have better infrastructure and border control, allowing for faster adaptation to disease containment.²⁰² Nonetheless, one may challenge the

198. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

199. See generally *Experts Extend Delay*, *supra* note 32 (providing background on the WHO's recommendation that a moratorium exist for laboratory-modified H5N1).

200. Rubin, *supra* note 65.

201. *Id.* at 65.

202. See *id.*

feasibility of this approach by claiming that investments in counter-terror research and infrastructure are unduly expensive. In response, a proponent of counter-measures may stress that a nation's polity would likely accept the counter-terror research costs because doing so would directly protect the polity itself from disease.²⁰³

Another contention is that developed nations cannot afford to invest in additional counter-terror measures during an economic recession. Therefore, one may assert nations should restrain the publication of the riskiest DR until a time when more is known about the pathogen in question. On the other hand, legislators may wish to avoid the blame associated with national casualties caused by a lack of pandemic preparedness. So a national legislature may have the incentive to persuade its constituents to accept some degree of investment in biosecurity counter-measures.

Beyond these considerations, there is at least hope presently for U.S. governmental funding of counter-terror research. The President has acknowledged that life science holds opportunities to alter biosecurity risks through advances in knowledge.²⁰⁴ Indeed, the President views this strategy as the way to "manage the evolving risk."²⁰⁵ This American perspective may lead to more counter-measures in the future.

By the same token, the NSABB even recommends employing counter-measures in response to DR publication.²⁰⁶ The NSABB recommends taking counter-measures before publication.²⁰⁷

The NSABB and the OECD are not the only entities recommending counter-measures. The WHO's own Global Influenza Pandemic Action Plan (GAP) has established counter-terror research as a concept in its objectives.²⁰⁸ The GAP seeks to increase the efficacy of global influenza vaccines,²⁰⁹ by transferring the necessary technology to developing nations, such as Indonesia, Thailand, and Vietnam.²¹⁰ Thus, three entities from three different perspectives favor counter-measures as a supplement to the current body of law.

203. *See id.* at 65.

204. *See President's Strategy*, *supra* note 113.

205. *Id.* at 4.

206. *Responsible Communication*, *supra* note 2828, at 7.

207. *Id.* at 10.

208. *Objective 3: Research and Development*, WORLD HEALTH ORG., http://www.who.int/influenza_vaccines_plan/objectives/objective3/en/index.html (last visited Jan. 16, 2013).

209. *Id.*

210. *GAP Projects: Capacity Enhancement and Technology Transfer in Developing Countries*, WORLD HEALTH ORG., http://www.who.int/influenza_vaccines_plan/objectives/projects/en/index.html (last visited Jan. 16, 2013).

Another reason for developed nations to invest in counter-terror research is that they simply cannot afford to do otherwise while still permitting DR to be communicated. For example, it would be rational for a national legislature to respond with some form of counter-measures after weighing the negative economic ramifications of an intentional misuse of DR.²¹¹

But whatever level of appeal a counter-measure may hold, it remains an imperfect solution. If the United States is prepared for a bioterrorist attack, another nation may not be. An unprepared nation may suffer severe casualties from a virulent virus, and the United States would not likely be able to prevent all such foreign infections from reaching its shores.²¹² In addition, counter-measures at home may not adequately reduce the risks of bioterrorism against citizens located abroad.

Counter-measures that are implemented *after* publication have dubious effect because the current law does not inquire whether laymen can access adequate technology to misuse the research. If such technology exists in the region where a subversive group operates, then counter-measures might not be implemented soon enough to have any deterrent effect. A new agreement can consider whether sufficient technology exists to facilitate a misuse in the near future. For this reason, the contents of the newly suggested agreement are superior to the scenario presented under the current body of law.

In all, the efficacy of counter-measures employed *a posteriori* to counteract the risks inherent in DR publication is largely speculative. Expressing guidelines before and after publication would better address the risks of misuse. A new agreement would do just that.

At any rate, many of the counter-measures set forth thus far can be implemented during negotiations of a new agreement. Therefore, the ability to use counter-measures is not an advantage that belongs solely to the current body of law.

7. Standards Set by the U.S. Department of Health and Human Services: Disappointments

The U.S. Department of Health and Human Services (“HHS”) boasts regulations that limit the use of “select agents and tox-

211. ROBERT ARNOLD ET AL., U.S. CONG. BUDGET OFFICE, A POTENTIAL INFLUENZA PANDEMIC: POSSIBLE MACROECONOMIC EFFECTS AND POLICY ISSUES, at 11-12 (2005), rev. July 27, 2006; Rubin, *supra* note 65, at 67.

212. Brendan Maher, *Crisis Communicator*, 463 NATURE 150 (2010).

ins.”²¹³ Select agents and toxins are those that “pose a severe threat to public health and safety, [and] to animal health.”²¹⁴ One of the biological agents and toxins included in this list is anthrax; others include diseases to which only animals primarily are susceptible.²¹⁵ The appearance of anthrax on the list is no surprise given that the Act under which the HHS regulations were created became law in the wake of the 2001 American anthrax crisis.²¹⁶ It is fascinating that H5N1 and H1N1 do not appear on these regulatory lists, or in the proposed changes, although the NSABB was involved in the process of recommending changes.²¹⁷

From these facts, one must assume that the purpose of the HHS regulations is not to solve DR communication issues. In addition, the NSABB clearly mentions amending the HHS regulations as one of its avenues for action; yet, the NSABB hastens to add that DR typically encompasses a broader realm of research than the HHS regulations can address.²¹⁸ Therefore, it appears unlikely the NSABB has employed the HHS regulations to address DR, and those regulations would be completely effective in covering the breadth of DR issues if they were so employed.

Since the HHS regulations have not been amended to cover H5N1 or H1N1, two of the most well-known viruses to spark attention over pandemic-potential, the HHS regulations will probably not play a central role in the future resolution of DR issues in regards to human health. Therefore, reliance on the use of these regulations would be misplaced. Accordingly, a new agreement that is adapted to the broader range of DR issues would be more appropriate to balance the interests of global human health and national security. The proposed definition of DR located above in part 1.i. should likely accommodate the necessary breadth involved in DR disputes.

8. United States National Strategy for Countering Biological Threats: Frustrations While Waiting

In 2009, the White House outlined its policy for responding to and preempting biological threats.²¹⁹ At bottom, the President’s strategy is to partner with other nations, revitalize prior agree-

213. Select Agent and Toxin Rule, 42 C.F.R. § 73.4 (2011).

214. *Id.* § 73.2.

215. *Id.* § 73.4 (listing overlap select agents and toxins).

216. Kemper, *supra* note 44, at 387.

217. 42 C.F.R. §§ 73.3-.4 (2011); Possession, Use, and Transfer of Select Agents and Toxins, 76 Fed. Reg. 61206 (proposed Oct. 3, 2011) (to be codified at 42 C.F.R. pt. 73).

218. *NSABB FAQs*, *supra* note 11.

219. *See President’s Strategy*, *supra* note 113.

ments,²²⁰ and encourage further research.²²¹ A strategy of the Executive branch is only a strategy of course, and it does not carry the effect of law until it is put into practice. But still, it represents a fair picture of what may occur in the future.

The Strategy itself eschews any definitiveness by stating that it merely guides the agencies of the U.S. government.²²² It further adds that the specific conduct of the agencies shall be “directed separately [and apart from this Strategy].”²²³ Thus, in order to gather what specific direction the Executive announced to the agencies after the Strategy, one must view the actions subsequently taken by the HHS and the NSABB. As has been stated above, the H5N1 case, which occurred after the Strategy was issued, constituted an instance where the NSABB made an initial review, reached strong conclusions, and continued to reconsider the DR in the ensuing three or four months.²²⁴ This conduct raises an inference that the NSABB conducts a shoot-from-the-hip, ask-questions-later review. Review processes like these 1) aggravate the public health community,²²⁵ a vital part of the resolution to DR conflicts, 2) likely delay beneficial research, and 3) create uncertainty for otherwise legitimate research projects.

Thus, a new, concrete agreement is needed to eliminate uncertainties and unnecessary aggravations for public health stakeholders. This Article’s proposed agreement could solve such problems by permitting DR publication based on the persuasion of a sufficient amount of guiding factors.

9. Advantages

The principal advantage to applying the present body of law to a DR dispute is that a resolution of some kind would likely be reached sooner than crafting a new agreement may require.

With the problems of Indonesia and the H5N1 DR surfacing within two years of each other, the biosecurity realm might be

220. Among other things, one prior agreement that President Obama wishes to strengthen is the Biological and Toxin Weapons Convention (BWC); however, since the BWC only covers state-parties, it would be an ineffective remedy in a DR situation where non-state-actor terrorists are a potential player. *Id.* at 5; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062.

221. *See President’s Strategy, supra* note 113.

222. *Id.* at 4-5.

223. *Id.*

224. *See Kelland & Begley, supra* note 33.

225. *See Carvajal, supra* note 1 (explaining that Dr. Fouchier of the Erasmus MC Rotterdam held distaste for the NSABB’s sweeping condemnation of the DR on which Dr. Fouchier had labored, stating “this work should have been published in detail,” and “[t]his experiment was not designed overnight. We started planning . . . ten years ago.”)

changing too quickly to afford several more years of deliberation in negotiations. Therefore, the current law has the advantage of providing a more time-efficient solution.

10. Disadvantages

Although application of the current law is surely more time-efficient, this approach is likely to yield a poor result. The one-sided presumption of sovereignty that exists in the Nagoya Protocol, the fiction that the Cartagena Protocol was intended to cover DR, the advisory nature and limitations of the PIP, and the uncertainty of whether the HHS regulations shall even become relevant, paint a vague picture, or more accurately, a Picasso.

Overall, the disadvantages in the present biosecurity law render ample room for a new agreement to produce a global impact.

IV. CONCLUSION

The best means of balancing the various interests in a DR dispute is to form a new international agreement on the topic. Support for this conclusion derives, in part, from the synergy and understanding that the international community may gain by the negotiation process.

Primarily, a new agreement would be superior because the world would be able to rely on explicit and distinct factors during a DR dispute. But secondarily, a new agreement would be superior to the current law because a new agreement could clarify and make uniform the definitions of a pandemic and DR. Many contract-drafting legal practitioners realize that well-refined definitions may steer the legal outcome of the parties' dispute. If these fundamental definitions are clear, then the resolution will be extensively more accurate and fair.

Also, the research community's inclination to comply with current practices with the International Health Regulations (IHR) compliments the qualified recipient approach. Further, the qualified recipient approach would balance the freedom of communication desired by scientists and the practical security required by national governments.

A new agreement could be more expansive than the existing law, covering issues that the PIP overlooks, namely, bacterial attacks. Moreover, there should be a demarcation as to when viral sovereignty claims are proper and when they are not. A new agreement could state that if certain DR holds a substantial

benefit to international surveillance, then a nation seeking to withhold it should not receive the *full* protection of viral sovereignty but rather be scrutinized under the factors mentioned in this Article. In this fashion, the dangerous concept of viral sovereignty would receive a proper limitation.

In addition, the proposed agreement would include mandatory provisions where other multilateral agreements have failed. Perhaps not in all areas would the new agreement be mandatory, but it would set forth commands in the most important places, such as the general rule expressing when DR is communicable based on sensitive factors.

As for the Nagoya Protocol, it only protects one country at a time. Consequently, a new agreement is worthwhile because its provisions would intentionally protect *all* nations by establishing balanced DR communication procedures regardless of the country of origin. Such an agreement should extend its applicability to all nations through its express language.

The Redress Protocol is inadequate because it is improperly designed to address the unique prospect of DR misuse. A novel agreement will remedy the Redress Protocol's failures by reducing the occurrence of misuse in the first instance so that redress measures would be largely unnecessary.

Although disadvantages exist in negotiating a new agreement, the advantages win the day. The technical advantages include clear, yet flexible, legal presumptions and exceptions where none currently exist; a 360-degree accounting of the legal and epidemiological situation in a subject nation on a case-by-case basis (national identity factor and pandemic factor); the proper placement of legal burdens (substitutability factor); adaptations to electronic tracking; and laboratory-stage rules that strike a fair balance.

The legal advantages and disadvantages are difficult to quantify. However, clarity and certainty carry their weight in the proper resolution of legal disputes. Deliberations between security interests and health interests will likely continue if pandemics resurface as they have throughout the 2000's. If so, then either the international community can resolve DR difficulties by negotiating one agreement now, or it can sit idly by to observe sluggish and isolated deliberations between security and health representatives each time an H5N1 DR dispute occurs.

If these technical advantages were insufficient, a novel agreement would produce irresistible practical advantages. Those include encouraging private donations, increasing surveillance by reducing publication delay, consolidating valuable principles

from previous agreements, adding world consensus to the U.S.-sponsored risk-based approach (scope-of-threat factor), and leveraging the common ground between the relevant parties via a *benefits-derived* factor.

The creation of a new agreement, although not perfect, is preferable because its principles and likely outcomes are superior to the current body of law. To answer the initial question of this Article, the new agreement outlined herein is the best way to balance the interests of security and health. Balancing and harmonizing the interests of national security and global public health demand better mechanisms than the existing law provides. The next question arises: will the international community form a new agreement before the world's best life scientists seek different outlets for their talents, another Indonesian-like panic occurs, or vulnerable human populations suffer apocalyptic casualties?

**SHIFTING GEARS:
IMPROVING ANTI-TRAFFICKING EFFORTS
THROUGH A SHIFT IN POLICY FOCUS**

ELIZETE D. VELADO*

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I. INTRODUCTION

In 1948, the Universal Declaration of Human Rights outlined what were then considered, and today continue to be, the most basic and fundamental rights inherently retained by every human being. Included among these rights is the right to freedom from slavery and forced labor, a right that had been recognized in the United States since 1865. The Thirteenth Amendment to the U.S. Constitution abolished chattel slavery and involuntary servitude in the United States and granted Congress the power to pass legislation enforcing abolition. However, despite worldwide abolition of

* J.D., *cum laude*, The Florida State University College of Law, 2012; International Law Certificate, *cum laude*, The Florida State University College of Law, 2012; B.A., *cum laude*, Religion, The Florida State University, 2006. The author is currently a practicing attorney with Swope Rodante, P.A. in Tampa, Florida. She would like to sincerely thank Dr. Terry Coonan for all of his feedback and guidance during the writing process, as well as her family, friends, and colleagues for their constant encouragement and support.

legalized slavery, slavery and slave-like practices continue today under a very different name. Human trafficking is modern-day slavery. Today, all over the world, human beings are being bought and sold, and their bodies are being exploited as vehicles for sexual gratification or as a source of free or cheap labor. No formal or legal title is held over these individuals, but the central and identifying feature of their enslavement is the control obtained and exercised by a slaveholder.¹

Human trafficking, by one name or another, has been an issue of international concern for over a century. As early as 1904, attempts were made to deal with the phenomenon of human trafficking through a series of multinational treaties.² A multitude of declarations and treaties address human trafficking in one form or another, including servitude and forced labor, but it was not until the issue of human trafficking was taken up by the United Nations Office on Drugs and Crime (UNODC) that anti-trafficking efforts gained real international momentum. The Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (“the Palermo Protocol” or “the Protocol”)³ brought human trafficking out of the amorphous framework of international human rights and into the realm of organized crime prevention and prosecution. By promoting a three-prong approach that incorporated prevention efforts, effective prosecution, and the recommendation of victim protection, the Protocol achieved what human rights treaties could not: an internationally recognized definition of human trafficking and an enforceable obligation on parties to take action against human trafficking domestically. The United States’ own domestic anti-trafficking efforts mirror the recommendations and requirements

1. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 5 (rev. ed. 2004).

2. See International Agreement for the Suppression of the "White Slave Traffic," Mar. 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S.; 1921 International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39; International Convention for the Suppression of the "White Slave Traffic," May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20.

3. The Protocol to Suppress and Punish Trafficking in Persons, Especially Women & Children was one of three Protocols to the United Nations Convention against Transnational Organized Crime adopted in Palermo, Italy in 2000. This Protocol, along with the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, are commonly referred to as “the Palermo Protocols.” Because this paper will deal exclusively with the Protocol to Suppress and Punish Trafficking in Persons, the singular term “the Palermo Protocol” as used in this paper will refer only to the Protocol to Suppress and Punish Trafficking in Persons.

of the Protocol closely, but in many ways, both the Palermo Protocol and U.S. law fail to adequately address all aspects of the problem of modern day slavery by prioritizing prosecution of traffickers far above protection of their victims.

Since the enactment of its Victims of Trafficking and Violence Protection Act of 2000 (TVPA),⁴ which preceded the U.N. adoption of the Palermo Protocol by only two months, the United States has focused a majority of its anti-trafficking efforts on developing prevention and prosecuting traffickers. However, the TVPA and subsequent reauthorizations fall short of providing the victim protections needed to achieve the TVPA's stated goals of protection, prevention, and prosecution. Indeed, the United States' laws aimed at victim protection inadequately address the multifaceted needs of human trafficking victims. This paper will begin by examining the victim protection obligations of the United States as a party to the Palermo Protocol and other international covenants. Then, the paper will discuss the requirements imposed upon the United States by the passage of the TVPA and will examine the adequacy of the TVPA and other U.S. law to adequately address victim protection. Next, this paper will consider the alternative jurisprudential approach to trafficking victim protection employed by the Council of Europe. Finally, it will explore the plausibility of incorporating this approach into U.S. law and how a greater emphasis on victim protection in the United States would also further the equally important goal of effective prosecution.

II. TRAFFICKING VICTIM PROTECTION UNDER INTERNATIONAL LAW

A. Obligations under International Human Rights Law

By adopting the Universal Declaration of Human Rights (UDHR) in 1948, the UN General Assembly took the first major step towards both recognizing and protecting the human rights of individual human beings.⁵ In her capacity as the first chairperson of the United Nations Commission on Human Rights, Eleanor Roosevelt played a pivotal role in its drafting and adoption.⁶ The Preamble of the UDHR recognizes the inherent and inalienable

4. Trafficking Victims Protection Act of 2000, 22 U.S.C. §7101 et seq. (2006).

5. SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY 85 (2008).

6. See generally MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

nature of human rights, as well as the “pledge” of Member States to promote universal observance of these rights:

[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [T]he peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and . . . have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms⁷

In furtherance of this objective, the UDHR goes on to explicitly state, “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”⁸ Even on its face, this Article does more than simply prohibit chattel slavery by specifically prohibiting servitude, and by prohibiting *all forms* of slavery. The wording reflects a desire of the drafters to reach the practices of forced labor and the trafficking of women and children for the purposes of prostitution.⁹ Although the UDHR was originally a non-binding resolution, its principles have become so widely accepted as international human rights norms that they may nonetheless be universally binding as part of the customary international law.¹⁰

7. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

8. *Id.* at art. 4.

9. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT* 41 (1999).

10. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317-352 (1995-96) (discussing the potential status of the UDHR as part of the customary international law). The requirements for identification and recognition of customary international law are laid out in the North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶ 74, 77:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked Not only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must there-

The United States is also a party to the International Covenant on Civil and Political Rights (ICCPR) which provides in relevant part that “[n]o one shall be held in slavery” and prohibits “slavery and the slave trade in all their forms.”¹¹ By calling for the end of slavery “in all [its] forms,”¹² the ICCPR sought to encompass a broader definition of slavery than the U.S. had officially adopted.¹³ Article 8 goes on in a similar vein to say, “No one shall be held in servitude.”¹⁴ It is important to note that “servitude” as contemplated by the ICCPR differs from “involuntary servitude” as prohibited by the Thirteenth Amendment to the United States Constitution.¹⁵ Indeed, the U.S. proposed various alternative formulations of the second paragraph of this Article. Specifically relevant, the U.S. proposed that the word “involuntary” be inserted before “servitude” in the second paragraph in order to distinguish between situations of compulsory servitude and those in which competent persons entered into contractual obligations.¹⁶ The proposal was opposed on the basis that all forms of servitude should be prohibited, and no person, however competent, should be able to contract away his right not to be held in bondage.¹⁷

Both the UNDHR and the ICCPR approach slavery as a human rights rather than a criminal issue. These instruments recognize the right of human beings *not* to be enslaved as opposed to an obligation on the nation-state to prosecute slave-holders. A focus on the victim’s right not to be enslaved certainly empowers a nation-state to prosecute and punish any individual who infringes upon that individual right. However, a rights-centered focus also leads naturally toward a duty on the part of the nation-state to recognize, and at a very minimum, refrain from further violating, the rights of an identified victim, whether through arbitrary detention, aggressive or coercive interrogation techniques, denial of the victim’s most basic needs, or some other official action.

fore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough.

11. International Covenant on Civil and Political Rights art. 8, *opened for signature* Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

12. *Id.*

13. See Joey Asher, Comment, *How the United States is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT’L L. REV. 215, 245-246 (1994). See discussion *infra* Part II.A.

14. ICCPR, *supra* note 11.

15. Asher, *supra* note 13, at 246.

16. MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 167 (1987).

17. *Id.*

B. Obligations under the Palermo Protocol

Despite early success in delineating the human rights of trafficked people in various treaties and declarations, the efforts failed to provide a workable definition of human trafficking or framework for uniform criminalization of all forms of human trafficking globally. It was only in the late 1990s that the UNDOC's Convention and Optional Protocols addressing international organized crime provided the world with the first internationally accepted legal definition of human trafficking and framework for global criminalization of human trafficking, marking an important step forward in the global fight against modern day slavery.¹⁸ The Palermo Protocol's statement of purpose identifies "prevent[ing] and combat[ing] trafficking in persons" and "protect[ing] and assist[ing] the victims of such trafficking, with full respect for their human rights" among Protocol's listed goals.¹⁹ However, The Palermo Protocol "is a criminal law instrument primarily designed to punish human traffickers."²⁰ The UN Special Rapporteur on Violence Against Women reported her concern over the lack of victim protection measures and expressed that a focus on crime control rather than human rights was "a failure of the international human rights community to fulfil its commitment to protect the human rights of women."²¹

Still, the Protocol marked an important milestone in the global fight against trafficking for a number of reasons. Perhaps the most significant contribution of the Palermo Protocol to anti-trafficking law is the definition adopted by the instrument. The Protocol provides the world with the first internationally recognized and accepted definition of human trafficking:

"[T]rafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat of use of force or other forms of

18. Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 791 (2009).

19. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), entered into force Dec. 25, 2003 [hereinafter Palermo Protocol].

20. SCARPA, *supra* note 5, at 63.

21. Special Rapporteur on Violence Against Women, *Rep. of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence against Women*, ¶ 7, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (by Radhika Coomaraswamy). Sylvia Scarpa notes that this statement most properly refers to every human being and not just women. *Accord* SCARPA, *supra* note 5, at 63 (quoting the Special Rapporteur's concerns and noting that the focus on human rights must extend to every human being, not just women and children).

coercion, of abduction, of fraud, of deception, *of the abuse of power or of a position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²²

Moreover, the Protocol does require parties to criminalize the conduct described by the trafficking definition “when committed intentionally.”²³ The criticisms expressed over the Protocol’s weak treatment of victim protections, while valid, fail to adequately credit the Palermo Protocol with what it does accomplish through its terms. Neither criminalization of human trafficking nor measures that treat and care for victims independently can cure the initial violation of the victims’ human rights when traffickers are permitted to continue their practice without impunity.

The definition of human trafficking provided for in the Protocol can be broken down into three elements—the action, means, and purpose—which ultimately constitute the crime of human trafficking.²⁴ Importantly, it is sufficiently broad to encompass a great majority of exploitative practices that involve the assertion of some level of control by one human being over another for the purpose of private gain.²⁵ The action element includes recruitment, transportation, transfer, harboring, and receipt. This element is designed to reach the entire range of actors along the supply-and-demand chain, including consumers and any person who profits or would profit from the exploitation, and does not discriminate between victims based on race, sex, or age.²⁶ The means element includes force, coercion, abduction, fraud, deception, abuse of power, or a position of vulnerability. This element broadens the scope of human trafficking significantly by including abuse of power and abuse of a position of vulnerability as means by which traffickers could be said to bring victims under their control with the purpose of exploiting them. Absent this particular formulation of the means element, highly exploitative practices like bonded labor in South Asia could not be brought within the definition of human trafficking.²⁷ Finally, requires that the action and the

22. Palermo Protocol, *supra* note 19, at art. 3(a) (emphasis added).

23. *Id.* at art. 5.

24. See generally ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 29-42 (2010) (discussing the necessity of all three elements for a situation of trafficking to be recognized and for the Protocol to become operational within a given fact-situation).

25. Gallagher, *supra* note 18.

26. GALLAGHER, *supra* note 24, at 24.

27. Rachira Gupta, Apne Aap, Forced Labor, Lecture at the Seton Hall University School of Law Zanzibar Winter Intersession Program on Modern Day Slavery and Human

means be related to the goal of “exploitation.” The Protocol provides an expansive definition of “exploitation” that encompasses “*at a minimum*, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”²⁸ The Protocol, therefore, creates a baseline from which the international community may expand the definition of human trafficking, as opposed to a restrictive ceiling that would limit the crime of human trafficking to actions committed for a finite set of contemplated purposes.

The Protocol addresses assistance to and protection of human trafficking victims to the extent that it provides parties with what amounts to a list of recommended practices. Qualifications and permissive terms undercut the mandatory language of Article 6. The Palermo Protocol requires to “protect the privacy and identity of victims of trafficking in persons,” but only “[i]n appropriate cases and to the extent possible under . . . domestic law”²⁹ The instrument further requires that parties “*consider* implementing measures to provide for the physical, psychological and social recovery of victims” and suggests in particular the provision of housing, information on their legal rights, medical assistance, et cetera as measures Parties should “*consider*.”³⁰ Parties must also “*endeavor* to provide for the physical safety of victims of trafficking.”³¹ The article requires that parties “take into account, in applying the provisions of this article, the age, gender and special needs of victims.”³² Parties must also “*endeavor* to provide for the physical safety of victims of trafficking.”³³ The article requires that parties “take into account, in applying the provisions of this article, the age, gender and special needs of victims.”³⁴ However, providing for the needs and safety of any victim is purely discretionary based, regardless of age, gender, or special needs, and parties can simply decline to do so based on the plain language of Article 6. The Article does, at least, require that parties provide in their domestic law for some sort of civil remedy through which a victim might receive compensation for the harm suffered as a

Trafficking (Dec. 29, 2010). For more information on the practice of bonded labor, including case studies, see KRISHNA PRASAD UPADHYAYA, ANTI-SLAVERY INT’L, POVERTY, DISCRIMINATION AND SLAVERY: THE REALITY OF BONDED LABOUR IN INDIA, NEPAL AND PAKISTAN (2008).

28. Palermo Protocol, *supra* note 19, at art. 3(a) (emphasis added).

29. *Id.* at art. 6(1).

30. *Id.* at art. 6(3) (emphasis added).

31. *Id.* at art. 6(5) (emphasis added).

32. *Id.* at art. 6(4).

33. *Id.* at art. 6(5) (emphasis added).

34. *Id.* at art. 6(4).

result of his or her trafficking.³⁵ Still, it is necessary to note that where parties elect not to provide victims with counseling or information regarding their legal rights in a language they understand, it is unlikely that victims will have the opportunity to learn about or obtain the compensation provided for.

Although more work is needed to provide for the needs of human trafficking victims, the Palermo Protocol's provisions requiring criminalization represent an important piece of the puzzle. Furthermore, as Ann T. Gallagher, the former UN Adviser on Human Trafficking, observed, it was precisely the movement of human trafficking from a purely human rights-related setting and into the realm of crime prevention that has created a situation in which domestic laws and legally enforceable duties will finally reflect the long-recognized human rights of trafficking victims:

[I]t is necessary to acknowledge that there is no way the international community would have a definition and an international treaty on trafficking if this issue had stayed within the realms of the human rights system. . . . No human rights treaty on trafficking . . . would have been able to link itself to a parent instrument that set out detailed obligations for tackling corruption, exchanging evidence across national borders, and seizing assets of offenders. No human rights treaty would have received the necessary number of ratifications to permit its entry into force a mere two years after its adoption. Certainly, no human rights treaty would have prompted the raft of international, regional, and national reforms that have fundamentally altered the legal and policy framework around this issue.³⁶

Consequently, while it is important to consider how the current law can be improved to accomplish the policy objectives expressed by both the Protocol and the Victims of Trafficking and Violence Protection Act,³⁷ the legal and policy framework that has rapidly developed over the last twelve years should be viewed as a stepping stone towards a greater objective as opposed to a misdirection.

35. *Id.* at art. 6(6).

36. Gallagher, *supra* note 18, at 793.

37. *See infra* text accompanying note 69.

C. U.N. Recommended Principles

Although the Palermo Protocol provided an important step toward a future without slavery, it still fell short of its three-fold goal in many respects. In 2004, in her first Report on trafficking, the UN Special Rapporteur on Trafficking in Persons noted, “Despite its overwhelming human rights dimension, trafficking is often perceived and addressed only as a ‘law and order problem’ and is primarily located within the crime prevention framework.”³⁸ The Report went on to highlight the re-victimization often suffered by trafficking victims as a result of official policies that fail to prioritize the human rights of victims:

Victims of cross-border trafficking are criminalized and prosecuted as illegal aliens, undocumented workers or irregular migrants, rather than as victims of a crime. Women and young girls who are trafficked into the sex industry are penalized on charges of prostitution instead of receiving assistance. Often, when detained they are denied basic judicial guarantees: they are not informed of their rights and how to exercise them, and they are not given access to lawyers or interpreters.³⁹

These are just a few of the issues covered by the report of the U.N. High Commissioner for Human Rights (UNHCR) to the Economic and Social Council providing the official Recommended Principles and Guidelines on Human Rights and Human Trafficking.⁴⁰

In outlining the Recommended Principles related to protection of and assistance to victims, the UNHCR required first and foremost that victims not be detained, whether for crimes committed as a consequence of their trafficking or for violation of immigration laws: “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”⁴¹ Although the report touches on prevention, prosecution,

38. Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Rep. of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶ 10, Comm’n on Human Rights, U.N. Doc. E/CN.4/2005/71 (Dec. 22, 2004) (by Sigma Huda).

39. *Id.*

40. U.N. High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Econ. & Soc. Council, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) [hereinafter U.N. Principles and Guidelines].

41. *Id.*

and protection respectively, its real value lies in the guidelines it sets forth for the promotion and protection of the human rights of victims and in the jurisprudential approach it adopts which emphasizes the primacy of human rights.⁴²

In the second part of the report, the UNHCR sets out a number of guidelines aimed specifically at victim protection and assistance. First and foremost, the U.N. Principles and Guidelines promote various measures to promote and protect human rights, including taking steps to develop a national plan of action, protecting trafficking victims' right to freedom of movement, and ensuring that anti-trafficking laws do not affect a victim's rights recognized under international refugee law.⁴³ In setting forth its Guidelines, the UNHCR observes the role of human rights violations in the international crime of human trafficking and emphasizes again the importance of moving forward with anti-trafficking efforts in a way that centers on the recognition and protection of human rights:

Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity . . . of those who have been trafficked⁴⁴

The UNHCR further argues, "The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked."⁴⁵ Guideline 6 addresses trafficking victim protection and support measures and recommends ensuring, among other things, the availability of safe and adequate shelter, access to medical care and psychological counseling, and the availability of legal assistance and information in a language the victim understands.⁴⁶ The Guidelines also address special measures that should be taken for the protection and support of child victims owing to "[t]he particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation"⁴⁷ Moreover, the report, building on one of the requirements set forth in the Palermo Protocol, provides that "[t]rafficked persons . . . have an international

42. See *id.* at 3-16; see also *infra* text accompanying note 107.

43. U.N Principles and Guidelines, *supra* note 41, at 5.

44. *Id.*

45. *Id.* at 10.

46. *Id.* at 10-11.

47. *Id.* at 12-13.

legal right to adequate and appropriate remedies”⁴⁸ and recommends that States ensure “an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible.”⁴⁹

Although the U.N. Principles and Guidelines are only advisory in nature, the 2002 report represents a strong push towards a victim rights-centered approach to anti-trafficking efforts that was later adopted by the Council of Europe in its approach to human trafficking.⁵⁰ It also provides a firm grounding for a shift in policy that more adequately addresses the protection aspect of a well-rounded anti-trafficking framework.

III. VICTIM RIGHTS AND PROTECTIONS UNDER U.S. LAW

One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights.⁵¹

A. The Inadequacy of Eighteenth Century Anti-slavery Provisions to Address Human Trafficking and Modern Day Forms of Slavery

When the United States ratified the Palermo Protocol in 2005, it expressed in its reservation that “U.S. federal criminal law . . . serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose.”⁵² However, prior to passage of the Trafficking Victims Protection Act in 2000, the Thirteenth Amendment to the U.S. Constitution and federal anti-slavery laws were insufficient to address the complex and multi-faceted network of organized exploitation that constitutes present-day slavery. Ratified in 1865, the Thirteenth Amendment to the Constitution declared: “Neither slavery nor involuntary servitude, except as a punishment for a

48. *Id.* at 13.

49. *Id.* at 14.

50. See discussion *infra* Part III.A.

51. 22 U.S.C. §7101(b)(22) (2006).

52. U.S. Reservation to U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 335, 2225 U.N.T.S. 209, available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12&chapter=18&lang=en

crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁵³ Although the wording of the amendment seems to broadly ban all forms of slavery, the Thirteenth Amendment has been so narrowly interpreted by the Courts as to render it ineffective against most forms of modern day slavery.

As early as 1905, the Thirteenth Amendment was tested in its effectiveness at addressing the phenomenon of international sex trafficking. The victim, a Chinese woman by the name of Ah Zou, was admitted to the United States after representing herself as daughter of one of her traffickers.⁵⁴ Thereafter, the man who “purchased” her from her foster mother in China forced her into prostitution.⁵⁵ After her escape, she was ordered deported, and her case was brought on appeal before district court for the Northern Division of the District of Washington.⁵⁶ The court held that the Thirteenth Amendment, as “part of the supreme law of [the United States],” required the victim’s emancipation and vacated the order for her deportation.⁵⁷ The court based its holding on the reasoning that “[c]ompliance with the [immigration] statute in this case [would] be . . . a barbarous proceeding, for it [would] be the equivalent to remanding the appellant to perpetual slavery and degradation.”⁵⁸ However, on appeal, the Ninth Circuit reversed the holding, reasoning that the trial court improperly yielded to “humane considerations” in its decision.⁵⁹ According to the Ninth Circuit’s reasoning, emancipation from slavery could not constitute a legitimate reason for the application of the Thirteenth Amendment where an alien’s condition as a slave would not be legally recognized “by virtue of an order of deportation” or where the alien would not “be sent into slavery at any place within the United States or within its jurisdiction.”⁶⁰

Subsequent case law continued to limit the scope of applicability of the Thirteenth Amendment and relevant statutes to the extent of rendering them ineffective against almost all forms of modern day slavery, as well as wholly insufficient to fulfill U.S. obligations under the Palermo Protocol to criminalize conduct carried out by means of force, coercion, abduction, fraud, deception, or abuse of power or a position of vulnerability. As recently as

53. U.S. CONST. amend. XIII, § 1.

54. *United States v. Ah Sou (Ah Sou II)*, 138 F. 775, 776 (9th Cir. 1905).

55. *Id.*

56. *United States v. Ah Sou (Ah Sou I)*, 132 F. 878 (D. Wash), rev’d, 138 F. 775 (9th Cir. 1905).

57. *Id.* at 879-80.

58. *Id.* at 879.

59. *Ah Sou II*, 138 F. at 777-78.

60. *Id.* at 778.

1988, the U.S. Supreme Court affirmatively held that “involuntary servitude” as defined in U.S. Constitutional and criminal law did not reach cases in which psychological coercion was the sole means by which the victims were controlled.⁶¹ *United States v. Kozminski* involved two developmentally disabled men that “were found laboring on a . . . dairy farm in poor health, in squalid conditions, and in relative isolation from the rest of society.”⁶² The Court found that in order to “prove a conspiracy to violate rights secured by the Thirteenth Amendment,”⁶³ the Government was required to prove “that the conspiracy involved the use or threatened use of *physical or legal coercion*.”⁶⁴ The Court relied in part on precedent which held that “involuntary servitude,” as contemplated by the Thirteenth Amendment, extended only “to cover those forms of compulsory labor akin to African slavery[.]”⁶⁵

Congress superseded the Court’s narrow construction of the law criminalizing involuntary servitude through the enactment of the Trafficking Victims Protection Act, which addressed many gaps in U.S. criminal and immigration law that existed up until that point.⁶⁶ However, the TVPA and its reauthorizations fall somewhat short of the United States’ obligations under the Palermo Protocol, and they certainly fail to adequately provide for the level of victim protection and assistance required by international human rights law and recommended by the U.N. Principles and Guidelines.

B. *The TVPA as a Response to Modern Day Slavery*

In 2000, Congress passed the Trafficking Victims Protection Act of 2000, a division of the Victims of Trafficking and Violence Protection Act.⁶⁷ In stating its purpose, Congress described the

61. *United States v. Kozminski*, 487 U.S. 931 (1988), *superseded by statute*, 18 U.S.C. § 1589 (2006), *as recognized in* *United States v. Marcus*, 487 F. Supp. 2d 289, 302 (E.D.N.Y. 2007).

62. *Id.* at 934.

63. *Id.* at 944.

64. *Id.* (emphasis added).

65. *Id.* at 942 (citing *Butler v. Perry*, 240 U.S. 328, 332 (1916)).

66. *United States v. Marcus*, 487 F. Supp. 2d 289, 302 (E.D.N.Y. 2007).

67. The TVPA was reauthorized in 2003, 2005, and 2008 by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter TVPRA 2003], the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 [hereinafter TVPRA 2005], and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 [hereinafter TVPRA 2008]. The TVPRA 2008 expired in 2011, but as of March 7, 2013, the latest Trafficking Victims Protection Reauthorization Act had passed through both houses of Congress and has been signed into law by President Obama. Valerie Jarrett, *No One Should Have to Live in Fear of Violence*, HUFF POST POLITICS BLOG (Mar. 7, 2013, 2:30 PM), http://www.huffingtonpost.com/valerie-jarrett/no-one-should-have-to-liv_b_2830510.html. For the purposes of this article, “TVPA” refers to the original Traf-

practice of human trafficking as “contemporary manifestation of slavery.”⁶⁸ Congress further outlined the goals of the TVPA as combating trafficking, prosecuting offenders, and protecting victims.⁶⁹ The TVPA marked a major turning point in the way U.S. law approached modern forms of slavery, specifically with regard to the legal treatment of victims.⁷⁰ Presently, the U.S. Government estimates that between 14,500 and 17,500 human beings are trafficked into the United States every year for the purpose of either sexual or labor exploitation. These estimates, however conservative, fall short of creating a realistic picture of the extent of human trafficking within the United States because it fails to take into account the high number of domestic victims that fall prey to traffickers. Still, neither the TVPA nor its subsequent reauthorizations distinguish between domestic and foreign victims when defining the crime of human trafficking.

The TVPA criminalizes “severe forms of trafficking,” which are defined in U.S. law as either:

- (A) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) The recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁷¹

No distinction is made between victims of different genders or ages, except to the extent that victims of sex trafficking under the age of eighteen are presumed to have been coerced.⁷² By defining human trafficking in terms of the exertion of “force, fraud, or coercion,” Congress sought to broaden the conditions under which individuals could be held criminally accountable for slavery and slave-like practices.⁷³

In enacting the TVPA, Congress also moved beyond the bare minimum requirements of the Palermo Protocol and focused at least some of its efforts on the protection of human trafficking victims. The T-Visa offers immigration relief to victims without

ficking Victims Protection Act of 2000 as codified and reauthorized by TVPRA 2003, TVPRA 2005, and TVPRA 2008.

68. 22 U.S.C. §7101 (2006).

69. *Id.*

70. Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 108-109 (2006).

71. 22 U.S.C. § 7102(8)(a) (2006).

72. *See id.*

73. 22 U.S.C. §7101(b)(2006).

status who are willing to cooperate with the law enforcement investigation and prosecution of their traffickers. Terry Coonan notes, “The provision of legal status and benefits is absolutely crucial to victim care as well as to successful prosecutions of traffickers. Lacking such protections prior to the TVPA, victims were merely deportable aliens, and . . . often punished more harshly than the traffickers themselves.”⁷⁴ Once victims are certified by the Department of Health and Human Services, victims gain access to important temporary services.⁷⁵ Upon obtaining legal status through the T-Visa, victims are eligible for the same benefits afforded to refugees.⁷⁶ Furthermore, the TVPA and its subsequent reauthorizations have provided much-needed funding for victim care. The federal government does not directly take on the task of providing assistance; it instead provides for victim protection and assistances indirectly through grants to non-governmental organizations.⁷⁷

C. Gaps in U.S. Law

Like the Palermo Protocol, the U.S. Code defines human trafficking, whether for sex or labor, in terms of “force, fraud, or coercion.”⁷⁸ Where the definitions notably differ, however, is in terms of the Palermo Protocol’s inclusion of “abuse of power or of a position of vulnerability” as a means by which human trafficking may occur.⁷⁹ This element is glaringly absent from the U.S. definition, and as a result precludes or complicates the prosecution of situations of human trafficking in which the victim initiates contact with the traffickers or in which consent is obtained from the victim in an inherently coercive situation. For example, if a sex trafficking victim, after suffering years or even decades of forced prostitution, finally “pays off” an imaginary “debt” that has been used to coerce their compliance but makes a decision to continue to engage in prostitution and split the proceeds with her trafficker, a question arises as to whether the trafficker could be prosecuted under the statute for the years following the payment of the “debt.” Under the Palermo Protocol’s definition, the receipt of payments, by means of an abuse of the victim’s position of vulnerability created through years of severe sexual or psychological abuse, for

74. Coonan, *supra* note 70, at 109.

75. U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 374-75 (2011) [hereinafter TIP REPORT].

76. *Id.* at 374-75.

77. *Id.* at 375.

78. 22 U.S.C. §7102 (2006).

79. *See* text accompanying note 19.

the purpose of exploiting the victim for personal profit, would clearly fall within the confines of human trafficking. Under the TVPA's definition, however, absent proof of some element of force, fraud, or coercion, the trafficker would escape criminal liability for the continued exploitation.

While the protection of victims is clearly one of the TVPA's overall objectives, it is significant that of the three objectives listed in the act, victim protection occupies the last seat. The goal of victim protection is clearly secondary to the goal of prosecution, and as a result, foreign victims of trafficking in the United States are required to fully comply with all "reasonable" requests for assistance, including but not limited to testifying in open court, in order to be eligible for protection and assistance. Although the TIP Report points out that testimony in court is not a prerequisite to relief,⁸⁰ where the victim is an adult and testimony in open court is necessary and reasonable in the estimation of a certifying entity (in this case, the State or U.S. Attorney's Office), a victim-witness is required under the TVPA to testify in order to qualify for T-Visa certification.⁸¹ Additionally, the continued detention of immigrant victims and the legislated link between victim-witness assistance and eligibility for services have counter-productive consequences that undermine the stated goals of both the TVPA and the TIP reporting system.

The TVPA specifically addressed the detention of victims, stating, "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation."⁸² In spite of this, state and local law enforcement continue to incarcerate first and ask questions later, especially in regard to prostitution-related offenses. Moreover, the Department of Homeland Security has shown reluctance to moving away from a policy of detaining non-criminal immigrants. In fact, the high instance of immigrant detention generally has drawn international criticism. In 2008, the Inter-American Commission on Human Rights published a report in which it described various ways in which various practices within the American system of immigrant detention contravened relevant international human rights standards. In particular, the Commission described its concern over the widespread and increasing use of detention, the lack of authority and oversight, the

80. TIP REPORT, *supra* note 75, at 374.

81. 22 U.S.C. §7105(b)(A)-(B) (2006) bases relief on the requirements of 8 U.S.C. §1101 (2006).

82. 22 U.S.C. §7101(b)(19)(2006).

lack of a genuinely civil detention system that reflects the civil nature of immigration infractions, the outsourcing of immigration detention to unsupervised or insufficiently supervised private entities, and the disturbing impact of immigration detention on due process, especially when the overuse of arbitrary facility transfers affects the immigrant's ability to access an attorney.⁸³

Although the U.S. ranked itself among Tier 1 nations in its own Trafficking in Persons Report, a closer reading of the TIP Report reveals a situation that falls far short of the stated goal of victim protection. At best, federal legislation has resulted in temporary services that are offered on an inconsistent basis and that fail to adequately address the full spectrum of victims' needs.⁸⁴ The U.S. Department of State also notes additional issues with regard to law enforcement officials and their treatment of victims: "NGOs reported isolated incidents of officers citing victims risking withdrawal of benefits when faced with reluctant victims; NGOs also reported continued challenges in getting law enforcement to recognize reluctant victims for protection purposes."⁸⁵ Despite the brevity of the statement, the reality reflected by it reveals a systemic failure on the part of the U.S. Government. Human Rights Watch brought a number of cases to the attention of the State Department prior to the publishing of the TIP report, all of which highlighted extreme abuse carried out by law enforcement officers or immigration agents against victims of human trafficking, including aggressive interrogation techniques, denial of mental health services, arbitrary immigration detention, and a general refusal by authorities to recognize these trafficked persons as victims.⁸⁶ The letter from Human Rights Watch illustrates a pattern of conduct that is both traumatic for the victims and detrimental to the United States goal of prosecuting human traffickers.

83. INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS (2010), available at <http://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf>.

84. See TIP REPORT, *supra* note 75, at 374-76.

85. TIP REPORT, *supra* note 75, at 375.

86. Letter from Alison Parker, Director, U.S. Program, Human Rights Watch, and Meghan Rhoad, Researcher, Women's Rights Division, Human Rights Watch, to Mark Taylor, Senior Coordinator, Office to Monitor and Combat Trafficking in Persons, U.S. Dept. of State (Apr. 19, 2010), available at <http://www.hrw.org/news/2010/04/19/us-victims-trafficking-held-ice-detention> (last visited May 4, 2012).

D. The Trafficking in Persons Report as a Model for Improved Protection

In addition to codifying both the crime of human trafficking and certain minimal protections for victims of trafficking within the U.S., Congress took a further step in its efforts to combat the human trafficking epidemic its creation of the annual Trafficking in Persons Report (TIP Report) compiled and published by the Department of State. When assessing global efforts to eradicate human trafficking, U.S. law requires the Department of State to consider certain factors related to victim protection, including victim assistance efforts, abstinence from victim prosecution, and rights recognized:

- (v) What steps the government of that country has taken to assist victims of such trafficking, including efforts to prevent victims from being further victimized by traffickers, government officials, or others, grants of relief from deportation, and provision of humanitarian relief, including provision of mental and physical health care and shelter . . .
- (viii) Whether the government of that country refrains from prosecuting victims of severe forms of trafficking in persons due to such victims having been trafficked, and refrains from other discriminatory treatment of such victims.
- (ix) Whether the government of that country recognizes the rights of victims of severe forms of trafficking in persons and ensures their access to justice.⁸⁷

Notably, Congress specifically listed efforts to prevent re-victimization of victims among the factors considered in the evaluation of anti-trafficking policy. Additionally, Congress clearly recognized the potential for victimization at the hands of government officials and enumerates the extent to which a country refrains from prosecuting or otherwise discriminating against human trafficking victims as a factor that indicates an appropriate anti-trafficking strategy.

Although improvements in the anti-trafficking have been made over the twelve years since the TVPA was first passed, and both the federal government and a small percentage of state governments have made attempts to improve victim protection efforts and to create training programs for law enforcement officers, social workers, judges, and others most likely to come in contact with human trafficking victims, these patchwork and

87. 22 U.S.C. § 2151(f)(1)(B)(2006).

underfunded efforts have proved insufficient to prevent the continued re-victimization of trafficked persons. Furthermore, the slight increase in funding for victim's services to a modest \$25.5 million provided for by the proposed reauthorization of the TVPA is unlikely to bridge the gap between the limited services currently provided and the overall need reported by non-governmental organizations. Moving forward, the United States should keep the goals and recommendations of the TIP Report in mind.

IV. THE COUNCIL OF EUROPE— A PROTECTION-CENTERED APPROACH

The Convention for the Protection of Human Rights and Fundamental Freedoms ("European Human Rights Convention") has been lauded as "[t]he most effective human rights treaty in the world,"⁸⁸ providing a basis for adjudicatory relief for victims of forced labor and human trafficking, even before the adoption of the European Convention on Action against Trafficking in Human Beings ("European Convention on Trafficking" or simply "Convention"). Article 4 of the European Human Rights Convention prohibits slavery, servitude, and the required performance of forced or compulsory labor.⁸⁹ This Article has been interpreted to impose an affirmative duty on member states to prevent and protect victims of slavery and slave-like practices.⁹⁰ In 2010, the European Court of Human Rights decided *Rantsev v. Cypress and Russia*, a landmark case that extended the affirmative duty of states to cases involving modern day sex trafficking.⁹¹

A. *The European Convention on Action against Trafficking in Human Beings*

Although the European Court of Human Rights is empowered to continue to interpret the European Convention on Human Rights within the context of contemporary circumstances,⁹² this instrument is not ideal for addressing the problem of human traf-

88. SCARPA, *supra* note 5, at 137.

89. European Convention on Human Rights art. 4, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5.

90. *See* Siliadin v. France, App. No. 73316/01, 2005-VII Eur. Ct. H.R. (holding that parties to the ECHR have an affirmative duty to criminalize and punish practices set out in Article 4, including forced labor).

91. *Rantsev v. Cypress and Russia*, App. No. 25965/04, Eur. Ct. H.R. (2010) (holding that human trafficking falls within the scope of Article 4 of the European Human Rights Convention).

92. *See e.g. id.* ¶ 276 ("[The European Human Rights Convention] is a living instrument which must be interpreted in the light of present-day conditions.")

ficking, and it provides very little in the way of guidance for nations seeking to address human trafficking within their borders. As an instrument designed to proactively address human trafficking, the European Convention on Trafficking provides more than a detailed action plan for member states. The Convention marks the beginning of a radical sea-change in the way nations address human trafficking within their respective domestic legislation. The Convention shifts away from the prosecution-centered focus of both the Palermo Protocol and the TVPA and toward a victim-centered approach that focuses instead on the needs and human rights of victims.⁹³

Article 12 of the Convention (Assistance to Victims) imposes a positive duty on Parties to adopt “measures . . . necessary to assist victims in their physical, psychological and social recovery.”⁹⁴ It goes on to enumerate the minimum standards for party compliance, requiring:

standards of living capable of ensuring their subsistence [including] appropriate and secure accommodation, psychological and material assistance; access to emergency medical treatment; translation and interpretation services, when appropriate; counseling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; access to education for children.⁹⁵

Although it could arguably be inferred from first section of Article 12 quoted above, the Article goes on to explicitly stipulate the requirement that parties “take due account of the victim’s safety and protection needs.”⁹⁶ Further provisions in Article 12 require access for victims to medical treatment and vocational training.⁹⁷ Unlike the prosecution-focused TVPA, the European Convention on Trafficking explicitly prohibits party states from conditioning benefits on the willingness of trafficking victims to cooperate in the investigation or prosecution of their traffickers.⁹⁸

93. SCARPA, *supra* note 5, at 163.

94. Council of Europe Convention on Action against Trafficking in Human Beings, art. 12, ¶ 1, *opened for signature* May 16, 2005, C.E.T.S. No. 197, *entered into force* Feb. 1, 2008.

95. *Id.* at art. 12(1)(a)-(f).

96. *Id.* at art. 12(2)

97. *Id.* at art. 12(3)-(4)

98. *Id.* at art. 12(6).

This particular prohibition is likely to most acutely affect victims lacking legal status in the country providing services.

The Convention grants further protections to victim-witnesses by affirmatively requiring party states to provide “a recovery and reflection period of at least 30 days” to all potential victims of trafficking so that they might “take an informed decision on cooperating with the competent authorities.”⁹⁹ Application of this provision prevents member states from removing or deporting illegally present victims for at least the minimum timeframe, during which time the victim would ideally at least partially heal from the physical and emotional trauma of their trafficking. Moreover, all of the victim benefits outlined in Article 12 are available to potential victims during this recovery and reflection period, regardless of the individual’s ultimate decision concerning whether or not to cooperate.¹⁰⁰ In the Convention’s Explanatory Report, the COE explains the purpose of the Article “is to allow victims to recover and escape the influence of traffickers[,]” which includes both physical healing and the recovery of “a minimum of psychological stability.”¹⁰¹ By requiring a recovery and reflection period, the Convention also aims to ensure that the resulting prosecutions are effective, citing the likelihood that witness statements would be more reliable once the victim-witness has overcome the shock of his or her traumatic ordeal.¹⁰²

Notwithstanding the extensive protections required by the European Convention on Trafficking, the Convention is not without fault. According to an official Opinion of the COE Parliamentary Assembly, the extent and effectiveness of the enumerated protections were severely curtailed by the unwillingness of member states to place the goal of victim protection above concerns over illegal migration:

The Assembly cannot avoid the impression that the Council of Europe member states are not willing to make the difference between illegal migration and trafficking in human beings. The measures for the protection of victims, which should be at the heart of the Convention, have become weaker in the course of the negotiations. The current draft Convention rather gives the impression of reflecting the member states’ desire to protect themselves from illegal migration instead of accepting that trafficking

99. *Id.* at art. 13(1).

100. *Id.*

101. Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report, ¶ 173, C.E.T.S. No. 197 (2005) [hereinafter Explanatory Report]

102. *Id.* ¶ 174.

in human beings is a crime and that its victims must be protected.¹⁰³

However, this is not to undercut the achievement embodied by the Convention. Unlike the TVPA, the European Convention on Trafficking represents a shift away from a prosecutorial focus and a major stride towards recognizing the primacy of victim protection and human rights. Still, a great deal of work has yet to be done.

To date, the Convention has been ratified by twenty countries and signed by an additional twenty.¹⁰⁴ Non-member states are able to sign on and accede to the Convention. The first round of country reports and the first general report have been published by The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA), the body responsible for oversight of the European Trafficking Convention's implementation, and to the extent reported, countries have complied with Convention requirements.¹⁰⁵ Although it is unrealistic to suggest that the U.S. should sign on to this treaty and submit to the oversight of the COE, the European Trafficking Convention provides a good model for the direction in which U.S. trafficking law and policy aim.

V. RECOMMENDATIONS

The TVPA and its subsequent amendments have undoubtedly represented major strides in U.S. law. From a human rights perspective, however, the TVPA "falls short . . . in that it grants benefits only to victims of trafficking who are willing to cooperate in the prosecutions of their traffickers."¹⁰⁶ Unlike the Palermo Protocol, the U.N. Recommended Principles on Human Rights and Human Trafficking emphasize the "primacy of human rights" in the fight against human trafficking:

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investi-

103. Parliamentary Assembly, Council of Europe, Draft Council of Europe Convention on Action Against Trafficking in Human Beings, Opinion No. 253 (2005).

104. Status of Signature and Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings, *available at* http://www.coe.int/t/dg2/trafficking/campaign/flags-sos_en.asp

105. *See Action against Trafficking in Human Beings: Publications*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Publications/default_en.asp [last visited May 4, 2012].

106. Coonan, *supra* note 70, at 110.

gate and prosecute traffickers and to assist and protect trafficked persons.

3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.¹⁰⁷

Although focusing on the criminal element to trafficking in persons has allowed the world to come together on an issue of such paramount importance, those leading the fight cannot continue to neglect what many were already willing to acknowledge in 1947, and that is that human trafficking is, at its root, a violation of fundamental human rights. Human trafficking is a crime *because* it is a violation of the victims' human rights.

Moving forward, the United States can improve on the current anti-trafficking framework by shifting the focus of anti-trafficking efforts away from prosecution somewhat and towards victim protection. Overall, current federal legislation and policy fails to adequately address the protection and rehabilitative needs of both foreign and domestic victims of trafficking. Victim-sensitive training programs for law enforcement and relevant agencies at both the state and federal levels are necessary to ensure that victims are swiftly identified and that investigations and prosecutions are carried out in a manner which is least harmful to the victim. Without appropriate training, sex trafficking victims will continue to be re-victimized by law enforcement officials reluctant to view them as victims rather than criminals and prostitutes, and labor trafficking of both foreign and domestic male victims will continue to be overlooked. In southern Florida, for example, it is actually grassroots community activists and not law enforcement that have been leading the fight against labor trafficking.¹⁰⁸

Furthermore, with regard to immigrant victims, a greater sensitivity to the trafficked persons' status as victims is required both in the drafting and implementation of immigration regulation. For instance, the U.S. should seek to minimize or eliminate the arbitrary detention of human trafficking victims, and where foreign victims are placed in removal proceedings, the U.S. should endeavor to carry out removal in accordance with international refugee law and with the safety and needs of the victim in mind. Additionally, lawmakers should consider implementing a recovery

107. U.N. High Commissioner for Human Rights, *supra* note 41.

108. See FLORIDA STATE UNIV. CTR. FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA STRATEGIC PLAN ON HUMAN TRAFFICKING (2010); *CIW Anti-Slavery Campaign*, COALITION OF IMMOKALEE WORKERS, <http://ciw-online.org/slavery.html> [last visited May 4, 2012].

and reflection period that allows victims to receive services for at least thirty days prior to being required to assist with a law enforcement investigation. As noted in the Explanatory Report to the COE Convention, the granting of a minimum thirty-day recovery and reflection period is likely to result in more effective prosecutions and a greater willingness on the part of victims to cooperate with law enforcement and prosecutors.¹⁰⁹ Although such a change would need to be implemented on both a federal and state level to be truly effective, a shift away from a prosecution-centered perspective toward an approach that places the rights and recovery of the victim at the forefront is necessary to further U.S. goals in combatting trafficking.

The groundwork for greater victim protection has already been laid out in U.S. law, both through the TVPA's relevant provisions, and through the TIP reporting system. All that the U.S. requires now is the political will to move its anti-trafficking efforts in the direction most beneficial for human trafficking victims and prosecutors alike. As both the letter of U.S. law and the European Convention on Trafficking recognize, human trafficking is first and foremost a violation of a human beings most basic and inalienable rights. The U.S. must move toward an anti-trafficking regime that provides greater protection for victims and implement strategies to prevent re-victimization of trafficked persons, especially by law enforcement and government officials acting in their official capacity. To the extent that the U.S. continues to view victim protection and national security as competing objectives, and as long as the U.S. persists in treating the human rights of victims as the enemies of law enforcement efforts, the U.S. as a nation will continue to fail in its attempt to effectively combat the scourge of modern slavery.

109. Explanatory Report, *supra* note 101, ¶ 174.