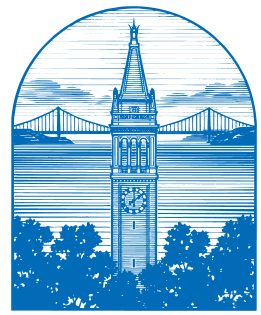


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Energy Investment Disputes in Latin America: The Pursuit of Stability

Elisabeth Eljuri* and Clovis Trevino**

ABSTRACT

Sovereign ownership of subsoil resources in Latin America raises important tensions. The State, as owner, may grant property or participation rights to private investors in the energy sector, but it may also revoke them. As contracting party, it may enter into investment contracts (directly or through a State-owned entity), but it may also breach them. And as sovereign, it may offer legal and fiscal stability, but it may also use its regulatory power to alter the economic balance of the contract or even destroy its value. In light of these tensions, the pursuit of stability in energy investments in Latin America presents important challenges. This Article provides an overview of the rise and resolution of energy disputes in Latin America. Following an Introduction, Part I sets out a brief historical overview of energy investment disputes in the region. Next, Part II addresses key substantive issues that have been the subject of litigation in connection with energy investments. Part III discusses whether there is a backlash against international arbitration by host States in the region, followed by an overview in Part IV of some techniques to infuse stability into the energy investment contract.

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INTRODUCTION

In Latin America, unlike in the United States or Western Europe, subsoil resources belong to the State, and only the State can determine if and how private investors participate in resource exploitation. Sovereign ownership of subsoil resources raises some important tensions. The State, as the *owner* of subsoil resources, grants property or participation rights to private investors in the energy sector; as the *contracting party*, it negotiates the terms and performs the investment contract, either directly or through a State-owned entity; and as the *sovereign*, it controls the legal and physical framework in which the contract takes shape.

As a result of this tension, investor-State energy disputes in Latin America have followed a recurrent pattern: in times of need of foreign investment, the *owner* grants property or participation rights to the investor; the *contracting party* makes direct promises to the investor; and the *sovereign* makes express or implied commitments to offer a stable legal framework. However, promises are often broken. The *owner* may revoke or cancel property rights; the *contracting party* may breach the contract; and the *sovereign* may use its regulatory power to alter the economic balance of the contract or even destroy its value. Thus, the pursuit of stability in energy investments in Latin America presents significant challenges.¹

During most of the twentieth century, energy investment disputes between a State and a foreign investor were resolved through diplomatic channels or outright intervention by the investor's home State. The fate of an investor whose home State declined to offer its protection was left to the courts of the *sovereign* host State. The advent of bilateral investment treaties (BITs) during the late 1980s and 1990s revolutionized the paradigm of investor-State dispute settlement by giving investors the possibility of elevating investment disputes to international arbitration tribunals.

States' consent to international arbitration under BITs, however, has not deterred some Latin American countries from directly expropriating or using their regulatory powers to alter the economic balance of energy investments. In response, energy investors have filed arbitration claims against Latin American States, most prominently, before the International Centre for Settlement of Investment Disputes (ICSID).

The elevation of energy investment disputes to international arbitration tribunals has led to the development of a body of customary rules adapted to the industry's nature and specificities—the so-called *lex petrolea*.² However, the line between legitimate State regulation of the oil and gas sector and undue interference with property rights remains fraught. This tension lies at the heart of the pursuit of stability in energy investment disputes in Latin America.

Focusing on recent international arbitration cases involving oil and gas disputes in the region, this Article provides an overview of the rise and

1. See generally Elisabeth Eljuri, *Venezuela's Exercise of Sovereignty over the Hydrocarbon Industry and Preventive Protections to be Considered by Investors*, OIL GAS & ENERGY L. INTELLIGENCE, Apr. 2008.

2. See generally R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 Y.B. COM. ARB. 1131 (1998); see also Thomas C.C. Childs, *Update on Lex Petrolea: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production*, 4 J. WORLD ENERGY L. BUS. 214 (2011) (highlighting the development of legal rules that reflect the specific characteristics of the international exploration and production industry).

resolution of energy disputes in Latin America. Part I sets out a brief historical overview of energy investment disputes in the region. Next, Part II addresses key substantive issues that have been the subject of litigation in connection with energy investments. Part III discusses whether there is a backlash against international arbitration by host States in the region, followed by an overview, in Part IV, of some techniques to infuse stability into the energy investment contract. Part V provides some concluding remarks.

I.

ENERGY DISPUTES IN LATIN AMERICA: A BRIEF HISTORICAL OVERVIEW

During the nineteenth and early twentieth centuries, investor-State dispute resolution in Latin America was characterized by physical seizure of property, expropriations, and nationalizations by the host State and, in response, armed interventions and embargoes by investors' States demanding redress for claims or unpaid debt.³ This policy—embraced by countries such as the United States, France, Germany, Italy, and Spain—became known as “gunboat diplomacy.”⁴ In this context, Argentine jurist Carlos Calvo proposed the so-called “Calvo doctrine” in the late 1860s, stating that in disputes between aliens and governments, foreign citizens had to submit their claims to the local courts.⁵

The Calvo doctrine rests upon two pillars: sovereign equality and equal treatment of nationals and foreigners.⁶ By application of the Calvo doctrine, investment contracts in the region generally included a Calvo clause specifying that foreign investments were to be governed exclusively by domestic law, that disputes arising from such investments could only be resolved by domestic courts, and that the investor could not request diplomatic protection from its government (at least not until local remedies had been exhausted).⁷ Some Latin American States also incorporated the Calvo doctrine into their domestic law.⁸

3. See Mary H. Mourra, *The Conflicts and Controversies in Latin American Treaty-Based Disputes*, in *LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS* 7 (Mary H. Mourra & Thomas Carbonneau eds., 2008).

4. *Id.*

5. See Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 205–06 (1950).

6. See Guido Tawil, *On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine*, in *ARBITRATION ADVOCACY IN CHANGING TIMES* 329 (Albert Jan van den Berg ed., 2011).

7. See Mourra, *supra* note 3, at 20.

8. See R. Doak Bishop, *The United States' Perspective Toward International Arbitration with Latin American Parties*, 8 INT'L L. PRACTICUM 63, 63–64 (1995).

The increasing acceptance of the Calvo doctrine during the twentieth century is evidenced by the adoption of the Convention on Rights and Duties of States, signed by the United States and several Latin American countries in 1933.⁹ This Convention provides that “[n]ationals and foreigners are under the same protection of the law, and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.”¹⁰ The Convention further provides that “[n]o State has the right to intervene in the internal or external affairs of another.”¹¹ However, the Calvo doctrine never gained international customary law status, in part because European States and the United States consistently rejected it.¹²

Bolivia’s expropriation in 1937 of oil concessions, awarded to Standard Oil in the 1920s, tested the nonintervention stance of the United States.¹³ After a period of serious tension, the United States espoused Standard Oil’s claim and entered into diplomatic negotiations with Bolivia. An agreement was reached in 1942, when Bolivia’s foreign minister offered to pay Standard Oil U.S. \$1 million as an “indemnity.”¹⁴ The company asked for U.S. \$3 million and insisted that the settlement be documented as a sale.¹⁵ A compromise was reached whereby the Standard Oil properties were sold to Bolivia for U.S. \$1.5 million. Shortly thereafter, Bolivia received economic development assistance from the United States in the amount of U.S. \$25 million.¹⁶

About a year after Bolivia expropriated the Standard Oil properties, Mexico expropriated the oil holdings of major U.S. and British companies.¹⁷ Following a period of intense social conflict and labor strikes, the Mexican Federal Board of Arbitration and Conciliation ordered oil companies to increase the wages of oil workers. The oil companies failed to comply with the order, and the executive branch issued an expropriation decree in March 1938.¹⁸ The United States insisted that the dispute be submitted to international arbitration, which Mexico refused to do. At last, the two governments agreed to create a joint

9. Convention on the Rights and Duties of States (Inter-American), Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

10. *Id.* at 9.

11. *Id.* at 8.

12. See Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 22 (2005).

13. See Harold Eugene Davis, LATIN AMERICAN DIPLOMATIC HISTORY: AN INTRODUCTION 206 (1977).

14. *Id.* at 210.

15. *Id.*

16. *Id.*

17. *Id.* at 211.

18. *Id.*

commission in order to evaluate the expropriated assets and recommend the amount of compensation due.¹⁹ Mexico agreed to pay the amount determined by the commission, plus interest, over the next seven years.²⁰

A second wave of expropriations—led by Ecuador,²¹ Venezuela,²² Bolivia,²³ and Peru—occurred in the 1960s. Most notably, in October 1968, the government of Peru sent troops to take possession of the *La Brea y Pariñas* oilfield in northern Peru, held since 1924 by the International Petroleum Corporation (IPC).²⁴ In August 1969, Peru expropriated the property but it characterized the taking of subsoil resources as a recovery of oil reserves rightfully belonging to the State.²⁵ The dispute came to an end in 1974, when the United States and Peru negotiated a global settlement for U.S. \$76 million, to be distributed among several U.S. companies affected by Peru's nationalizations.²⁶

Thus, regardless of the almost universal adherence by Latin America to the Calvo doctrine, Latin American States were not able to insulate themselves from the power of foreign countries to intervene diplomatically on behalf of their citizens.²⁷ Not surprisingly, Latin American countries initially responded to international arbitration and, more particularly, to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),²⁸ with skepticism or outright rejection. In September

19. *Id.* at 214.

20. *Id.*

21. In 1971, Ecuador adopted a new hydrocarbons law, followed by the creation of Corporación Estatal Petrolera Ecuatoriana (CEPE) in 1972. *See* Supreme Decree No. 1459, Official Register No. 322, Oct. 1, 1971 (Ecuador).

22. In 1975, Venezuela nationalized the oil industry, granting Petróles de Venezuela S.A. a monopoly. *See* Organic Law that Reserves to the State the Industry and the Trade of Hydrocarbons, Extraordinary Official Gazette No. 1769, Aug. 29, 1975 (Venez.).

23. For instance, in 1969 Bolivia nationalized Bolivian Gulf Oil Company. *See* Supreme Decree 8981, Official Gazette 477, Nov. 7, 1969 (Bol.).

24. *See* Dale B. Furnish, *Peruvian Domestic Law Aspects of the La Brea and Pariñas Controversy*, 59 KY. L. J. 351 (1970).

25. *Id.* at 352–53. Supreme Decree No. 014-EM/DGH of Aug. 22, 1969.

26. *See generally* Victor Arnold and John Hamilton, *The Greene Settlement: A Study of the Resolution of Investment Disputes in Peru*, 13 TEX. INT'L L. J. 263 (1977–1978). Peru also nationalized the interest of several U.S. companies in sugar lands, copper, and iron mines.

27. *See* Nigel Blackaby, *Energy Investment Disputes in Latin America: A Historical Perspective*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 213 (Arthur W. Rovine ed., 2015).

28. International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States Art. 37(2)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

1964, when the ICSID Convention was submitted for a vote, nineteen Latin American countries voted against its adoption.²⁹

It was not until the late 1980s and 1990s that Latin American States entered into the international system of investment protection by signing and ratifying BITs.³⁰ BITs are similar to each other in their content and structure. Ostensibly, they serve the purpose of promoting and protecting foreign investments made by nationals of one contracting party in the territory of the other contracting party.³¹

BITs generally contain (1) a provision defining investments and investors qualifying for protection; (2) a national treatment provision; (3) a most-favored-nation (MFN) clause; (4) a guarantee of fair and equitable treatment; and (5) a provision for compensation in the event of expropriation or nationalization.³² BITs generally provide access to international arbitration to qualifying investors under the auspices of the ICSID, *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), or arbitration under other arbitration rules.³³

The UN Conference on Trade and Development (UNCTAD) statistics show that Latin American States did not execute BITs until the late 1980s.³⁴ But by the end of the 1990s, they had entered into a total of 300 BITs.³⁵ With the exception of Brazil, which did not ratify the BITs it signed during the 1990s,³⁶ Latin American States rapidly built into a growing network of BITs, largely

29. See 2 HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES pt. 1, at 606 (photo. reprint 2001) (1968) [hereinafter ICSID CONVENTION]. The Latin American States that voted 'no' were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

30. U.N. Conference on Trade and Development, *Bilateral Investment Treaties 1959–1999*, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 14, 2000) (by Abraham Negash), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf>.

31. See generally Andrew Newcombe and Lluïa Paradell, HISTORICAL DEVELOPMENT OF INVESTMENT TREATY LAW, Standards of Treatment 1-2 (2008), available at <http://www.italaw.com/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf>.

32. *Id.* at 65.

33. *Id.* at 70–73.

34. U.N. Conference on Trade and Development, *supra* note 30, at 15..

35. *Id.*

36. *Id.* According to UNCTAD database, Brazil signed BITs with Belgium-Luxembourg (1999), Chile (1994), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Germany (1995), Italy (1995), Korea (1995), Netherlands (1998), Portugal (1994), Switzerland (1994), United Kingdom (1994), and Venezuela (1995).

deactivating the Calvo doctrine. Most Latin American countries—with the notable exception of Mexico and Brazil—also ratified the ICSID Convention, which provided an international platform for the arbitration of investor-State disputes.

Today BITs, in conjunction with the ICSID Convention, are the most important source of legal protection of foreign investments in Latin America.³⁷ Despite the threat of international arbitration under BITs, some Latin American States, most notably, Venezuela, Argentina, Ecuador and Bolivia, have undertaken measures to re-calibrate the economic balance of energy investments and increase their control over energy resources. The next Part discusses key substantive areas of recent investor-State disputes.

II.

ENERGY INVESTMENT DISPUTES IN LATIN AMERICA: SUBSTANTIVE ISSUES OF DISPUTE

In the last decade, Latin American countries have faced a steadily increasing number of arbitrations filed by foreign investors before international tribunals. According to a recent UNCTAD report, “Recent Developments in Investor-State Dispute Settlement (ISDS),” as of 2013, Argentina, Venezuela, Ecuador, and Mexico were among the top ten most frequent respondents in investor-State arbitration.³⁸ Moreover, ICSID statistics show that twenty-six percent of all cases registered at ICSID as of December 31, 2014 arose in the oil, gas, and mining sectors—the biggest proportion among all economic sectors.³⁹

Although complete statistics about energy disputes in Latin America are not readily available, a survey of relevant cases reveals that investors often sue States over measures affecting control or title over their investments, or investment value and profitability,⁴⁰ including, but not limited to, direct expropriation or nationalization, indirect expropriation, as well as fiscal or regulatory measures such as the imposition of windfall profit taxes or export taxes. These measures are discussed next.

37. See generally Rudolf Dolzer and Margrete Stevens, *BILATERAL INVESTMENT TREATIES* (1995).

38. See Recent Developments in Investor-State Dispute Settlement (ISDS), at 8 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

39. See ICSID, *The ICSID Caseload — Statistics*, Issue 2015-1, at 12, available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf.

40. See generally Thomas Wälde, *Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law*, 1 J. WORLD ENERGY L. BUS. 55 (2008).

A. *Direct Expropriation*

Direct expropriation entails a mandatory legal transfer of title to property from the private investor to the host State or the outright physical seizure of property. In cases of direct expropriation, the host State openly, deliberately, and unequivocally deprives the owner of its property through the transfer of title, as reflected in a formal law or decree, or outright physical seizure.⁴¹

For instance, in July 2012, the Argentine legislature passed a law expropriating fifty-one percent of the shares of Argentina's oldest oil company, YPF S.A.,⁴² held until then by Repsol, S.A.⁴³ In response to the expropriation of YPF, Repsol filed an arbitration claim before ICSID pursuant to the Argentina-Spain BIT.⁴⁴ After protracted litigation on multiple fronts, Repsol entered into a settlement agreement with Argentina, and the ICSID arbitration proceeding was discontinued.⁴⁵

Another prominent example is the 2007 nationalization of Venezuela's heavy oil projects in the Orinoco oil belt. In February 2007, the Venezuelan government passed a decree ordering that the existing oil contracts between PDVSA and foreign oil companies (i.e., four association agreements, and thirty-two exploration at risk and profit sharing agreements) be converted into mixed companies, with Petróleos de Venezuela S.A. (PDVSA) (Venezuela's national oil company) or a PDVSA affiliate, holding a controlling interest (of at least a sixty percent).⁴⁶ The decree afforded foreign investors four months to agree to the terms of the new mixed company contracts or face a takeover of operations by the State.⁴⁷

41. See U.N. Conference on Trade and Development, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II*, at 7, U.N. Doc. UNCTAD/DIAE/IA/2011/7 (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

42. "YPF S.A." (acronym for Yacimientos Petrolíferos Fiscales S.A.) is an Argentine oil company engaged in the exploration and production of hydrocarbons and the refining and distribution of chemical and petrochemical products.

43. Law No. 26.741, July 5, 2012, B.O., art. 7 (Arg.).

44. Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38.

45. *Convenio de Solucion Amigable y Avenimiento de Expropiacion*, dated Feb. 27, 2014, available at http://www.repsol.com/imagenes/es_es/Acuerdo_con_Argentina_tcm7-673555.pdf.

46. See ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶ 203 (Sept. 3, 2013), available at <http://www.italaw.com/sites/default/files/case-documents/italaw1569.pdf> [hereinafter ConocoPhillips v. Venezuela].

47. *Id.* ¶ 204; see Decreto No. 5.200, con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco; así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas [Decreto No. 5.200 Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Risk and

Venezuela's measures affected several projects held by foreign energy companies, including Total, Statoil, BP, Chevron, ExxonMobil, Opic Karimun, and ConocoPhillips. These companies had contracts with PDVSA providing for international arbitration under the auspices of the International Chamber of Commerce (ICC),⁴⁸ and several of them had the option of resorting to international arbitration under applicable BITs. Faced with the prospect of a forced exit from the country followed by prolonged international arbitration, a number of foreign oil companies accepted revised contract terms and migrated into "mixed companies" with a PDVSA affiliate as majority shareholder.⁴⁹ But at least three international oil companies, ConocoPhillips, ExxonMobil, and Opic Karimun, rejected Venezuela's terms, opting instead for ICC arbitration,⁵⁰ as well as BIT arbitration.⁵¹

In the case of *ConocoPhillips*, in May 2007, a PDVSA affiliate took physical control of the operations of the company's Petrozuata, Hamaca, and Corocoro projects. Thereafter, in October 2007, the Venezuelan National Assembly ratified a law⁵² providing that the oil contracts would be "extinguished" as of the date of the publication of the law or as of the date of the issuance of a transfer decree, depending on the case.⁵³ Article 2 of the law

Profit Sharing Exploration Agreements], Feb. 26, 2007, GACETA OFICIAL No. 38.632 (Venez.), arts. 4–5.

48. See, e.g., Association Agreement Among Lagoven Cerro Negro, S.A., Mobil Producción e Industrialización de Venezuela Inc. and Veba Oel Venezuela Orinoco GmbH dated 28 October 1997, Section 15 (providing for ICC arbitration seated in New York) (on file with authors); Association Agreement between Maraven, S.A. and Conoco Orinoco Inc., as modified 18 June 1997 (providing for ICC arbitration in 13.16) (on file with authors).

49. See Elisabeth Eljuri and Clovis Trevino, *Venezuela: On the Path to Complete 'Oil Sovereignty,' or the Beginning of a New Era of Investment?*, 2 J. WORLD ENERGY L. & BUS. 259 (2009).

50. See, e.g., Mobil Cerro Negro, Ltd. v. Pétroleos de Venezuela, S.A. and PDVSA Cerro Negro, S.A., ICC Case No. ARB/15416/JRF, award dated Dec. 23, 2011; see also "Conoco files for ICC arbitration against Venezuela's PDVSA," Reuters, 10 Oct. 2014, available at <http://www.reuters.com/article/2014/10/10/us-conocophillips-pdvs-a-arbitration-idUSKCN0HZ1IY20141010>.

51. See *ConocoPhillips v. Venezuela*, *supra* note 46; Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 [hereinafter *ExxonMobil v. Venezuela*]; OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14, available at <http://www.italaw.com/sites/default/files/case-documents/italaw3013.pdf>.

52. National Assembly Decree: Law on the Effects of the Process of Migration into Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration at Risk and Profit Sharing Agreements, Oct. 8 2007, GACETA OFICIAL No. 38.785 (Venez.).

53. *Id.* at 1.

transferred the equity interests of the foreign partners to the newly-created mixed companies.

ConocoPhillips brought an ICSID arbitration claim against Venezuela, asking the tribunal to find that Venezuela had breached Venezuela's investment protection law⁵⁴ and the Netherlands-Venezuela BIT.⁵⁵ The alleged breach included unlawfully expropriating ConocoPhillips's investment, failing to accord fair and equitable treatment and full protection and security, and taking arbitrary and discriminatory measures impairing the use and enjoyment of ConocoPhillips's investments in Venezuela.⁵⁶

In a decision on jurisdiction and merits, a tribunal affirmed jurisdiction under the Netherlands-Venezuela BIT over three Dutch-based entities—ConocoPhillips Petrozuata (CPZ), ConocoPhillips Hamaca (CPH), and ConocoPhillips Gulf Of Paria (CGP)—through which ConocoPhillips held its interests in Petrozuata, Hamaca, and Corocoro.⁵⁷ But the tribunal sided with Venezuela by rejecting ConocoPhillips's attempt to ground jurisdiction in Article 22 of Venezuela's investment law.⁵⁸

Translated into English, Article 22 of Venezuela's Investment Law *could* read as follows:

Disputes arising between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments with Venezuela, or any disputes which apply the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using, when applicable, the systems of litigation provided for in the Venezuelan laws in force.⁵⁹

54. Decree No. 356 Having the Rank and Force of Law on Promotion and Protection of Investments, Oct. 22, 1999, GACETA OFICIAL EXTRAORDINARIO No. 5.390 (Venez.) [hereinafter Venezuela's Investment Law].

55. Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela, *Neth.-Venez.*, Oct. 22, 1991, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITS/VEN_Netherlands.pdf [hereinafter Netherlands-Venezuela BIT].

56. *See* ConocoPhillips v. Venezuela, *supra* note 46, ¶ 212.

57. *Id.* ¶ 290(b).

58. *Id.* ¶ 290(a).

59. Venezuela's Investment Law, *supra* note 54, art. 22, as translated by the Claimants in ConocoPhillips v. Venezuela, *supra* note 46, ¶ 225. Although the Respondent proposed a different translation, *see* para. 225, the tribunal found that "[w]hile there are small differences between those translations the Parties do not see them as significant. Nor does the Tribunal." *Id.* (internal citations omitted).

The crucial issue before the tribunal was whether the words “should it so provide” meant that Venezuela had consented to submit to international arbitration if the applicable treaty or agreement, in this case, the ICSID Convention, so provided (the interpretation favored by the investors), or that consent to international arbitration must be expressly provided in a further treaty or agreement (the interpretation favored by Venezuela). After extensive analysis, the *ConocoPhillips* tribunal sided with Venezuela in finding that it lacked jurisdiction under Article 22 of the investment law.⁶⁰ This conclusion was consistent with prior decisions on jurisdiction in *Mobil v. Venezuela* and *Cemex v. Venezuela*, rejecting the investors’ claims that Article 22 contained Venezuela’s consent to ICSID jurisdiction.⁶¹

As to the merits, the tribunal rejected ConocoPhillips’s claims of denial of fair and equitable treatment, particularly in relation to certain tax measures. However, a majority of the tribunal found Venezuela liable for unlawful expropriation. The majority held that Venezuela had breached its obligation to negotiate in good faith over fair market value compensation for its taking of ConocoPhillips’s interests in the three projects,⁶² insisting instead in compensation based on book value.⁶³ The calculation of damages was reserved for a second phase, and is still ongoing as of the time of writing.

In contrast with the *ConocoPhillips* tribunal, the tribunal in *ExxonMobil v. Venezuela* accepted Venezuela’s argument that “mere lack of agreement on compensation does not render an expropriation unlawful.”⁶⁴ The tribunal found that Venezuela had participated in months of negotiations with ExxonMobil, and that the evidence submitted by ExxonMobil did not demonstrate that the proposals made by Venezuela were incompatible with the requirement of ‘just’ compensation required by the BIT.⁶⁵ Accordingly, the tribunal rejected the claim that the expropriation was unlawful.⁶⁶

60. *ConocoPhillips v. Venezuela*, *supra* note 46, ¶ 262.

61. See *ExxonMobil v. Venezuela*, *supra* note 51, Decision on Jurisdiction (June 10, 2010), ¶ 209, available at <http://www.italaw.com/sites/default/files/case-documents/ita0538.pdf>; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010), ¶ 160, available at <http://www.italaw.com/sites/default/files/case-documents/ita0142.pdf>.

62. *ConocoPhillips v. Venezuela*, *supra* note 46, ¶ 404.

63. *Id.*, *supra* note 46, ¶ 393. Following the *ConocoPhillips* decision on jurisdiction and the merits, Venezuela submitted a request for reconsideration but the majority of the tribunal found that it had no power to reconsider its earlier ruling. See *Id.*, Decision on Respondent’s Request for Reconsideration, Mar. 10, 2014.

64. *ExxonMobil v. Venezuela*, *supra* note 51, Award, Oct. 9, 2014, ¶ 144 (internal citations omitted).

65. *Id.* ¶ 305. Article 6(c) of the Netherlands-Venezuela BIT provides that compensation for expropriation or nationalization, or measures having an effect equivalent to nationalisation or

The distinction between “unlawful expropriation,” as found by the *ConocoPhillips* tribunal, and “lawful expropriation,” as found by the *ExxonMobil* tribunal, may be crucial, as a finding of unlawful expropriation could open the door for the arbitrators to depart from the BIT’s fair market value compensation standard (calculated immediately before the expropriatory measure was taken or became public knowledge) and look to customary international law for the standard of full reparation.⁶⁷ For instance, in *ConocoPhillips*, the tribunal found that the expropriation had been unlawful and it set the date of valuation of the expropriated assets as of the date of the award.⁶⁸

In contrast, the *ExxonMobil* tribunal held that the compensation due to *ExxonMobil* for the lawful expropriation of its assets must be calculated in conformity with the fair market value standard set out in Article 6(c) of the BIT.⁶⁹ However, the *ExxonMobil* tribunal left open the question of whether the standard for compensation in cases of unlawful expropriation would differ from the standard for compensation to be paid in cases of lawful expropriation.⁷⁰

B. Indirect Expropriation

The vast majority of BITs refer to both direct and indirect expropriation. Indirect expropriation may result from measures by the host State that substantially deprive the foreign investor of the profitability of its investment without affecting legal title. For instance, Article 3(1) of the U.S.-Ecuador BIT provides that:

“Investments shall not be expropriated or nationalized either directly or indirectly through *measures tantamount to expropriation* or nationalization (expropriation) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due

expropriation

“shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier, it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”

66. *Id.* ¶ 306.

67. *ConocoPhillips v. Venezuela*, *supra* note 46, ¶ 337.

68. *Id.*

69. *ExxonMobil v. Venezuela*, *supra* note 51, ¶ 306.

70. *Id.*

process of law”⁷¹

A recent case arising out of a measure “tantamount to an expropriation” is *Occidental Petroleum Corporation et al. v. Republic of Ecuador*.⁷² Occidental was Ecuador’s largest investor, responsible for roughly twenty percent of Ecuador’s total oil production.⁷³ Occidental, Ecuador, and Empresa Estatal Petróleos del Ecuador (PetroEcuador) were parties to a participation agreement whereby Occidental would receive a share of oil production in exchange for undertaking the obligation to explore, develop and exploit an oil block.⁷⁴

In May 2006, the Ecuadorian Minister of Energy and Mines declared the participation contract expired.⁷⁵ Shortly thereafter, the government seized Occidental’s oil fields, including wells, drills, storage facilities, and other oil exploration and production assets.⁷⁶ Ecuador characterized the measure as a “bona fide administrative sanction”⁷⁷ in response to Occidental’s conveyance of a forty percent operational working interest in the oil block to another company, in breach of transfer restrictions contained in the participation contract.⁷⁸ In response, Occidental filed an arbitration claim against Ecuador at ICSID under the U.S.-Ecuador BIT.⁷⁹

A majority of the tribunal found that Occidental had breached the participation agreement by failing to secure the required ministerial authorization for the transfer of rights.⁸⁰ In spite of the investor’s breach, the tribunal held that, “the [expiration] Decree was not a proportionate response in the particular circumstances”⁸¹ and was issued in breach of Ecuadorian law and customary international law.⁸² The majority ultimately found Ecuador liable for

71. Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Ecuador, art. 3(1), Aug. 27, 1993, S. TREATY DOC. NO. 103–15 (1993) (emphasis added).

72. See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5 2012), available at <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf> [hereinafter *Occidental v. Ecuador*].

73. *Ecuador Cancels an Oil Deal with Occidental Petroleum*, N.Y. TIMES, May 17, 2006, available at <http://www.nytimes.com/2006/05/17/business/worldbusiness/17oil.html>.

74. *Occidental v. Ecuador*, *supra* note 72, ¶¶ 115–116.

75. *Id.* ¶ 105.

76. *Id.* ¶ 200.

77. *Id.* ¶ 277(1).

78. *Id.* ¶ 244.

79. *Id.*

80. *Id.* ¶ 876(iv).

81. *Id.* ¶ 452.

82. *Id.* ¶ 876(i–iii).

failure to provide fair and equitable treatment and for indirectly expropriating Occidental's investment.⁸³

In the majority's view, Ecuador's taking of Occidental's investment by means of an administrative sanction was a measure 'tantamount to expropriation.'⁸⁴ In relation to the meaning of "tantamount to expropriation," the tribunal cited to *Metalclad v. Mexico*, where the tribunal said:

"Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."⁸⁵

The tribunal reduced the damages awarded to Occidental by a factor of twenty-five percent to account for the investor's breach of the participation agreement by improperly transferring a forty percent operational interest in the oil block.⁸⁶ One of the arbitrators dissented, emphasizing that liability should have been apportioned equally between Ecuador and Occidental.⁸⁷ The dissenter also noted that Occidental's transfer of a forty percent operational interest in the oil block had been valid (until declared invalid by a competent judge), and that therefore Occidental should only have received sixty percent of the total damages.⁸⁸ Ecuador filed an application for annulment; pending at the time of writing.

C. Fiscal or Regulatory Measures

A host State may also diminish the value or return of an investment by taking measures that modify the legal and economic equilibrium of the oil project, such as: an increase in the applicable tax rate, an imposition of windfall profit taxes or export taxes, or a failure to reimburse value added tax ("VAT"). These measures can also amount to an indirect expropriation in violation of an applicable BIT. However, the line between indirect expropriation and legitimate

83. *Id.*

84. *Id.* ¶ 455.

85. *Id.* (citing to *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000), available at <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>).

86. *Id.* ¶ 876(iv).

87. See *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 8 (Sept. 20, 2012) (Prof. Brigitte Stern dissenting opinion), available at <http://italaw.com/sites/default/files/case-documents/italaw1096.pdf>.

88. *Id.* ¶¶ 152–159.

governmental regulatory or tax measures is not clearly drawn and will depend on the specific facts and circumstances of the case.

1. *Windfall Profit Taxes*

In response to the oil-price spike that began in 2002, in April 2006 Ecuador enacted Law 42, which required oil companies to pay at least a fifty percent share of “extraordinary income” (the difference between the market price of Ecuadorian oil actually sold and the average market price of oil at the time the contracts were executed, multiplied by the number of barrels produced).⁸⁹ The implementing decree initially set the share of “extraordinary income” payable to the State at fifty percent.⁹⁰ Thereafter, in October 2007, Ecuador issued another decree increasing the government take from fifty to ninety-nine percent.⁹¹

At least four oil companies brought arbitration claims against Ecuador challenging the legality of “extraordinary income” or windfall profit tax under their contracts, Ecuadorian law, and/or a BIT.⁹² For instance, Burlington Resources Inc. (“Burlington”) brought a claim before ICSID under the U.S.-Ecuador BIT arguing that Law 42 was “a measure tantamount to expropriation,” which had a “destructive impact on Burlington’s investment”⁹³ in two participation agreements for Blocks 7 and 21, solely operated by Burlington’s French partner, Perenco Ecuador Ltd. (“Perenco”). Tensions over the collection of the windfall profit tax ultimately led to a declaration of expiration of the participation agreements for Blocks 7 and 21, and to the physical takeover of the oil fields.⁹⁴

89. Ley No. 2006-42 Ley Reformativa a la ley de Hidrocarburos [Law No. 2006-42 Hydrocarbons Reform Law], Apr. 20, 2006, REGISTRO OFICIAL No. 257, art. 2 (Ecuador).

90. See Executive Decree 1672, July 13, 2006, REGISTRO OFICIAL No. 312 (Ecuador).

91. See Executive Decree 662, Oct. 18, 2007, REGISTRO OFICIAL No. 193 (Ecuador).

92. See, e.g., *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (May 13, 2008), available at <http://www.italaw.com/documents/CityOrienteProvisional-En.pdf>; *Perenco Ecuador Ltd v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009), available at <http://www.italaw.com/sites/default/files/case-documents/ita0623.pdf>; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, available at http://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf [hereinafter *Burlington v. Ecuador*]; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4; *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0868.pdf>.

93. *Burlington v. Ecuador*, *supra* note 92, ¶ 109.

94. *Id.* ¶ 123.

The *Burlington* tribunal noted that, “the expropriation analysis must be on the investment as a whole, and not on discrete parts of the investment.”⁹⁵ According to the tribunal

“[b]y definition, [the Law 42] tax would appear not to have an impact upon the investment as a whole, but only on a portion of the profits. On the assumption that its effects are in line with its name, a windfall profits tax is unlikely to result in the expropriation of an investment.”⁹⁶

The majority of the tribunal found that Burlington had failed to substantiate the allegation that its investment had been expropriated or rendered worthless. Instead, the evidence showed that the investment was capable of generating a commercial return in spite of the enactment of Law 42 at fifty percent or ninety-nine percent.⁹⁷ While the windfall tax did not amount to an expropriation, the physical takeover of Blocks 7 and 21 to enforce Law 42 did.⁹⁸

Perenco brought a parallel claim against Ecuador under the Ecuador-France BIT based on the same operative facts as *Burlington v. Ecuador*, namely that Law 42 at fifty percent and ninety-nine percent, Ecuador’s declaration of expiration of the participation agreements, and the ensuing physical taking of Blocks 7 and 21 constituted an expropriation.⁹⁹ The *Perenco* tribunal agreed with the *Burlington* tribunal that Law 42 did not amount to an indirect expropriation.¹⁰⁰ The *Perenco* tribunal added that:

“Given the oil industry’s typically expected returns and its experience with governmental responses to market changes, it would be unsurprising to an experienced oil company that given its access to the State’s exhaustible natural resources, with the substantial increase in world oil prices, there was a chance that the State would wish to revisit the economic bargain underlying the contracts.”¹⁰¹

The *Perenco* tribunal did find that Law 42 at ninety-nine percent constituted a breach of contract.¹⁰² In the tribunal’s view, “Law 42 at ninety-

95. *Id.* ¶ 257.

96. *Id.* ¶ 404.

97. *Id.* ¶ 456.

98. *Id.* ¶ 123 (“Ecuador’s physical takeover of Blocks 7 and 21 was a complete and direct expropriation of Burlington’s investment.”).

99. *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, ¶¶ 85–215 (Sept. 12, 2014), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4003.pdf> [hereinafter *Perenco v. Ecuador*].

100. *Id.* ¶¶ 671, 680 (Perenco “did not press the point that at 50% Law 42 was itself an expropriation”).

101. *Id.* ¶ 588 (internal citations omitted).

102. *Id.* ¶ 407. Note that, whereas in *Burlington v. Ecuador*, the claimant’s subsidiaries, not the claimant itself, were party to the relevant participation agreements, Perenco was party to the participation contracts for Blocks 7 and 21, which contained provisions providing for ICSID arbitration. Therefore, Perenco, unlike Burlington, advanced its contract claims alongside its treaty

nine percent unilaterally converted the Participation Contracts into *de facto* service contracts while the State developed a new model of such contracts which it demanded the contractor to sign.”¹⁰³ The tribunal also found that Ecuador’s declaration that the contracts had expired on July 20, 2010 amounted to an expropriation of Perenco’s contractual rights.¹⁰⁴

2. Export Taxes

The imposition of export withholding taxes on hydrocarbons may also frustrate the expectations of an oil investor. In 2002, Argentina imposed export taxes on crude oil, natural gas, and liquefied petroleum gas (LPG).¹⁰⁵ In 2004 and 2007, Argentina again increased the export taxes on crude oil and fuel. These taxes, borne by the exporter, were designed to prevent producers from receiving more than forty-two U.S. dollars per barrel of oil produced.¹⁰⁶ At least five companies brought arbitration claims alleging that the export taxes violated their BIT rights.¹⁰⁷

French-based Total S.A. brought a claim before ICSID under the Argentina-France BIT arguing that Argentina’s imposition of export taxes on crude oil, natural gas and LPG as of 2002 breached the fair and equitable treatment standard contained in the BIT.¹⁰⁸ In particular, the company complained that the export taxes violated the guarantees contained in a series of decrees adopted by Argentina in 1989, which provided that producers would have the right to receive compensation if the government imposed restrictions on the export of crude oil and its derivatives or on the free availability of natural gas.¹⁰⁹

claims.

103. *Id.* ¶ 409.

104. *Id.* ¶ 710.

105. Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010) ¶¶ 370–376, available at <http://italaw.com/sites/default/files/case-documents/ita0868.pdf> [hereinafter Total S.A. v. Argentine Republic].

106. *Id.* ¶ 380. Any excess amounts were to be retained by Argentina.

107. See El Paso Energy Int’l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), available at http://www.italaw.com/documents/El_Paso_v._Argentina_Award_ENG.pdf; Pan Am. Energy LLC v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006), available at <http://www.italaw.com/sites/default/files/case-documents/ita0616.pdf>; BP Am. Prod. Co. v. Argentine Republic, ICSID Case No. ARB/04/8; Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0907.pdf>; Total S.A. v. Argentine Republic, *supra* note 105.

108. Total S.A. v. Argentine Republic, *supra* note 105, ¶ 381.

109. *Id.* ¶¶ 352–354.

The tribunal rejected Total S.A.'s claim that the export taxes had restricted its exports in violation of the BIT.¹¹⁰ In the tribunal's view, the export taxes constituted "fiscal measures (to which oil producing and exporting countries normally have recourse) generally addressed to the exporters of crude oil and their derivatives (not specifically to Total)."¹¹¹ These export taxes, the tribunal added, are part of the general fiscal legislation to which Total S.A. is subject.¹¹² Moreover, the concession did not promise "fiscal stability" or an exemption from potential government intervention.¹¹³

3. *Value-added Tax (VAT) Reimbursement*

As a way to attract foreign capital, host States have traditionally reimbursed to foreign investors the VAT these investors had paid on purchases of goods and services required for exploration and production activities in the host State. States' refusal to reimburse VAT in such cases may give rise to energy-related disputes. For instance, in November 2013, Occidental Exploration and Production Company (Occidental E&P) initiated an arbitration claim against Ecuador arguing that Ecuador's denial of its application for VAT refunds violated the U.S.-Ecuador BIT's guarantees of fair and equitable treatment and national treatment, and its protection against expropriation without compensation.¹¹⁴

Under the 1999 participation agreement between Occidental E&P and Petroecuador, Occidental E&P was entitled to a participation formula expressed as a percentage of oil production.¹¹⁵ Occidental E&P argued that under the tax regime, it was entitled to reimbursement of VAT paid as a result of importation or local acquisition of goods and services used for the production of oil.¹¹⁶ In turn, Ecuador claimed that the tribunal lacked jurisdiction over Occidental E&P's claims because the BIT excluded matters of taxation from the scope of its application.¹¹⁷

The tribunal rejected Ecuador's jurisdictional objection on the basis that what was really in dispute was not a tax matter (as the tax was "unchallengedly

110. *Id.* ¶ 470.

111. *Id.*

112. *Id.* ¶ 470.

113. *Id.* ¶ 435.

114. Occidental Exploration and Prod. Co. v. Republic of Ecuador, Case No. UN 3467, Final Award, ¶¶ 1–4 (London Ct. of Int'l Arb. 2004), available at <http://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>.

115. *Id.* ¶ 28.

116. *Id.* ¶ 30.

117. *Id.* ¶ 64.

due and owing and in fact paid”¹¹⁸), but whether the VAT refund had been secured under Occidental E&P’s participation share, as claimed by Ecuador, or whether, as argued by the claimant, it should be recognized as a right under Ecuadorian tax law.¹¹⁹ On the merits, the tribunal sided with Occidental E&P, finding that: (1) the contract did not contemplate that VAT would be reimbursed through the participation percentage that Ecuador received under the participation agreement;¹²⁰ and (2) Occidental E&P was entitled to reimbursement under Ecuador’s tax laws.¹²¹

The tribunal upheld Occidental E&P’s claims under the BIT’s fair and equitable treatment standard on the basis that Ecuador’s denial of Occidental E&P’s VAT reimbursement applications significantly changed the framework under which its investment had been made.¹²² The tribunal also upheld Occidental E&P’s claim under the national treatment clause of the BIT because Ecuadorian companies that exported non-petroleum products continued to receive VAT refunds.¹²³ However, the tribunal rejected Occidental E&P’s expropriation claim on the grounds that Ecuador’s denial of VAT reimbursement did not amount to deprivation of the use or reasonably expected economic benefit of the investment.¹²⁴

EnCana Corporation filed similar claims against Ecuador under the Canada-Ecuador BIT.¹²⁵ In 1995, two of EnCana’s subsidiaries entered into participation agreements with Petroecuador entitling them to receive a percentage of the production.¹²⁶ Starting in 2001, Ecuador’s tax authorities denied the subsidiaries’ claims for VAT refunds.¹²⁷ In August 2004, following the ruling in favor of Occidental E&P, Ecuador enacted an interpretive law providing that Article 69A of the Tax Law is interpreted to mean that VAT is not applicable to petroleum activity because petroleum is not manufactured but is instead extracted from deposits.¹²⁸

118. *Id.* ¶ 74.

119. *Id.*

120. *Id.* ¶ 110.

121. *Id.* ¶ 143.

122. *Id.* ¶ 190.

123. *Id.* ¶ 177.

124. *Id.* ¶ 89.

125. *EnCana Corporation v. Republic of Ecuador*, Case No. UN 3481, Award, (London Ct. of Int’l Arb. 2006), available at http://www.italaw.com/sites/default/files/case-documents/ita0285_0.pdf [hereinafter *EnCana v. Ecuador*].

126. *Id.* ¶ 31.

127. *Id.* ¶ 73. Ecuador’s internal revenue service is known as *Servicio de Rentas Internas* (SRI).

128. *Id.* ¶ 95.

At issue in *EnCana* were VAT refunds to which the Claimant was allegedly entitled under Ecuadorian laws and regulations. Departing from the Occidental E&P award, the EnCana tribunal held that it had jurisdiction over EnCana's expropriation claims but not over its other claims under the Canada-Ecuador BIT.¹²⁹ Article XII of the BIT excluded claims related to "taxation measures" from the scope of the treaty, except for a claim that a taxation measure was "in breach of an agreement between the central government authorities of a Contracting Party and the investor" and for an expropriation claim.¹³⁰

The first exception was inapplicable because EnCana did not claim a "breach" of the participation contracts. In any event, there was "no relevant agreement between EnCana and the central government authorities of Ecuador" because the participation contracts were concluded by EnCana subsidiaries, which did not qualify as investors under the BIT.¹³¹ Although the tribunal assumed jurisdiction over EnCana's expropriation claims under the second exception, it rejected EnCana's claim that Ecuador's denial of VAT constituted a direct or an indirect expropriation of its investments.¹³²

As to the direct expropriation claim, the tribunal first found that a claim concerning the retrospective cancellation of the State's liability to pay money on account of tax refunds due could, in principle, qualify as an "investment" under the BIT.¹³³ However, the tribunal noted that, after the passage of the interpretive law, oil companies had no right to VAT refunds.¹³⁴ Even if they had such right, the tax authorities' policy on oil refunds did not rise to the level of repudiation of a legal right so as to amount to a direct or indirect expropriation of accrued rights to VAT refunds.¹³⁵

The tribunal rejected the indirect expropriation claim on the grounds that nothing in the record showed that "the change in VAT laws or their interpretation brought the companies to a standstill or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments."¹³⁶ Moreover, the tribunal noted that "[i]n the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime

129. *Id.* ¶¶ 112–168.

130. *Id.* ¶ 109.

131. *Id.* ¶¶ 171–172, 179–182.

132. *Id.*

133. *Id.* ¶ 183.

134. *Id.* ¶ 187.

135. *Id.* ¶ 197.

136. *Id.* ¶ 174.

will not change, perhaps to its disadvantage, during the period of the investment.”¹³⁷

III.

A BACKLASH AGAINST INTERNATIONAL ARBITRATION?

The increasing number of investment arbitration claims (and awards) against Latin American States has brought about a debate about the appropriateness and fairness of the current investor-State dispute settlement system.¹³⁸ The debate has translated into action as some Latin American countries have taken steps to insulate themselves from the system.¹³⁹ These steps include: the termination, renegotiation or non-renewal of BITs, denunciation of the ICSID Convention, the adoption of domestic legislation adverse to international arbitration, the exclusion of ICSID in new BITs, contractual waivers of international arbitration, and proposals for the creation of a regional arbitration center as an alternative to ICSID.¹⁴⁰

Two caveats must be made. First, these steps have been taken by a limited number of Latin American countries. Therefore, the so-called Latin American “backlash” against international investment arbitration may be an overstatement. Second, as far as arbitrations involving private commercial parties are concerned, Latin American States progressively accepted arbitration as an adequate and effective means of dispute resolution. The more apparent setbacks are related to arbitrations involving State parties and foreign investors under BITs.

A. *Termination, Renegotiation or Nonrenewal of BITs*

The host State may denounce BITs, which generally provide access to international arbitration to qualifying investors under the auspices of the ICSID, ad hoc arbitration under UNCITRAL rules, or arbitration under other arbitration rules. For instance, in April 2008, Venezuela sent a formal communication to the Netherlands indicating Venezuela’s intention not to renew the Netherlands-Venezuela BIT.¹⁴¹ The Venezuelan Minister of Energy and Petroleum explained

137. *Id.* ¶ 173.

138. See, e.g., Bernardo M. Cremades, *The Resurgence of the Calvo Doctrine in Latin America*, 7 *BUS. L. INT’L* 53 (2006).

139. See generally Katia Fach Gomez, *Latin America and ICSID: David versus Goliath*, 17 *L. & Bus. Rev. Am.* 195 (2011).

140. *Id.*

141. See Luke Eric Peterson, *Venezuela surprises The Netherlands with termination notice for BIT; treaty has been used by many investors to ‘route’ investments into Venezuela*, *INV. ARB. REP.*

that the decision was adopted because certain companies had abused corporate nationality. The Minister explained, "CNPC registers as Dutch, Eni registers as Dutch, ExxonMobil turned out to be Dutch as well. There is clearly an abuse of the treaty and we are going to denounce it."¹⁴²

Similarly, on January 6, 2010, the President of Ecuador requested that the Ecuadorian Constitutional Court issue a decision denouncing thirteen BITs, including those between Ecuador and Argentina, Canada, Chile, China, Finland, France, Germany, Sweden, Switzerland, Netherlands, United Kingdom and Ireland, United States of America, and Venezuela.¹⁴³ Ecuador's Constitutional Court concluded that the clauses concerning investor-State arbitration in certain BITs are contrary to the Constitution of Ecuador.¹⁴⁴ Bolivia has also announced that it will revisit its BITs.¹⁴⁵

The immediate legal effects of denunciation or non-renewal of BITs are limited because the protections offered by these treaties generally survive for a period of five to fifteen years after termination, expiration, or non-renewal.¹⁴⁶ Therefore, even if the State is not obligated to offer treaty protection to

(May 16, 2008), available at http://www.iareporter.com/articles/20091001_93.

142. *Venezuela Denunciará Acuerdo en Holanda Por "Abuso" de Exxon y Otras Empresas*, [Venezuela Will Denounce Agreement with the Netherlands for Abuse of Exxon and Other Businesses], EL ECONOMISTA (Apr. 21, 2008), available at <http://www.economista.es/empresas-finanzas/noticias/489075/04/08/Venezuela-denunciara-acuerdo-en-Holanda-por-abuso-de-Exxon-y-otras-empresas.html>. (However, the reference to "denunciation" is not correct because the treaty was simply not renewed by Venezuela.)

143. See Letter Number T.4766-SNJ-10-21 from President Correa to the President of the Constitutional Court, dated Jan. 6, 2010 (contending that the U.S. and other BITs "contain clauses that contradict the Constitution" and requesting "a favorable opinion to denounce the Bilateral Investment Treaties").

144. See, e.g., Constitutional Court of Ecuador, Resolution No. 043-10-DTI-CC, Case No. 0013-10-TI, Nov. 25, 2010 (Ecuador-United States BIT), available at <http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/7633e338-42eb-4e06-9cb8-f427e6125f7c/0013-10-TI-res.pdf?guest=true>; see also Constitutional Court of Ecuador, Resolution No. 035-10-DTI-CC, Case No. 0003-10-TI, Oct. 7, 2010 (Canada-Ecuador BIT), available at <http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/29148308-43b1-4dcc-a71d-00bf6ba3f70b/0003-10-TI-res.pdf?guest=true>.

145. Damon Vis-Dunbar et al., *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, INV. TREATY NEWS (ITN) (May 9, 2007), http://www.iisd.org/pdf/2007/itm_may9_2007.pdf.

146. The scope of the survival clause is also subject to some level of interpretation. See generally Elisabeth Eljuri & Pedro J. Saghy, *BIT Termination and the Survival Clause. What Does the Concept of Protection of Investments Made Prior to Termination of the BIT Actually Cover?*, IBA Conference Material, 2008.

investments made after termination of the BIT, investments undertaken prior to termination benefit from the BIT's survival clause.¹⁴⁷

B. Denunciation of the ICSID Convention

A host State may also denounce the ICSID Convention. Article 71 of the ICSID Convention provides that any contracting State may denounce the Convention by written notice to the Convention depositary.¹⁴⁸ Under Article 71, denunciation takes effect six months after the Convention depositary receives notice.¹⁴⁹

Thus far three Latin American countries—Bolivia, Ecuador and Venezuela—have withdrawn from the ICSID Convention. Bolivia became the first State in the history of the ICSID Convention to denounce it in May 2007,¹⁵⁰ followed by Ecuador in July 2009,¹⁵¹ and next by Venezuela in January 2012.¹⁵²

Other countries declared their intention to denounce the ICSID Convention during the Fifth Summit of the Member States of the Bolivarian Alliance for the Americas (ALBA), but these countries have yet to act on their threats.¹⁵³ More recently, public statements by Argentina's Chief Legal Advisor to the Treasury and a draft bill from March 2012 triggered speculation about Argentina's potential denunciation of the ICSID Convention, but Argentina has yet to withdraw from ICSID.¹⁵⁴

147. See, e.g., Netherlands-Venezuela BIT, *supra* note 55, art. 14(3) provides: "In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date."

148. ICSID CONVENTION, *supra* note 28, art. 71.

149. *Id.* ("Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.").

150. Press Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007).

151. Press Release, ICSID, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009).

152. Press Release, ICSID, Venezuela Submits a Notice Under Article 71 of the ICSID Convention (Jan. 26, 2012).

153. See Emmanuel Gaillard, *Anti-Arbitration Trends in Latin America*, N.Y. L.J. (June 5, 2008), available at http://www.shearman.com/~media/Files/NewsInsights/Publications/2008/07/AntiArbitration-Trends-in-Latin-America/Files/View-Full-Text/FileAttachment/IA_070208_03.pdf.

154. See Docket No. 1311-D-2012, Derogación de la ley 24353 de Adhesión de la República Argentina al Convenio Sobre Arreglos de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados adoptado en Washington—Estados Unidos de América—el 18 de marzo de 1965 [Repeal of the Act of Accession 24353 Argentina to the Convention on the

The effect of denouncing the ICSID Convention has been the subject of much debate. Article 72 provides that notice of denunciation “shall not affect the rights or obligations . . . of that State . . . or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”¹⁵⁵ ICSID tribunals must determine whether an investor may “consent” to ICSID jurisdiction within the six-month period contemplated by Article 71, or after denunciation takes effect.

In any event, a BIT dispute resolution clause may well provide for alternative dispute resolution options under ICSID. Ad hoc arbitration under UNCITRAL Rules and institutional arbitration under the auspices of the Stockholm Chamber of Commerce or the ICC are possible alternatives.

C. Article 25(4) Notice of Class of Disputes Not To Be Submitted to ICSID Jurisdiction

Article 25(4) of the ICSID Convention allows a contracting State to notify the Centre of the class or classes of disputes that the State would or would not consider submitting to the jurisdiction of the Centre.¹⁵⁶ Thus, if a State is a signatory to the ICSID Convention, that State could serve notice to ICSID that it will no longer consent to ICSID jurisdiction as a forum to resolve energy-related disputes with foreign investors.

For instance, prior to denouncing the ICSID Convention, Ecuador had notified ICSID, in accordance with Article 25(4), that “it will not accept to submit to the jurisdiction of the Centre disputes related to the management of its non-renewable natural resources, understanding as such (but not limited to) mining resources and hydrocarbons.”¹⁵⁷ The legal effect of Ecuador’s Article

Settlement of Investment Disputes Between States and Nationals of Other States Adopted in Washington—United States—Mar. 18, 1965], Mar. 21, 2012, <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012> (Arg.).

155. ICSID CONVENTION, *supra* note 28, art. 72 (“Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”).

156. *Id.* art. 25(4) (“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).”).

157. Press Release, ICSID, Ecuador’s Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007).

25(4) notification is controversial but moot in light of Ecuador's subsequent denunciation of the ICSID Convention altogether.¹⁵⁸

D. Domestic Legislation Limiting Access to International Arbitration

The host State could enact legislation or constitutional amendments seeking to shield the State from international arbitration. Recently, some Latin American countries have adopted new constitutions or have interpreted their existing constitutions to limit access to international arbitration. For instance, Article 320 of the 2009 Bolivian Constitution provides that "foreign investment shall submit to Bolivian jurisdiction, laws and authorities." Article 366 expressly excludes international arbitration for the resolution of disputes in the hydrocarbons productive chain:

Every foreign enterprise that conducts activities in the hydrocarbons production chain in the name and representation of the State shall be subject to the sovereignty of the State, and to the laws and authority of the State. No foreign court or foreign jurisdiction shall be recognized, and foreign investors may not invoke any exceptional situation for international arbitration, nor resort to diplomatic claims. (Authors' translation.)¹⁵⁹

Similarly, Article 422 of the 2008 Ecuadorian Constitution prohibits the State from concluding treaties or international instruments in which Ecuador would cede sovereign jurisdiction to international arbitration tribunals in contractual or commercial disputes between the State and physical or juridical persons.¹⁶⁰ On the basis of Article 422, the Constitutional Court of Ecuador declared several BITs unconstitutional in July 2010.¹⁶¹

Article 422, however, provides for an important exception: The prohibition shall not apply to "the international treaties and instruments providing for the resolution of disputes between States and citizens of Latin America by regional arbitral instances or by jurisdictional organs designated by the contracting States." In short, Article 422 of the Constitution of Ecuador rejects the current

158. For a discussion of the legal effects of a notification under Article 25(4) of the ICSID Convention, see PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶ 144 et seq. (June 4, 2004) <http://italaw.com/documents/PSEGGlobal-Turkey-Award.pdf>.

159. CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA [Political Constitution of the Plurinational State of Bolivia], art. 366, 25 de enero de 2009 (Bol.) (translated by the authors).

160. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [Constitution of the Republic of Ecuador], art. 422, REGISTRO OFICIAL 449, 20 de octubre de 2008 (Ecuador).

161. Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 AM. REV. INT'L ARB. 269, 269 (2008).

investor-State arbitration system but appears to contemplate the creation of regional arbitration mechanisms.¹⁶²

In a similar vein, Mexico's new hydrocarbons law provides that dispute resolution mechanisms may be used for the resolution of disputes related to exploration and production contracts, including arbitration agreements in the terms of the Mexican Commercial Code and international treaties to which Mexico is party.¹⁶³ However, the law provides that disputes arising out of the unilateral administrative rescission of an exploration and production contract are nonarbitrable.¹⁶⁴ The potential overlap between contractual disputes and disputes arising out of unilateral administrative terminations of exploration and production contracts could give rise to interesting arbitrability challenges.

Moreover, under Mexican law, an arbitration proceeding in connection with exploration and production contracts is subject to the following conditions: (1) the applicable laws must be Mexican Federal Laws; (2) the arbitration must be conducted in Spanish; and (3) the award must be strictly in accordance with the law and binding and final for both parties.¹⁶⁵ The interaction between the choice-of-law provision of Mexico's new hydrocarbons law and the choice-of-law clauses of many of Mexico's BITs raises interesting issues. For instance, Article 27 of the China-Mexico BIT provides that "[an investor-State] tribunal established under this Section [entitled 'Constitution of the Arbitral Tribunal'] shall decide the issues in dispute in accordance with this Agreement and with the applicable rules and principles of international law."¹⁶⁶

162. *Id.* at 269.

163. Decreto por el que se Expide la Ley de Hidrocarburos y se Reforman Diversas Disposiciones de la Ley de Inversión Extranjera: Ley Minera, y Ley de Asociaciones Público Privadas [Decree Whereby the Hydrocarbon Law is Issued and Reforms Various Provisions of the Law of Foreign Investment: Mining Law, and Law on Public-Private Partnerships], *Diario Oficial de la Federación* [DO], 11 de Agosto de 2014 (Mex.). Art. 21 provides (in Spanish):

"Tratándose de controversias referidas a los Contratos para la Exploración y Extracción, con excepción de lo mencionado en el artículo anterior [regulando la rescisión administrativa], se podrán prever mecanismos alternativos para su solución, incluyendo acuerdos arbitrales en términos de lo dispuesto en el Título Cuarto del Libro Quinto del Código de Comercio y los tratados internacionales en materia de arbitraje y solución de controversias de los que México sea parte. La Comisión Nacional de Hidrocarburos y los Contratistas no se someterán, en ningún caso, a leyes extranjeras. El procedimiento arbitral en todo caso, se ajustará a lo siguiente: (i) Las leyes aplicables serán las Leyes Federales Mexicanas; (ii) Se realizará en idioma español, y (iii) El laudo será dictado en estricto derecho y será obligatorio y firme para ambas partes."

164. *Id.*

165. *Id.*

166. Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, Mex.-

E. Exclusion of ICSID in New BITs

Recently, Venezuela has entered into BITs with Cuba, Iran, Belarus and Russia. These BITs include dispute resolution provisions that exclude ICSID as a dispute resolution option.¹⁶⁷ For instance, the BITs between Venezuela and Cuba, and between Venezuela and Belarus offer the option of resorting to arbitration under UNCITRAL Rules.¹⁶⁸ The BIT between Venezuela and Russia provides, in addition to UNCITRAL arbitration, the option of resorting to the Stockholm Chamber of Commerce.¹⁶⁹

This trend to exclude ICSID as a dispute resolution option may be limited to a minority of countries. Several other BITs recently entered into by other Latin American countries contemplate the option of resorting to ICSID arbitration under the ICSID Convention or the ICSID Additional Facility Rules.¹⁷⁰ For instance, the BIT between Chile and Iceland, signed in 2006, provides for ICSID arbitration, *ad hoc* arbitration under UNCITRAL Rules, and ICC arbitration.¹⁷¹ Similarly, the BIT between Nicaragua and Belgium-Luxembourg, signed in 2005, provides for ICSID arbitration, *ad hoc* arbitration under UNCITRAL Rules, and ICC arbitration.¹⁷² In addition, The BIT between

China, at. 27, Nov. 7, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/759>.

167. See Ley Aprobatoria del “Acuerdo Entre el Gobierno de la República de Venezuela y el Gobierno de la República de Cuba para la Promoción y Protección Recíproca de Inversiones [Investment Treaty Between Venezuela and Cuba] art. 9, Cuba-Venez., Dec. 11, 1996, GACETA OFICIAL No. 37.913 (Venez.) [hereinafter Cuba-Venezuela BIT (1996)]; Iran-Venezuela BIT (2006); Ley Aprobatoria del Acuerdo Entre la República de Venezuela y el Gobierno de la República de Belarús Sobre Promoción y Protección Recíproca de Inversiones [Bilateral Investment Treaty Between Venezuela and Belarus] art. 8, Belr.-Venez., Dec. 6, 2007, GACETA OFICIAL No. 38.894 (Venez.) [hereinafter Belarus-Venezuela BIT (2008)]; Ley Aprobatoria del Acuerdo Entre el Gobierno de la República Bolivariana de Venezuela y el Gobierno de la Federación de Rusia Sobre la Promoción y Protección Recíproca de Inversiones, [Bilateral Investment Treaty Between Venezuela and Russia] art. 8, Russ.-Venez., Nov. 7, 2008, GACETA OFICIAL No. 39.191 (Venez.) [hereinafter Russian Federation-Venezuela BIT (2008)].

168. See Cuba-Venezuela BIT (1996), *supra* note 167, at. 9; Belarus-Venezuela BIT (2008), *supra* note 167, at. 8.

169. See Russian Federation-Venezuela BIT (2008), *supra* note 167, at. 9.

170. See, e.g., Convenio Entre El Gobierno de la República de Chile y El Gobierno de la República de Islandia Para la Promoción y Protección Recíproca de las Inversiones [Bilateral Investment Treaty Between Chile and Iceland] art. 8, Chile-Ice., June 26, 2003, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/685> [hereinafter Chile-Iceland BIT (2003)]; Agreement Between the Belgo-Luxembourg Economic Union, on the One Hand, and the Republic of Nicaragua, on the Other Hand, on Reciprocal Promotion and Protection of Investments art. 12, BLEU (Belg.-Lux. Econ. Union)-Nicar., May 27, 2005, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/394> [hereinafter Belgo-Luxembourg Economic Union-Nicaragua BIT (2005)].

171. See Chile-Iceland BIT (2003), *supra* note 170, art. 8.

172. See Belgo-Luxembourg Economic Union-Nicaragua BIT (2005), *supra* note 170, at 12.

Colombia and Spain, signed in 2007, offers the option of resorting to domestic tribunals, to *ad hoc* arbitration under UNCITRAL Rules, to ICSID, or the ICSID Additional Facility.¹⁷³

F. Express Waiver of International Arbitration

The host State may use its soft power to restrict or reduce access to international arbitration. For instance, the State, State agency, or State-owned entity may demand an explicit waiver of the right to resort to international arbitration as a pre-requisite to entering into a contract or, if there is a contract in place, as a condition to continue operating in the country. It is unclear how often States attempt to impose waivers of investment arbitration in contracts between the State and an individual investor, although some reports suggest that it is “a frequent problem.”¹⁷⁴ For instance, the Colombian model concession agreement, originally contained a provision stating that

[t]he Parties agree not to resort to investment arbitration contemplated in any Bilateral Investment Treaty or other international treaty that may contain the aforementioned protection and that may come to be applicable, when a controversy has arisen between the Parties relating to the initiation, execution or termination of the present Contract, in which case the parties should resort to the dispute resolution mechanisms referred to in the present Contract to resolve such controversies.¹⁷⁵

Contractual waivers of investment arbitration raise a large number of vexing questions, including questions as to applicable law, jurisdiction and admissibility, as well as policy considerations.¹⁷⁶ Moreover, there is limited authority available concerning the effectiveness of contractual waivers of investment treaty arbitration.¹⁷⁷

The State could also threaten to cancel the contract or to exclude from future contracts any company that resorts to international arbitration against the

173. See Acuerdo Entre la República de Colombia y el Reino de España para la Promoción y Protección Recíproca de Inversiones [Bilateral Investment Treaty Between Colombia and Spain], Colom.-Spain, at. 10, Mar. 31, 2005, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/801>.

174. See S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?*, 29 ICSID REV.-FOR. INV. L. J 2 (2014) (citing to Sebastian Perry, *Colombia Asks Investors to Waive Treaty Rights*, GLOBAL ARB. REV. (Nov. 21, 2013)).

175. See República de Colombia, Ministerio de Transporte, Agencia Nacional de Infraestructura, Contrato de Concesión Bajo el Esquema de APP No. [*] de [*], available at http://www.globalarbitrationreview.com/cdn/files/gar/articles/PPP_Model_Contract.pdf. The model concession contract no longer contains this clause.

176. See generally Strong, *supra* note 174.

177. *Id.*; see also Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction Under Bilateral Investment Treaties*, 20 ARB. INT'L 179, 183 (2004).

State.¹⁷⁸ Reportedly, in 2008, Ecuador announced that it would “consider contracts with oil companies terminated unless they remove the International Centre for Settlement of Investment Dispute (ICSID) as the venue of arbitration.”¹⁷⁹ Venezuela also excluded certain oil companies from prequalification processes for future rounds if they had pending litigation (including arbitration) against the State.

G. Forum-Selection and Arbitration Clauses

The host State or contracting State entity may refuse to agree to international arbitration agreement in energy investment agreements. It is no secret that host States typically provide a model contract with boilerplate terms to the participants of a bidding round. The leverage of the oil investor in negotiating more preferable bargaining outcomes will depend on several factors, such as the attractiveness and potential profitability of the project, oil prices, the number of bids received, the State’s need for capital investment, the strategic relation between the host State and the home State of an oil investor (if any), and the negotiation strategy followed by the investor.¹⁸⁰ In times of high oil prices, the bargaining power of the investor will tend to be lower, and vice-versa.

For instance, the model mixed company contract between Corporación Venezolana del Petróleo S.A. (CVP) and private entities for the undertaking of primary hydrocarbons activities provides that, “[t]he disputes and controversies arising out of a breach of the conditions, terms, procedures and actions that constitute the object of the contract or derive from it, shall be resolved in accordance with the legislation of the Bolivarian Republic of Venezuela and before its jurisdictional organs.”¹⁸¹ The authors are not aware of any instances in which foreign companies have successfully negotiated the inclusion of an international arbitration clause in a mixed company contract with CVP.

178. See, e.g., Fernando Cabrera Diaz, *Ecuador Threatens Cancellation of Oil Contracts Unless ICSID Nixed as Arbitration Forum*, INVESTMENT TREATY NEWS, Aug. 29, 2009, available at <http://www.iisd.org/itn/2008/08/29/ecuador-threatens-cancellation-of-oil-contracts-unless-icsid-nixed-as-arbitration-forum/>.

179. *Id.*

180. For a discussion of the dynamics of the host State-international oil company (IOC) bargaining relationship, see Vlado Vivoda, *International Oil Companies and Host States: A New Bargaining Model*, OIL GAS & ENERGY L. INTELLIGENCE, Oct. 2011, at 1.

181. See, e.g., Agreement whereby the Constitution of a Mixed Company between Corporación Venezolana del Petróleo (CVP) and the Company GAZPOMBANK Latin America Ventures B.V. (GAZPOMBANK) or its Respective Affiliates, is Approved by the National Assembly, Official Gazette No. 39,859, Feb. 7, 2012 Art. 12 provides (in Spanish): “Las diferencias y controversias que deriven del incumplimiento de las condiciones, pautas, procedimientos y actuaciones que constituyen el objeto del presente documento o deriven del mismo, serán dilucidadas de acuerdo con la legislación de la República Bolivariana de Venezuela y ante sus organismos jurisdiccionales.”

However, such clauses have been included in financing agreements in connection with oil and gas projects or in non upstream-related contracts.

Ecuador's 2012 model exploration and production services contract provides for *ad hoc* arbitration under the 1976 UNCITRAL Rules for the resolution of disputes "relating to the application, interpretation, performance, breach, as well as the effects of early termination or violation of the Applicable Law or other circumstances related to this Contract."¹⁸² The clause further provides that if the amount in dispute is unknown or exceeds U.S. \$10 million, the arbitration shall be administered by the Permanent Court of Arbitration (PCA) in The Hague. All other cases will be administered by the Arbitration and Mediation Center of the Quito Chamber of Commerce.¹⁸³ However, clause 31.7 of the Model Contract excludes from arbitral jurisdiction all controversies arising out of a declaration of expiration, which shall be resolved exclusively by competent Ecuadorian tribunals.¹⁸⁴

In contrast, the Brazilian 2013 model production-sharing contract for exploration and production of oil and natural gas also contains an international arbitration clause providing for *ad hoc* arbitration under UNCITRAL Rules, seated in the city of Rio de Janeiro, and conducted in Portuguese.¹⁸⁵ The model contract also provides that "the arbitrators shall decide on the basis of the Brazilian substantive laws."¹⁸⁶ The model contract, however, leaves open the possibility that the parties, by common agreement, may choose ICC arbitration "or another Arbitration Chamber notoriously recognized and of unblemished reputation."¹⁸⁷

182. See Contrato de Prestación de Servicios para la Exploración y Explotación de Hidrocarburos (Petróleo Crudo), En el Bloque . . . De La Región Amazónica Ecuatoriana [Contract for the Provision of Services for the Exploration and Exploitation of Hydrocarbons (Crude Oil), in the Block. . . The Amazon Region of Ecuador] (on file with authors) (translated by authors).

183. *Id.*

184. *Id.* cl. 31.7.

185. See Brazilian Production Sharing Contract for Exploration and Production of Oil and Natural Gas (on file with authors). Clause 36.4 provides:

If, at any moment, one of the Parties considers that there are no conditions for an amicable settlement of the dispute or controversy referred to in paragraph, such matter or controversy should be submitted to arbitration *ad hoc*, using as parameter the rules laid down in the Regulation of Arbitration (Arbitration Rules) of the United Nations Commission on International Trade Law - UNCITRAL and in line with the following precepts: (a) The choice of arbitrators shall follow the standard established in the Arbitration Rules of UNCITRAL. . . . The city of Rio de Janeiro, Brazil, will be the seat of arbitration and the place of delivery of the arbitral award. The language to be used in the arbitration proceeding shall be the Portuguese. . . .

186. *Id.* cl. 36.4(f).

187. *Id.* cl. 36.5.

H. UNASUR: A Regional Alternative to ICSID?

A number of Latin American States have proposed the creation of a regional arbitration center as a response to their dissatisfaction with the current system of international investor-State arbitration.¹⁸⁸ In April 2013, the First Ministerial Conference of Latin American States Affected by Transnational Interests convened in Ecuador. It brought together ALBA member States and representatives from Mexico, Honduras, El Salvador, Guatemala and Argentina. The conference resulted in the adoption of a declaration and an agreement by the signatory parties: “[t]o support the constitution and implementation of regional organs for settling investment disputes to ensure fair and balanced rules when settling disputes between corporations and States.”¹⁸⁹

The South American Union of Nations (UNASUR)¹⁹⁰ was formed in 2008. It is currently composed of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. UNASUR serves as the negotiation forum for a regional dispute settlement body not yet constituted as of this Article’s writing but expected to be running in 2015.¹⁹¹

IV.

THE PURSUIT OF STABILITY IN ENERGY INVESTMENT CONTRACTS

The relationship between a foreign investor and the host State is infused with at least three tensions: the State, as *owner* of the oil resources, determines the scope of property rights or participation that the foreign investor may acquire in the energy sector. The State, as *contracting party*, makes direct promises to the foreign investor (and vice-versa). And the State, as *sovereign*, controls the legal and physical framework in which the contract takes shape.

188. See Silvia Karina Fiezzoni, *UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador’s Proposal*, INV. TREATY NEWS (Jan. 12, 2012), <http://www.iisd.org/itn/2012/01/12/unasur/>.

189. Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests, signed by representatives from Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, St. Vincent and Grenadine, and Venezuela in the city of Guayaquil, Ecuador (Apr. 22, 2013), http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf.

190. South American Union of Nations Constitutive Treaty, May 23, 2008, <http://www.unasursg.org/images/descargas/DOCUMENTOS%20CONSTITUTIVOS%20DE%20UNASUR/Tratado-UNASUR-solo.pdf>.

191. See *La Unasur Tendrá Su Centro de Arbitraje en el 2015* [The Unasur Will Have Its Center of Arbitration in 2015], EL CIUDADANO (Oct. 2, 2014), <http://www.elciudadano.gob.ec/la-unasur-tendra-su-centro-de-arbitraje-en-el-2015/>.

As recent experience shows, the *owner* may revoke or cancel property or participation rights; the *contracting party* may breach the investment contract; and the *sovereign* may use its regulatory powers to modify the economic balance of the investment contract. Moreover, the State may denounce or terminate its treaty commitments (as provided in the treaty itself) or may resort to other measures to exact waivers of international arbitration. Stabilization techniques, therefore, must take into account the multiple dimensions and inherent tensions in the investor-State relation.

A. *Gaining Access to International Arbitration*

First and foremost, any expectation or promise of stability must be given effect by giving investors access to a judge detached from the jurisdictional power of the host State. Submission to arbitration in an oil contract is “an essential tool in the stabilization of the legal framework surrounding oil operations”. First, such a clause neutralizes the host State’s jurisdictional power, and second, it determines the law applicable to the contract.¹⁹²

Consent to international arbitration may be provided in the contract itself, in an applicable BIT or, less commonly, in a domestic investment law.¹⁹³ Investment-treaty planning can significantly reduce an investor’s risk in the face of State exercise of sovereign power. In *ConocoPhillips v. Venezuela*, an ICSID tribunal affirmed jurisdiction under the Netherlands-Venezuela BIT over three Dutch entities: ConocoPhillips Petrozuata (CPZ), ConocoPhillips Hamaca (CPH), and ConocoPhillips Gulf of Paria (CGP) – through which the U.S. company ConocoPhillips Company held its interests in three major oil investment projects in Venezuela.¹⁹⁴

Venezuela argued that the Dutch claimants were inserted into the ownership chain for the sole purpose of gaining BIT protection, and that jurisdiction should be denied on the basis that the corporate restructuring was “an abuse of the corporate form and blatant treaty shopping.”¹⁹⁵ The claimants countered that they had restructured “before the dispute arose.”¹⁹⁶ The

192. Bertrand Montebault, *The Stabilisation of State Contracts Using the Example of Oil Contracts—A Return of the Gods of Olympia*, 6 INT’L BUS. L.J. 593, 603 (2003).

193. For a discussion of consent to ICSID arbitration in domestic investment laws, see generally Michele Potestà, *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, 27 ARB. INT’L 149 (2011).

194. See Luke Eric Peterson, *Conoco’s Restructuring of Venezuela Assets for BIT Protection is OK: Legally ‘Decisive’ Date of Income Tax Hikes is its Entry Into Force, not Date of Enactment*, INV. ARB. REP. (Sept. 5, 2013), available at http://www.iareporter.com/articles/20130905_1.

195. *ConocoPhillips v. Venezuela*, *supra* note 46, at 268.

196. *Id.* at 269.

tribunal—acknowledging that tensions between Venezuela and foreign oil companies were on the rise from at least 2004—placed weight on the fact that there were no “claims” afoot at the time of the restructuring, during 2005 and 2006.¹⁹⁷

The *Conoco* holding may be contrasted with the claim brought by Dutch affiliates of Exxon Mobil Corporation against Venezuela under the same BIT.¹⁹⁸ In *ExxonMobil*, arbitrators declined jurisdiction over the company’s tax and royalty claims, stressing that ExxonMobil had sent Venezuela various notices and demand letters prior to its restructuring to add Dutch entities into the corporate ownership chain.¹⁹⁹ With respect to “pre-existing disputes,” the tribunal found that “to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute . . . an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.”²⁰⁰ The timing of the restructuring, therefore, may be crucial.²⁰¹

B. Stability Commitments in National Legislation

The State, acting as *sovereign*, may undertake stability commitments in its national legislation. In order to attract foreign investment, several countries have enacted specific stability laws or have included a provision for stability in general hydrocarbon laws or tax codes.²⁰² For example, the Peruvian Organic Law on Hydrocarbons provides tax stability guarantees establishing that “[t]he State guarantees the Contractors that the tax and exchange systems in force at the time the Contract is entered into, shall remain unchanged during the life thereof.”²⁰³

In addition, the stability laws of several countries authorize the State to enter into a special stability agreement with a foreign investor for fiscal guarantees. For instance, the 2005 Bolivian Hydrocarbons Law provides in

197. *Id.* at 278–81.

198. *ExxonMobil v. Venezuela*, *supra* note 51, ¶ 24.

199. *Id.* ¶¶ 200–206.

200. *Id.* ¶ 205 (internal citations omitted).

201. *Id.*

202. See generally A.F.M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. WORLD INV. & TRADE 233 (2007).

203. See Regulation of the Guarantee of Tax Stability and the Tax Regulations of the Law N° 26221, Organic Law of Hydrocarbons, approved by Supreme Decree N° 32-95-EF, in the Law that regulates Stability Contracts with the State under Sectorial Laws – Law N° 27343” as appropriate and in the Amendment Law in Hydrocarbons – Law N° 27377.

Article 63 (entitled “Tax Stability Agreements for Promoting Industrialization”) that:

The Ministry of State Assets and the Ministry of Hydrocarbons, in a joint manner and in representation of the State, may establish with the investors, prior to the making of the investment and the corresponding registration, tax stability agreements of the tax regime in effect at the time of the execution of the agreements, for a period of no more than ten (10) years without extension; these agreements shall be approved by the National Congress.²⁰⁴

A mere legislative promise for stabilization will not prevent the State from exercising its sovereign authority. However, such an express commitment may bolster an investor’s claim of breach of its legitimate expectations. As Professor Wälde and Ndi have observed, “a stabilization promise made only in legislation is not sufficient to assume an explicit, formal, and binding stabilization agreement.”²⁰⁵ Nonetheless, a subsequent breach by the State of a stabilization commitment, whether contained in legislation or in a contract, could be a factor in ascertaining whether compensation is due and in determining the quantum of compensation.

C. Contractual Stability Commitments

As *contracting party*, the State, or State-owned enterprise may agree to include a provision purporting to insulate the contractual relationship from any subsequent governmental legislative or tax measures that may have the effect of altering such relationship. As noted in *Total S.A. v. Argentine Republic*

Stabilisation clauses are clauses, which are inserted in State contracts concluded between foreign investors and host states with the intended effect of freezing a specific host State’s legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal.²⁰⁶

The inclusion of a stabilization clause in a State contract will not preclude the *sovereign* from modifying the legal regulatory framework of the investment concerned. However, a tribunal “would have little difficulty holding that a fully stabilised contract that did not admit of any future legislative or other change cannot be changed unilaterally.”²⁰⁷

204. Ley No. 3058, Ley de Hidrocarburos [Law of Hydrocarbons], art. 63, OFICIAL GAZETTE, May 18, 2005 (Bol.), <http://www.ine.gob.bo/indicadoresddhh/archivos/alimentacion/nal/Ley%20N%C2%BA%203058.pdf> (Bol.) (translated by the authors).

205. Thomas W. Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT’L L.J. 215, 240 (1996).

206. *Total S.A. v. Argentine Republic*, *supra* note 105, ¶ 101.

207. *Perenco v. Ecuador*, *supra* note 99, ¶ 593.

In turn, the absence of a stabilization clause may bear on the investor's legitimate expectations of stability. As noted in *Perenco v. Ecuador*, "it is well recognized in investment treaty arbitration that States retain flexibility to respond to changing circumstances unless they have stabilised their relationship with an investor."²⁰⁸ The ultimate question is whether the investor assumed the risk of regulatory change or whether the State, as *sovereign* and/or as *contracting party*, undertook to provide a stable legal framework.

Stability commitments by the host State may take different forms. The State may undertake to provide stability in a specific regulatory area, such as taxation. For instance, Peru's Model License Contract for the Exploration and Exploitation of Hydrocarbons provides that "[t]he State, through the Ministry of Economy and Finance, warrants the Contractor, the benefit of tax stability during the Term of the Contract, which shall be subject, only, to the tax regime prevailing at the date of Subscription."²⁰⁹

The question arises whether a tax (or other) stabilization commitment pertains only to the text of the law or regulation or whether the commitment also covers the law's application or interpretation. This issue arose in *Duke Energy v. Peru*,²¹⁰ where an ICSID tribunal composed of Guido Tawil, Petro Nikken, and L. Yves Fortier (presiding) found Peru liable for breach of a contractual tax stabilization commitment *vis-à-vis* a Bermudan subsidiary of Duke Energy when it levied taxes in response to a corporate restructuring undertaken by Duke.²¹¹

The *Duke Energy v. Peru* tribunal first noted that in order to demonstrate a breach of a stabilization clause, an investor would need to prove "(i) the existence of a pre-existing law or regulation (or absence thereof) at the time the tax stability guarantee was granted, and (ii) a law or regulation passed or issued after the [legal stability agreement] that changed the pre-existing regime."²¹² With respect to a change in the interpretation or application of a law, the tribunal

208. *Id.* ¶ 586.

209. See *Modelo de Contrato de Licencia para la Exploración y Explotación de Hidrocarburos Entre Perupetro S.A. y Empresa Petrolera* [Model of License Agreement for the Exploration and Exploitation of Hydrocarbons Between Perupetro S.A. and Oil Company], <http://www.perupetro.com.pe/wps/wcm/connect/3e502458-feb7-435d-a9da-4db307e97412/ModeloContrato.pdf?MOD=AJPERES> (translated by the authors).

210. *Duke Energy Int'l Peru Inv. No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award (July 25, 2008), http://www.italaw.com/documents/DukeEnergyPeruAward_000.pdf [hereinafter *Duke Energy v. Peru*].

211. For a discussion of the *Duke Energy v. Peru* dispute, see Luke Eric Peterson, *ICSID Tribunal Awards \$18.4 Million to Duke Energy for Breach of Tax Stability Pledges by Peru; Other Claims Rejected*, INVESTMENT ARB. REP. (Aug. 26, 2008), http://www.iareporter.com/articles/20091001_42.

212. *Duke Energy v. Peru*, *supra* note 210, ¶ 217.

considered that an investor would need to prove that a stable interpretation or application of the law when the tax stability guarantee was granted has been modified.²¹³ Such a showing—the tribunal noted—requires “compelling evidence.”²¹⁴

Last, where a stable interpretation or application of the law has yet to develop, the tribunal manifested some restraint with respect to assessing the correctness of Peruvian tax rulings, concluding that “absent a demonstrable change of law or a change to a stable prior interpretation or application, that the application of the law to [the investor] was patently unreasonable or arbitrary.”²¹⁵

Under the reasoning of the *Duke Energy v. Peru* tribunal, absent a demonstrable change in the law or in a prior interpretation or application of the law, the State may interpret or apply its law provided that such application or interpretation is not “patently unreasonable or arbitrary.”²¹⁶ One of the arbitrators dissented on this issue, noting that the tribunal, must evaluate the actions of the Peruvian tax authorities and the tax court subsequent to the execution of the tax stability agreement, against its “own determination of the meaning and scope of the stabilized regime at the relevant time.”²¹⁷

D. Economic Equilibrium Clauses

The State or State entity may also undertake the obligation to compensate the service contractor for economic prejudice suffered as a result of new laws or regulations affecting the economic balance of the contract.²¹⁸ Such “economic equilibrium clauses” may protect against adverse financial effects of changes in the law. As an example of this approach, the Strategic Association Agreements for development and production in the Orinoco Belt entered into between PDVSA and major international oil companies during the 1990s provided that PDVSA itself would compensate the companies “for adverse economic situations resulting from adoption of governmental decisions or changes in the legislation which causes a discriminatory treatment of the [association agreement] or PDVSA’s partner.”²¹⁹

213. *Id.* ¶ 218.

214. *Id.* ¶ 220.

215. *Id.* ¶ 226.

216. *Id.*

217. *Id.*, Partial Dissenting Opinion of Guido Tawil, 15 July 2008, ¶ 8.

218. Maniruzzaman, *supra* note 202, at 124.

219. See Brandon Marsh, *Preventing the Inevitable: The Benefits of Contractual Risk Engineering in Light of Venezuela’s Recent Oil Field Nationalization*, 13 STAN. J. L. BUS. & Fin. 453, 465 (2008).

Nonetheless, the inclusion of an economic equilibrium clause in a State contract could be regarded as an acknowledgement by the investor that laws or regulations *can* change, thus undercutting any claim by the investor that it had a legitimate expectation of stability in the existing legal and regulatory framework. For instance, in *Ulysseas, Inc. v. Ecuador*, U.S. claimant Ulysseas brought a claim against Ecuador under the U.S.-Ecuador BIT alleging that Ecuador had breached its promise of maintaining a stable legal and regulatory framework²²⁰ in connection with claimant's contract with State-owned electricity regulatory agency CONELEC for the operation of a power-generating barge.²²¹

In support of its claim, Ulysseas argued that its expectation of stability in the Ecuadorian power sector regulatory framework was reasonable in light of promises contained or expectations engendered by an economic equilibrium clause contained in Article 24 of the relevant contract, setting forth in relevant part that "[i]f laws or standards are enacted which prejudice the investor or change the contract clauses, the State will pay the investor the respective compensation for damages caused by those situations."²²²

The tribunal concluded that Article 24 of the contract, did not support Ulysseas' "claim that it had a legitimate expectation that no prejudicial changes would be made to the electricity regulatory system," but constituted, in effect, an acknowledgement by the claimant that "changes might be introduced to laws 'or other provisions of any nature' which 'would prejudice the investor' and that, should this occur, compensation would be paid for damages so caused to it."²²³ The economic equilibrium clause led the tribunal to conclude that the claimant had no legitimate expectation of a stable legal framework.²²⁴

220. *Duke Energy v. Peru*, *supra* note 210, ¶ 204.

221. *Ulysseas, Inc. v. Republic of Ecuador*, Final Award, ¶ 94 (Perm. Ct. Arb. June 12, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf>.

222. *Id.* ¶ 216. The tribunal quoted Article 24's complete text:

TWENTY-FOUR: INDEMNIFICATION PAID TO THE PERMIT HOLDER.

Article two hundred seventy-one of the Constitution of the Republic of Ecuador stipulates that the State, through the GRANTOR, may establish special guarantees and security assurances to the investor to ensure that the agreements will not be modified by laws or other provisions of any type which have an impact on their clauses. If laws or standards are enacted which prejudice the investor or change the contract clauses, the State will pay the investor the respective compensation for damages caused by those situations, in such a way as to at all times restore and maintain the economic and financial stability which would have been in effect if the acts or decisions had not occurred. *Id.* ¶ 229 (bold in original).

223. *Id.* ¶ 258.

224. *Id.* ¶ 259.

E. Renegotiation Clauses

Another stabilization technique is to include a renegotiation clause requiring the parties to amend the contract in response to new laws or circumstances with a material effect on the contract in order to reestablish the lost economic balance.²²⁵ For instance, the participation agreements at issue in *EnCana v. Ecuador* required the renegotiation of the percentage of production corresponding to the investor in the event that any modification to the Ecuadorian tax regime in effect on the date of the execution of the contract, affected the contract's economy.²²⁶

The EnCana tribunal noted, in dictum, that it could well be a breach of the fair and equitable treatment clause of the BIT "for a State entity such as Petroecuador, having negotiated the terms of an investment agreement on a certain basis, subsequently to deny the other party the right to renegotiate in accordance with the agreement."²²⁷ However, the tribunal did not address this question because the claim was not raised by EnCana, which never requested renegotiation of the participation contracts in accordance with the renegotiation clause of the participation agreements.²²⁸

Similarly, the participation contracts for two exploratory oil properties (i.e., Block 7 and Block 21), at issue in *Perenco v. Ecuador*, included a tax modification clause requiring the application of a "correction factor" to absorb any increase or decrease in the tax burden resulting from changes to the tax regime, the creation or elimination of new taxes, or their interpretation. Clause 11.12 of the Block 7 Contract (Clause 11.7 of the Block 21 Contract) provided:

11.12. Modification to the tax regime. In the event of a modification to the tax regime or the creation or elimination of new taxes not foreseen in this Contract . . . on the signature date of this Contract and as described in this Clause, or their interpretation, which have consequences for the economy of this Contract, a correction factor shall be included in the participation percentages, which absorbs the increase or decrease in the tax burden . . . This correction factor shall be calculated between the Parties and following the procedure set forth in Article thirty-one (31) of the Regulations for Application of the Law Amending the Hydrocarbons Law.²²⁹

225. See Marsh, *supra* note 219.

226. *EnCana v. Ecuador*, *supra* note 125, ¶ 34 (In case of any amendment to the tax regime or labor participation effective at the date of execution of this Contract as described in this Clause, or its interpretation, or creation of new taxes or liens not provided for in this Contract, which may affect this Contract's economy, a correction factor in the participation percentages shall be included to absorb the increase or decrease of a tax charge or labor participation aforementioned.).

227. *Id.* ¶ 158.

228. *Id.*

229. *Perenco v. Ecuador*, *supra* note 99, ¶ 361.

While noting that these clauses were “clearly designed to protect the contractual bargain,” the *Perenco* tribunal affirmed that “they do not constitute stabilisation clauses *per se*.”²³⁰ Clauses 11.12 and 11.17 “plainly did not purport to freeze Ecuadorian law as at the time of their signing and prohibit the State from modifying the tax regime.”²³¹ By their own terms, clauses 11.12 and 11.17 “did not preclude the State from introducing new taxes or modifying existing ones.” In the tribunal’s view, “[t]he process envisaged was one of the negotiation in good faith of a mutually agreeable offset that would result in an amended contract.”²³²

Perenco, therefore, “was entitled to require Petroecuador to engage in negotiations to determine Law 42’s effect on the economy of the Contracts and to arrive at a consequent correction factor (in the event the parties agreed that the tax affected the economy of the Contract).”²³³ In order to establish a breach of Clause 11.7 or Clause 11.12, *Perenco* was required to: (i) show that it had pressed for negotiations or, in the alternative, that negotiations would have been futile; or (ii) if such negotiations occurred, show that the State refused to engage in good faith adjustment of the contracts.

The tribunal concluded that *Perenco* did not do enough, “preferring instead to adopt a ‘wait and see’ approach.”²³⁴ This finding underscores the importance of actively seeking to press for negotiations (unless futile) and to document all efforts made to reach an agreement.

F. *De Facto Stability*

Another strategy to infuse a degree of stability into the energy investment project is to seek financing for the project from other governments or from multilateral financing organizations or development agencies, such as the International Finance Corporation (IFC). A complementary risk-mitigation strategy is to pledge the project’s movable assets or property to project lenders as security. The underlying rationale is that a host State may be more reluctant to nationalize a project or project assets in which an agency such as the IFC or a foreign government has a stake. Moreover, the multilateral status of such an agency puts it in a strong position to negotiate or act as mediator between the host State and the affected investors if a dispute arises.²³⁵

230. *Id.* ¶ 366.

231. *Id.*

232. *Id.* ¶ 365.

233. *Id.* ¶ 378.

234. *Id.* ¶ 400.

235. *Id.*

Legitimacy in the host State may also be enhanced if the foreign investor develops partnerships with local firms and institutions, as well as good social performance so as to be perceived as “domestic”.²³⁶ Another stability strategy may be to seek a strategic partner with close political, economic or military ties to the host State. For example, partnering with a national oil company from a country with close ties to the host State may provide an added layer of protection against State intervention.

CONCLUSION

This Article argues that the relationship between a foreign oil investor and the host State is infused with at least three fundamental tensions: the State, as the *owner* of subsoil resources, determines the scope of participation or property rights that a foreign investor may acquire in its energy sector. The State, as the *contracting party*, makes direct undertakings to the foreign investor (and vice-versa) in the oil contract. And the State, as the *sovereign*, controls the legal and physical framework in which the contract takes shape.

Host States may break these promises. Prior to the emergence of the international investor-State dispute settlement system, the investor’s home State enforced broken promises (if at all) through diplomatic channels. The advent of BITs gave foreign investors the right to elevate broken promises to the international level by suing the *sovereign* outside its own courts.

A review of recent energy-related arbitral disputes reveals that investors often bring claims against States for damages suffered as a result of direct expropriation or nationalization, or as a result of regulatory measures that may amount to indirect expropriation and/or other BIT violations. Although the disputes discussed represent a small fraction of the universe of energy-related awards, they underscore the increasingly sophisticated tools that States may use to tilt in their favor the economic balance of energy investments.

In response to the proliferation of arbitration claims (and awards) against States, some Latin American States have taken steps to insulate themselves from the system, leaving investors looking for other means to ensure the stability and value of their investments. These steps underscore an additional tension in the investor-State relation: the State as *sovereign* may denounce the commitments they made—through BITs, the ICSID Convention and other treaties—to afford substantive and procedural protection to foreign investments. In addition, the State may undertake subsequent international treaty commitments that *could* conflict with, or supersede, BIT obligations.

236. See Vivoda, *supra* note 180, at 7.

In view of the multiple dimensions and inherent tensions in the investor-State relation, this Article provided an overview of techniques—beyond BITs—to infuse stability into the energy investment contract. Stabilization clauses are one mechanism by which investors and host States may bolster the credibility of their commitments.²³⁷ Economic equilibrium clauses may also infuse stability into the investor-host State relation by protecting the contractual balance against the adverse financial effects of changes in the host State's law. In turn, renegotiation clauses may allow the parties to respond to changed circumstances and re-establish the contract's economic equilibrium.

Ultimately, infusing stability into the energy investment contract requires the parties to allocate effectively not only the risk of loss arising out of changes in the legal framework, but also whether the economic balance of the contract should be recalibrated in response to other unforeseen events, such as an unprecedented rise in international oil prices. Both foreign investors and States stand to gain from more coherence, predictability, and legal security in their relation. And such stability starts at the contract-drafting level.

As some Latin American states modify the legal framework for foreign private participation in the energy sector, new contractual arrangements and disputes are likely to arise. Stabilization techniques must evolve accordingly. The incorporation of stabilization techniques, if properly done, should reduce the potential for disputes between States and foreign investors. But the pursuit of stability in the midst of changing rules, both domestically and internationally, will remain the biggest challenge.

237. See Gaetan Verhoosel, Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance between Stability and Change, 29 *LAW & POL'Y INT'L BUS.* 451, 453 (1998).

Bottomfeeding: How The USDA's Noodling With Catfish Regulations Violates the United States' WTO Obligations

Chelsea Fernandez Gold*

ABSTRACT

In 2008, Congress passed the Farm Bill with an amendment to the Federal Meat Inspection Act, which shifted the authority to regulate catfish and catfish products from the United States Food and Drug Administration (FDA) to the United States Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS), an agency that had no history of overseeing the inspection of seafood. The USDA, as required by law, drafted a proposed rule detailing this regulatory shift and sent it to the Office of Management and Budget (OMB) on June 3, 2014; the rule was then finalized on November 25, 2015. While the domestic catfish industry and its supporters advocated for the speedy publication of the final USDA rule, foreign exporters of catfish to the United States considered it to be a thinly veiled attempt to prevent the entry of catfish from countries like Vietnam. Given that the rule has been finalized, this Article details the set of allegations that Vietnam, or any foreign exporter of catfish, could bring before a World Trade Organization (WTO) Panel in which it would assert a violation of the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures. Ultimately, this Article concludes that, if the United States seeks to avoid a WTO dispute settlement, the only recourse is to repeal the provisions contained within the 2008 and 2014 Farm Bills and allow the authority to inspect catfish and catfish products to revert to the FDA.

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INTRODUCTION

In the struggle for survival, the fittest win out at the expense of their rivals because they adapt best to their environment.¹ For roughly thirty years, the United States has been negotiating its way through the global market by tearing

1. See CHARLES DARWIN, ON THE ORIGIN OF SPECIES 112 (6th ed. 2004) (“[I]n the struggle for life over other forms, there will be a constant tendency in the improved descendants of any one species to supplant and exterminate in each stage of descent their predecessors and their original parent.”).

down trade barriers through free trade agreements.² But the United States only believes in the free trade game until it starts losing; then, it accuses the other side of cheating or quits the game altogether.³ At the very least, this is the message the United States sends the rest of the world when it seeks to engage in free trade agreements while enacting protectionist policies, such as the rule requiring the mandatory inspection of catfish and catfish products.⁴

The rule is the result of a provision tucked into the Food, Conservation, and Energy Act of 2008 (“2008 Farm Bill”), which authorizes the unique treatment and inspection of catfish.⁵ Since its proposal, the rule has sparked an international controversy⁶ because it delegates regulatory responsibility for the inspection of catfish to the Food Safety and Inspection Service (FSIS), an office housed within the United States Department of Agriculture (USDA).⁷ This will differentiate catfish inspections from all other seafood inspections, which the Food and Drug Administration (FDA) handles.⁸ This shift in regulatory oversight will subject catfish to more stringent, continuous, and mandatory inspections and will require nations that export catfish to the United States to establish inspection systems equivalent to those in place in the United States. Aside from the cost,⁹ which is sure to be high, the new inspection regime is expected to ban foreign catfish producers from entering the United States market until they can meet the FSIS’s standard of equivalency, which can take years to achieve.¹⁰

2. See Chris Matthews, *Why the Era of Global Free-Trade is Dwindling*, FORTUNE (July 24, 2014), <http://fortune.com/2014/07/24/free-trade/>.

3. Editorial, *The Looming Shrimp War*, N.Y. TIMES, Oct. 6, 2003, <http://www.nytimes.com/2003/10/06/opinion/the-looming-shrimp-war.html>.

4. See generally Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. 75590 (Dec. 2, 2015) (to be codified at 9 C.F.R. pt. 300, 441, 530–34, 537, 539–54, 544, 548, 550, 552, 555, 557, and 559–61).

5. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11016(b), 112 Stat. 1651 (June 18, 2008) (classifying catfish as an “amenable species,” thereby subjecting it to mandatory, continuous inspections).

6. See, e.g., Ron Nixon, *Catfish Program Could Stymie Pacific Trade Pact, 10 Nations Say*, N.Y. TIMES, June 28, 2014, at A15 (highlighting that Vietnam’s success is garnering international support for assertion that the catfish inspection program violates international law); Zhenhu Bian, *America’s Fishy Trade Barriers*, WALL ST. J. ASIA, Aug. 29, 2013, <http://www.wsj.com/articles/SB10001424127887324009304579040741754600398> (stating that Chinese catfish producers “reserve the right to ask [their] government to use all the tools available to it as a WTO member to challenge this unfair obstacle”).

7. See Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75590.

8. See Mark Hemingway, *What Will it Take to Kill the Farm Bill’s Wasteful Catfish Subsidy?* THE WKLY. STANDARD (Jan. 28, 2014), http://www.weeklystandard.com/blogs/what-will-it-take-kill-farm-bills-wasteful-catfish-subsidy_775862.html.

9. Nixon, *supra* note 6 (explaining that Vietnam finds this shift to be an expensive, burdensome, and unnecessary regulation).

10. K. William Watson, *Crony Catfish*, CATO INST. (Aug. 13, 2014), <http://www.cato.org/blog/crony-catfish>.

While the domestic catfish industry supports the rule as necessary to ensure food safety and the economic security of their industry, foreign exporters find it to be arbitrary, subjective, and protectionist in nature.¹¹ Foreign catfish producers contend that the rule is in direct violation of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”).¹²

The SPS Agreement is a set of binding rules and disciplines for all relevant laws, regulations, and procedures directly related to food safety in the Member countries.¹³ It also provides Members with the ability to set the level of protection of human, animal, or plant health that they deem appropriate.¹⁴ However, there is a difference between SPS measures that are appropriate and necessary for the protection of human, animal, and plant health and those that merely function as protectionist measures. In the case of the rule, this Article asserts that the United States’ shift in regulatory oversight to an office with more stringent and onerous regulations amounts to a protectionist measure because the increased level of oversight for the catfish industry in particular is not supported by sufficient scientific evidence¹⁵ or based on a risk assessment.¹⁶ The

11. Compare Joey Lowery, Address at the Pub. Meeting Concerning the USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Products 65 (May 24, 2011), available at http://www.fsis.usda.gov/wps/wcm/connect/eefd3e0d-ea69-4c75-b1ac-ea4df9d133e4/Transcripts_05242011_Catfish_meeting.pdf?MOD=AJPERES (representing Catfish Farmers of America and claiming that, for the sake of consumer health and the well-being of an important, job-creating, domestic industry, it is critical that the FSIS begin inspecting catfish), with *Thad Cochran’s Crony Catfish: K. William Watson Comments*, CATO INST. (Aug. 12, 2014), <http://www.cato.org/multimedia/daily-podcast/thad-cochrans-crony-catfish> (finding the then-proposed rule to be a very obvious example of an attempt by a domestic industry to regulate its foreign competitors) and *A Fish By Any Other Name*, WALL ST. J. ASIA, May 20, 2009, <http://online.wsj.com/articles/SB124276314037135959> (finding the regulatory switch is “protectionism at its worst”).

12. Letter from Pham Binh Minh, Minister of Foreign Affairs, Socialist Republic of Vietnam and Vu Huy Hoang, Minister of Industry and Trade, Socialist Republic of Vietnam, to the Honorable John Kerry, Secretary of State, United States (Oct. 30, 2013), http://thehill.com/sites/default/files/joint_ministers_letter_to_hon_john_kerry.pdf (“[Vietnam’s] government is unwilling to sit by as this program is implemented . . . when the program so clearly violates America’s WTO obligations.”).

13. Dale E. McNiel, *The First Case Under the WTO’s Sanitary and Phytosanitary Agreement: The European Union’s Hormone Ban*, 39 VA. J. INT’L L. 89, 90 (1998); see Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, Apr. 15, 1994, 1867 U.N.T.S. 493, 496–97 [hereinafter SPS Agreement].

14. See SPS Agreement, *supra* note 13.

15. See *id.* art. 2.2.

16. See *id.* art. 5.1.

transition from the FDA to the USDA functions as a disguised barrier to international trade.¹⁷

Part II provides a framework to understand and evaluate the alleged violation of the SPS Agreement by tracing the legislative history of catfish food safety policy. In particular, Part II emphasizes the impact of the rule by highlighting the significant differences between the FDA and the USDA's inspection programs, as these differences will result in a costly and burdensome process for foreign catfish producers.

This historical background informs Part III, which analyzes a hypothetical case brought before a WTO Panel by Vietnam alleging that the rule amounts to a violation of the WTO SPS Agreement. Part III first establishes how the rule is neither founded on sufficient scientific evidence nor based on a risk assessment, thus violating articles 2.2 and 5.1 of the SPS Agreement. The Article then asserts that the rule is a "disguised restriction on international trade" in violation of article 5.5 of the SPS Agreement.

In Part IV, this Article recommends that Congress repeal section 11016 of the 2008 Farm Bill, either through the introduction of new legislation or through the passage of a congressional resolution of disapproval. Though there are alternative paths, such as reallocating funding to the FDA for increased catfish inspections or requiring a lengthy transitional period in which the FDA-compliant countries remain unaffected, they do not safeguard against a WTO complaint. Repeal is the only guaranteed safeguard against a potential WTO complaint against the United States.

I.

THE HISTORY OF FISHY CATFISH FOOD SAFETY POLICY IN THE UNITED STATES

The cultivation of the domestically raised catfish species *Ictaluridae* is the leading aquaculture industry in the United States.¹⁸ Many of the early pioneers entered into the farm-raised catfish industry looking for crop diversification or profitable alternatives to growing cotton on marginally productive lands.¹⁹ But the industry soon became much more than a mere alternative to cotton, growing to generate billions of dollars,²⁰ and becoming a primary source of economic

17. See *id.* art. 5.5.

18. See FSIS, USDA, EXECUTIVE ORDER 12866—PRELIMINARY REGULATORY IMPACT ANALYSIS 23 (2011) [hereinafter FSIS IMPACT ANALYSIS] ("Commercial *Ictaluridae* catfish production generates over [forty-six] percent of the value of aquaculture production in the [United States].").

19. Terrill R. Hanson, *Catfish Farming in Mississippi*, MISS. HIST. NOW, Apr. 2006, <http://mshistorynow.mdah.state.ms.us/articles/217/catfish-farming-in-mississippi>.

20. See Bartholomew Sullivan, *Federal Report Claims Vietnam Dumped Catfish on U.S. Market*, COM. APPEAL, Sept. 5, 2013, <http://www.commercialappeal.com/business/federal-report-claims-vietnam-dumped-catfish-on> (stating that catfish sales surpass \$4 billion annually).

activity and employment in many southern states.²¹ However, the catfish industry today is not what it used to be.

A. *The 2002 and 2008 Farm Bills*

Beginning in 2002, United States imports of foreign catfish grew exponentially.²² This influx of low-priced catfish²³ put significant pressure on the United States catfish industry by driving down the market price of catfish and reducing the domestic industry's market share.²⁴ Rather than compete with the foreign catfish imports, the domestic catfish industry called on Congress, which responded by enacting section 10806 of the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill").²⁵ Section 10806 mandated that only fish from the same taxonomical family as United States-grown catfish, *Ictaluridae*, could legally be labeled as "catfish."²⁶ In doing so, Congress prevented all foreign species of catfish, such as the Vietnamese *Pangasius*, from being marketed as "catfish."²⁷

21. See FSIS IMPACT ANALYSIS, *supra* note 18, at 23 (estimating that there are 1,300 catfish farms in at least sixteen states and that ninety-four percent of catfish are farmed in Alabama, Arkansas, Louisiana, and Mississippi).

22. See Kara Petteaway, *Free Trade vs. Protectionism: The Case of Catfish in Context*, 30 N.C. J. INT'L L. & COM. REG. 475, 475 (2004) (finding a main cause of this growth to have been the Vietnam-U.S. Bilateral Agreement in 2001, after which Vietnamese imports fared "surprisingly well," capturing as much as twenty percent of the United States frozen catfish fillet market and dramatically increasing its exports to the United States).

23. See Ted Carter, *Catfish Farming: Future Fading on a 'A Great American Story'*, MISS. BUS. J. BLOG, Feb. 22, 2013, <http://msbusiness.com/blog/2013/02/22/catfish-farming-future-fading-on-a-great-american-story/> (stating that *Pangasius* exporters sell at \$2.50 a pound lower than the U.S. product).

24. See *Appropriations for Fiscal Year 2002: Hearings Before the Subcomm. on Agric., Rural Dev., and Related Agencies of the S. Comm. on Appropriations*, 107th Cong. 269 (2001) (statement of Sen. Thad Cochran, Chairman, S. Subcomm. on Agric., Rural Dev., and Related Agencies) (stating that data suggests that catfish imports displaced significant volumes of U.S. produced catfish and suppressed producers' prices).

25. See Opinion, *Harvesting Poverty: The Great Catfish War*, N.Y. TIMES, July 22, 2003, <http://www.nytimes.com/2003/07/22/opinion/harvesting-poverty-the-great-catfish-war.html> (explaining how U.S. catfish farmers persuaded Congress to disregard science in the 2002 Farm Bill).

26. See Farm Sec. and Rural Inv. Act of 2002, § 10806(a)(1); see also FDA GUIDANCE FOR INDUSTRY: IMPLEMENTATION OF SECTION 403(T) OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT (21 U.S.C. 343(T)) REGARDING THE USE OF THE TERM "CATFISH" 1 (2002) ("[I]mporters, domestic distributors, and sellers of fish from families other than *Ictaluridae*, who previously used the term 'catfish' . . . may no longer use that term, either when the fish are offered for import into the United States or distributed or sold in interstate commerce within the United States. Other names must be used.").

27. See Farm Sec. and Rural Inv. Act of 2002, § 10806(a)(1) (requiring that the term "catfish" only be used for fish classified within the family *Ictaluridae*).

The 2002 Farm Bill was only the first step in protecting the United States catfish industry. It was followed by an aggressive and offensive publicity campaign aimed at American catfish buyers, which characterized foreign catfish as “dirty, even toxic, and definitely un-American.”²⁸ Despite these efforts, foreign catfish producers continued to successfully develop and cultivate a significant and growing presence in the United States by marketing and selling their products as “basa,” “tra,” and “swai.”²⁹

Because the impact of foreign catfish on the United States market remained strong,³⁰ many in the industry believed that the first attempt at regulation had failed.³¹ Consequently, catfish farmers and their supporters again turned to Congress expressing concerns over the safety of imported catfish³² and articulating a need for more stringent inspection procedures.³³ This amounted to an attempt to artificially prop up the failing domestic catfish industry,³⁴ and in

28. Seth Mydans, *Americans and Vietnamese Fighting Over Catfish*, N.Y. TIMES, Nov. 5, 2002, <http://www.nytimes.com/2002/11/05/world/americans-and-vietnamese-fighting-over-catfish.html>; see, e.g., Opinion, *Harvesting Poverty: The Great Catfish War*, N.Y. TIMES, July 22, 2003, <http://www.nytimes.com/2003/07/22/opinion/harvesting-poverty-the-great-catfish-war.html> (“Congressman Marion Berry . . . suggest[ed] that [foreign] fish were not good enough for American diners because they came from a place contaminated by so much Agent Orange[, and the] Catfish Farmers of America . . . ran advertisements warning of a ‘slippery catfish wannabe,’ saying such fish were ‘probably not even sporting real whiskers’ and ‘float around in Third World rivers nibbling on who knows what.’”).

29. See Carter, *supra* note 23 (affirming that the United States market preferred *Pangasius*); Congressman Bennie Thompson, Address at the Pub. Meeting Concerning the USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Prods. 60 (May 24, 2011) (transcript available at http://www.fsis.usda.gov/wps/wcm/connect/eefd3e0d-ea69-4c75-b1ac-ea4df9d133e4/Transcripts_05242011_Catfish_meeting.pdf?MOD=AJPERES) (showing that foreign catfish producers continued to have an impact because acreage has fallen forty percent, production numbers have decreased, and the number of people working in the catfish industry is down to less than 10,000 employees in recent years).

30. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 12-411, SEAFOOD SAFETY: RESPONSIBILITY FOR INSPECTING CATFISH SHOULD NOT BE ASSIGNED TO USDA 7 (2012) [hereinafter GAO REPORT] (providing data that indicates the volume of imported catfish entering the U.S. market has continued to increase, while the volume of domestic catfish entering the market has declined). The percentage of imported catfish in the U.S. market was estimated at 2 percent in 2002, 12 percent in 2006, and 23 percent in 2010.

31. See, e.g., Cindy Hyde-Smith, Address at the Pub. Meeting Concerning the USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Prods. 25 (May 26, 2011) (transcript available at http://www.fsis.usda.gov/wps/wcm/connect/eefd3e0d-ea69-4c75-b1ac-ea4df9d133e4/Transcripts_05242011_Catfish_meeting.pdf?MOD=AJPERES) (stating that the attempts to redefine catfish in the 2002 Farm Bill were unsuccessful as “catfish stubbornly remained catfish in the eyes of the consumers, regulators, and retailers.”).

32. See, e.g., Comments of Michael Hansen, Consumers Union, on Proposed Rule for Mandatory Inspection of Catfish and Catfish Prods. 4 (June 24, 2011) (on file with the FSIS) (emphasizing worries about foreign catfish producers’ use of drugs unapproved for use in aquaculture in the United States, which could affect consumers’ health or contribute to antibiotic resistance).

33. See *id.* (“FSIS is better suited than the [FDA] to ensure the safety of domestic and imported catfish, as FSIS does a more comprehensive review of food safety systems.”).

34. See John McCain, *The Fishy Deal on Catfish*, POLITICO, June 7, 2013,

2008, Congress complied. Without a single committee hearing, mark-up, floor debate, or scientific finding of any kind—in either the House or the Senate—Congress passed section 11016 of the 2008 Farm Bill.³⁵ Section 11016 amended the Federal Meat Inspection Act³⁶ (FMIA) to designate catfish, as defined by the Secretary of Agriculture, an “amenable species.”³⁷ This rebranding had the effect of shifting regulatory oversight of catfish (a term that had not yet been defined) from the FDA’s seafood Hazard Analysis and Critical Control Point (HACCP) program to the FSIS’s program of mandatory and continuous inspection.³⁸

B. A Bait and Switch in Inspection Programs

Since 1995, the FDA has used the HACCP program as its main food safety management tool to control pathogens and prevent product contamination in seafood.³⁹ The program is a risk-targeted approach to food safety in which processors are responsible for the safety of the seafood they process.⁴⁰ Such responsibilities include: identifying the likely hazards of a specific product, recognizing critical control points in a specific production process where a failure could result in a hazard being created or allowed to persist, implementing control techniques to prevent or mitigate these hazards, and monitoring the critical control points.⁴¹

For example, under the FDA’s HACCP program, a processing establishment that handles peeled, undeveined shrimp must draft a plan detailing the steps taken between the receipt of the raw shrimp and their shipment, including their quality check, rinsing, peeling, washing, chilling, packing, and

<http://www.politico.com/story/2013/06/the-fishy-deal-on-catfish-92415.html> (“Rather than compete, southern catfish farmers asked their powerful friends . . . to support a law . . . that forces Americans to buy domestic catfish.”).

35. See Comments of John P. Connelly, President, The Nat’l Fisheries Inst., on Proposed Rule for Mandatory Inspection of Catfish and Catfish Prods. 4 (June 24, 2011) (on file with the FSIS).

36. Federal Meat Inspection Act, 21 U.S.C. § 601(w)(2) (1907).

37. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11016(b)(2), 112 Stat. 1651 (June 18, 2008).

38. See Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75592.

39. Andrew Kaplan, *Is Something Fishy Goin’ On?: H.A.C.C.P. Regulations and the Seafood Industry*, 23 RUTGERS L. REC. 4 (1999).

40. See Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, 60 Fed. Reg. 65096, 65100 (Dec. 18, 1995) (codified in 21 C.F.R. pts. 123 and 1240) (defining the FDA’s HACCP program as a preventative system of hazard control that can be used by processors to ensure the safety of their products to consumers).

41. See Kaplan, *supra* note 39, at 4.

freezing phases.⁴² From there, the establishment must identify the potential hazards associated with the shrimp, such as parasites, pathogens, and chemical contaminants, as well as the measures that can be applied to minimize and mitigate the significant hazards.⁴³ These measures range from monitoring and maintaining low temperatures to fly proofing the shrimp and using sanitized gloves.⁴⁴ With the passage of the amendment to the FMIA in the 2008 Farm Bill and the subsequent shift in regulatory oversight from the FDA to the FSIS,⁴⁵ catfish will become the first and only seafood product to be subject to the FSIS's system of mandatory and continuous inspection under the USDA.⁴⁶

The FSIS's inspection program, on the other hand, involves mandatory and continuous oversight of every official establishment relating to processing, facility sanitation, hazard mitigation, and product transportation.⁴⁷ Specifically, the FSIS has an inspector at every domestic facility to monitor all aspects of processing.⁴⁸ The FSIS also requires foreign facilities exporting meat, poultry, egg, and now catfish products to the United States to establish and maintain inspection systems that are in line with the FSIS's regulations.⁴⁹ While there is no set timeline for equivalency determinations, imports from foreign catfish producers will be banned until an equivalent inspection system is established.⁵⁰ Even when a foreign exporter's processing plant has been deemed equivalent, all incoming shipments must be re-inspected by an FSIS import inspector at the port of entry into the United States to ensure that foreign countries have maintained their equivalent inspection systems.⁵¹ Moreover, unlike the FDA's

42. See KANPA INTERNATIONAL SALES, HACCP MANUAL: KANPA INTERNATIONAL SALES 10, available at <http://www.kanpa.com/HACCP.pdf>.

43. See *id.* at 12–14.

44. See *id.*

45. See Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75593–98.

46. See Press Release, John McCain, Floor Statement by Senator John McCain on the Agriculture Reform, Food, and Jobs Act of 2012 (the Farm Bill) (June 14, 2012), available at <http://www.mccain.senate.gov/public/index.cfm/2012/6/post-eb68cca1-0e3e-bf76-260d-cf86e079c5fb> (explaining that the USDA is creating a whole new government office just to inspect catfish even though catfish and all other seafood products are already inspected by the FDA).

47. See Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75619.

48. Federal Meat Inspection Act, 21 U.S.C. § 606(a) (1907) (stating that an inspector shall conduct examinations and inspections of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and shall have access at all times to every part of the establishment).

49. See *FSIS Import Procedures for Meat, Poultry & Egg Products*, FSIS, <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/fsis-import-procedures-for-meat-poultry-and-egg-products/fsis-import-procedures> (last visited July 22, 2014) (explaining the process of establishing equivalence).

50. See Melissa Harris, *Costly Switch? Farm Bill Moves Catfish Inspections from FDA to USDA*, CHI. TRIB., Mar. 2, 2014, http://articles.chicagotribune.com/2014-03-02/business/ct-confidential-fortune-fish-0302-biz-20140302_1_catfish-industry-fish-exports-fish-tacos.

51. See *id.*

HACCP program, which inspects facilities approximately every one-to-three years based on prioritization and risk, the FSIS system of mandatory and continuous inspection will result in inspection of *all* catfish produced by eligible countries.⁵² Given the considerable difference between these two inspection approaches,⁵³ and the financial burden and overall difficulty associated with achieving equivalency in other countries,⁵⁴ this shift will have important consequences for international trade now that commercial catfish production will come under the jurisdiction of the FSIS.⁵⁵

C. *The Risk Assessment*

According to the 2008 Farm Bill, the regulatory shift would not apply until the FSIS issued implementing regulations.⁵⁶ In February 2011, the FSIS began drafting the proposal for these regulations, applying processes previously only used for meat, poultry, and egg products to catfish and catfish products.⁵⁷ However, due to its expected economic impact, the proposed rule was designated as a “major regulation” under the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.⁵⁸ This designation

52. See FSIS IMPACT ANALYSIS, *supra* note 18, at 21–22.

53. See, e.g., Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75592–93, 75597–98 (stating that a country seeking eligibility to import its product into the United States would have to have its processing systems deemed “equivalent,” as compared to the FDA’s HACCP program, which does not presuppose a regulatory finding by the FDA of equivalence, nor does the FDA conduct continuous re-inspection of imported products as a condition of their entry).

54. See Sesto Vecchi & Gage Raley, *Catfish Driving a Wedge Between U.S. and Its Trade Partners*, WORLD FISHING & AQUACULTURE (Oct. 2, 2014), <http://www.worldfishing.net/news101/industry-news/catfish-driving-a-wedge-between-us-and-its-trade-partners> (explaining that putting in place a USDA-equivalent system will require major overhauls, which would shut down catfish export operations for years until the process is complete, as lawmakers will have to debate and pass legislation, draft regulations, allocate funding, and implement the new system. In the meantime, many catfish farmers, who are already struggling, will go out of business); see also Megan Engle, *China’s Poultry Slaughter System not Equivalent to United States’ System*, LEXOLOGY (Nov. 21, 2013), <http://www.lexology.com/library/detail.aspx?g=6f4cc464-4a4e-41f1-b4ba-684955444c7e> (showcasing an example of the historical difficulty associated with achieving equivalence).

55. See, e.g., Harris, *supra* note 50 (finding that catfish is a vital industry to Vietnam, accounting for more than \$380.7 million of the country’s more than \$1.5 billion in fish exports to the United States in 2013, which will be negatively impacted by the imposition of the proposed rule); Vecchi, *supra* note 54 (stating that the catfish trade is an important issue for Vietnam because its aquaculture sector has invested heavily in catfish farming to meet United States demand).

56. See Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75592.

57. See GAO REPORT, *supra* note 30, at 1–2.

58. See Fed. Crop Insurance Reform and Dep’t of Agric. Reorganization Act of 1994, Pub. L. No. 103-354 § 304(c), 108 Stat. 3178 (Oct. 13, 1994) (defining rules with a likely annual impact of

required the proposed rule to be supported by a risk assessment promulgated by the FSIS.⁵⁹

In assessing the potential risks posed by catfish for its required risk assessment, the FSIS looked for vulnerabilities related to microbial pathogens, bacterial contaminants, heavy metals, unapproved antimicrobials, and pesticides, drawing on data from the FDA, the Center for Disease Control (CDC), state public health agencies, and the World Health Organization (WHO).⁶⁰ Despite this extensive research into various vulnerabilities, the FSIS's risk assessment ultimately focused on the potential risks associated with *Salmonella*, identifying the need to protect catfish consumers from this target pathogen as the primary scientific justification for the rule.⁶¹ Yet the risk assessment was plagued with uncertainty,⁶² and considering that Congress had yet to define catfish, it was unclear how far the proposed rule's effects would spread.

D. A Definitional Change of the Meaning of Catfish

Despite the many attempts to eliminate the catfish inspection program,⁶³ Congress clarified the definition of catfish when it passed the Agricultural Act

\$100 million or more in 1994 dollars as "major regulations").

59. See *id.* § 304(b)(1)(A) (requiring an analysis of the health risks, costs, and benefits for "major" proposed regulations that regulate human health, human safety, or the environment).

60. Mandatory Inspection of Catfish and Catfish Products, (proposed Feb. 24, 2011) 76 Fed. Reg. 10433, 10438–40 (to be codified at 9 C.F.R. pt. 300, 441, 530–34, 537, 539–54, 544, 548, 550, 552, 555, 557, and 559–61).

61. See *id.* at 10440; see also RISK ASSESSMENT DIV., FSIS, USDA, ASSESSMENT OF THE POTENTIAL CHANGE IN HUMAN HEALTH RISK ASSOCIATED WITH APPLYING INSPECTION TO FISH OF THE ORDER SILURIFORMES 10 (2015) [hereinafter 2015 FSIS RISK ASSESSMENT] (stating that the FSIS focused on *Salmonella* contamination because the presence of this pathogen in the United States remains a concern and there is evidence that at least one outbreak of salmonellosis may have been related to catfish consumption); RISK ASSESSMENT DIV., FSIS, USDA, RISK ASSESSMENT OF THE POTENTIAL HUMAN HEALTH EFFECT OF APPLYING CONTINUOUS INSPECTION TO CATFISH 9 (2012) [hereinafter 2012 FSIS RISK ASSESSMENT]; RISK ASSESSMENT DIV., FSIS, USDA, PEER REVIEW COMMENTS AND RESPONSES TO AN UPDATED RISK ASSESSMENT OF THE EFFECT OF AN FSIS CATFISH INSPECTION PROGRAM 9–11 (2011) [hereinafter RISK ASSESSMENT PEER REVIEW COMMENTS] (stating that while the FSIS evaluated data regarding many contaminants, they are no longer relevant as the risk assessment only focuses on the potential adverse effects of *Salmonella*).

62. See 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 9 (explaining that the FSIS's lack of experience in implementing such an inspection program in the context of aquaculture makes estimating the impact of such a program difficult); 2012 FSIS RISK ASSESSMENT, *supra* note 61, at 9 (stating that specific information regarding the presence of *Salmonella* and the impact on mandatory and continuous inspection is unavailable); Richard Williams, *Public Interest Comment on Mandatory Inspection of Catfish and Catfish Products*, GEO. MASON U. MERCATUS CTR., June 20, 2011, <http://mercatus.org/publication/comment-usda-mandatory-inspection-catfish> (showcasing many of the issues with the FSIS's risk assessment, such as the unfounded assumption that the risk of the presence of *Salmonella* in catfish was equivalent to that in poultry, the problems with its probabilistic modeling, its use of conservative parameter values, the outdated and limited data used by the FSIS in its analysis, and the lack of significant risk associated with catfish).

63. See, e.g., Sean Murphy, *GAO Again Calls U.S. Catfish Inspection Program A Waste of Money*, SEAFOOD SOURCE, Feb. 12, 2015, <http://www.seafoodsource.com/news/supply-trade/27672->

of 2014,⁶⁴ which encompassed “all fish of the order Siluriformes” as opposed to limiting the definition to one family of catfish.⁶⁵ This broad definition resulted in the inclusion of all thirty-five domestic and foreign families belonging to the order Siluriformes.⁶⁶ Significantly, it included those species of catfish that had previously been excluded by the limited definition promulgated by the 2002 Farm Bill, like the Vietnamese *Pangasius*.⁶⁷

The USDA published the final rule in the Federal Register on December 2, 2015,⁶⁸ nearly a year after its anticipated release, first in December 2014⁶⁹ and later in April 2015.⁷⁰ The rule, which applies to both domestically and internationally farmed fish of the order Siluriformes, will become effective in March 2016.⁷¹ Once effective, the rule begins an 18-month “transitional

gao-again-calls-u-s-catfish-inspection-program-a-waste-of-money (reporting that the GAO issued its eighth publication calling for action to stop the catfish inspection program); Hemingway, *supra* note 8 (noting that, despite the appearance of the then-proposed rule as a “protectionist racket and a waste of taxpayer money,” no one can get rid of it: “In 2012, the Senate voted by voice to eliminate the program. In 2013, the House Agriculture Committee voted 31-15 to eliminate the program.”); Letter from The Honorable John McCain, Senator, United States Senate to The Honorable Debbie Stabenow, Chairwoman, Committee on Agriculture, Nutrition & Forestry, United States Senate and The Honorable Thad Cochran, Ranking Member, Committee on Agriculture, Nutrition & Forestry, United States Senate (Jan. 8, 2014), *available at* http://www.mccain.senate.gov/public/_cache/files/96c665ac-6c0b-4723-8af6-d82e3233b2fd/1-8-14-mccain-letter-on-catfish-conference-vote.pdf) (stating that during Senate consideration of the Farm Bill, McCain offered an amendment to repeal the catfish inspection program, but he was denied a vote even though the Senate approved a similar amendment by voice-vote in 2012).

64. Agric. Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

65. *Compare id.* § 12106 (broad definition) with Farm Sec. and Rural Inv. Act of 2002, Pub. L. No. 107-171, § 10806(a)(1), 116 Stat. 134, 526 (May 13, 2002) (narrow definition).

66. *Catfish*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/99455/catfish> (last visited June 28, 2014) (defining the order Siluriformes to include 2,900 individual species of catfish).

67. Press Release, Senator Thad Cochran, Cochran Hears Miss. Delta Views on Farm Bill Implementation (Aug. 4, 2014), *available at* <http://www.cochran.senate.gov/public/index.cfm/2014/8/cochran-hears-miss-delta-views-on-farm-bill-implementation> (“The 2014 law more clearly spells out that foreign imported catfish must undergo the same food safety requirements as domestically-produced catfish.”).

68. *See generally* Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. 75590.

69. FEDERAL REGISTER, MANDATORY INSPECTION OF CERTAIN FISH, INCLUDING CATFISH AND CATFISH PRODUCTS: TIMELINE (2014), <https://www.federalregister.gov/regulations/0583-AD36/mandatory-inspection-of-certain-fish-including-catfish-and-catfish-products>.

70. *See* Philip Brasher, *Poultry Inspection Overhaul Set for Summer, Catfish Plan Coming*, AGRI-PULSE, Feb. 26, 2015, <http://www.agri-pulse.com/Poultry-catfish-inspection-on-track-02262015.asp> (quoting the USDA’s deputy undersecretary for food safety, Al Almanza, who expected the final rule to be released in April 2015).

71. Press Release, FSIS, USDA Releases Final Rule Establishing Inspection Program For Siluriformes Fish, Including Catfish (Nov. 25, 2015) (on file with FSIS).

implementation period” for both domestic and international producers.⁷² During this time, the FSIS will conduct inspections and species and residue sampling on imported catfish shipments on a random basis.⁷³ Countries wishing to continue exporting their products must apply for an equivalency determination.⁷⁴

With the rule’s finalization and the grossly inadequate timeframe,⁷⁵ the resulting regulatory shift will likely lead to the United States defending the rule before a WTO Panel against Vietnam’s claims that the rule is based on a flawed risk assessment and serves as a thinly veiled attempt to prevent the entry of foreign catfish into the American market.⁷⁶ If Vietnam is successful, the judgment against the United States could range from removal of the rule within a reasonable period of time, to WTO-approved sanctions, or to compensation.⁷⁷

II.

WHAT’S THE CATCH?: THE FUTURE BEFORE A WTO PANEL

The WTO’s SPS Agreement reflects both the importance of global food safety measures and the recognition that such measures can be used for protectionist purposes.⁷⁸ For that reason, the SPS Agreement includes significant safeguards to ensure that Members’ SPS measures are genuine food safety measures addressing real health concerns rather than measures intended to provide trade protection against imports.⁷⁹ The SPS Agreement requires that an SPS measure is (1) supported by sufficient scientific evidence, (2) based on a risk assessment, and (3) not a disguised restriction on international trade.⁸⁰ Thus, in its complaint before the WTO Panel, Vietnam⁸¹ would assert that the

72. *Id.*

73. *Id.*

74. *Id.*

75. See *supra* note 54 (showcasing the difficulties and time-consuming processes associated with achieving equivalence).

76. See Nixon, *supra* note 6, at A15 (reporting growing international concern over the inspection program).

77. See Robert Z. Lawrence, Council on Foreign Relations, *Council Special Report: The United States and the WTO Dispute Settlement System*, CSR No. 25 (Mar. 2007) (explaining the WTO dispute settlement process); see, e.g., Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 83–84, WT/DS26/ARB (July 12, 1999) (deciding that the United States was entitled to suspend concessions on products from the E.U. in the amount of \$116.8 million because the level of impairment suffered by the United States as a result of the E.U.’s ban on hormone-treated beef was \$116.8 million).

78. See generally *WTO Agreement Series: Sanitary and Phytosanitary Measures*, 9-11 (2010), https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf (providing an overview of the SPS Agreement).

79. Comments of Jim Bacchus and Ira Shapiro on Proposed Rule for Mandatory Inspection of Catfish and Catfish Products (June 24, 2011) (on file with the FSIS).

80. See SPS Agreement, *supra* note 13, arts. 2.2, 5.1, 5.5.

81. See Bruce Einhorn & Chau Mai, *The Catfish Wars Could Derail U.S.-Asia Trade*, BLOOMBERG BUS. WK., July 3, 2014, <http://www.businessweek.com/articles/2014-06-30/the->

shift in regulatory oversight mandated by the 2008 Farm Bill and reaffirmed in the FSIS's rule is neither supported by scientific evidence nor based on a risk assessment, and it functions as a protectionist policy that—as finalized—would dramatically impact international trade.

*A. The FSIS's Rule Is Neither Founded on Sufficient Scientific Evidence
nor Based on a Risk Assessment*

Article 5.1 of the SPS Agreement provides that Members shall ensure that their sanitary or phytosanitary measures are based on an assessment of the risks⁸² to human, animal, or plant life or health.⁸³ Analysis under article 5.1 consists of two fundamental questions: first, whether a risk assessment appropriate to the circumstances was conducted, and second, whether the SPS measure is based on that risk assessment.⁸⁴

A risk assessment, within the meaning of article 5.1, must: (1) identify the diseases whose entry, establishment, or spread a Member country wants to prevent; (2) evaluate the likelihood of entry, establishment, or spread of these diseases; and (3) evaluate the likelihood of entry, establishment, or spread of these diseases according to the SPS measures which might be applied.⁸⁵

It is unlikely that a WTO Panel would find that the United States failed to meet the first of these requirements because it identified *Salmonella* as the target pathogen whose entry it sought to prevent. But under the latter two prongs, the result would turn on the Panel's interpretation of "potential."⁸⁶ Were the Panel

catfish-wars-heat-up-and-u-dot-s-dot-asia-trade-hangs-in-the-balance (showcasing that Vietnam would be the most likely complainant before a WTO Panel as the Vietnam Association of Seafood Exporters and Producers have already taken action by hiring Jim Bacchus, a former chairman of the WTO's Appellate Body, to prepare a possible legal challenge to the FSIS's then-proposed rule); see also Ron Nixon, *New Catfish Inspections Are Posing a Problem for a Pacific Trade Pact*, N.Y. TIMES, Nov. 14, 2013, at A23 (explaining that of all the countries in the talks, "Vietnam is going to have to do the most in terms of changing its policies to comply with any trade agreement obligations") (internal quotations omitted).

82. See SPS Agreement, *supra* note 13, Annex 1A(4) (defining a "risk assessment" as the "evaluation of the likelihood of entry, establishment, or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences").

83. SPS Agreement, *supra* note 13, art. 5.1.

84. See Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, ¶ 7.173, WT/DS392/R (Sept. 29, 2010) [hereinafter *U.S.—Poultry*].

85. See Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶ 121, WT/DS18/AB/R (Oct. 20, 1998) [hereinafter *Australia—Salmon*] (emphasis omitted).

86. Compare *id.* ¶ 125 (claiming that it is not sufficient that a risk assessment conclude that there is a possibility of entry, establishment, or spread of diseases and that a proper risk assessment must make its evaluations based on the probability of entry, establishment, or spread of diseases), with Appellate Body Report, *European Communities—Measures Concerning Meat and Meat*

to base its decision on the probability of entry, the risk assessment would be insufficient.⁸⁷ However, if it were to base its decision on the possibility of entry, the risk assessment would likely stand.

Next, assuming that the Panel would find that the FSIS conducted a risk assessment, it would then need to decide whether the SPS measure implemented is “based on” that risk assessment.⁸⁸ To answer this question, the Panel would have to determine: (A) whether the SPS measure, in accordance with article 2.2,⁸⁹ is supported by scientific principles and maintained with sufficient scientific evidence,⁹⁰ and (B) whether the results of the risk assessment sufficiently warrant the SPS measure at issue.⁹¹

The Panel has at its disposal many possible approaches when assessing sufficiency that might be appropriate depending on the factual situation. This Article first evaluates the sufficiency of the scientific evidence in support of the SPS measure and then examines whether the science reasonably supports the risk assessment.

1. The FSIS’s Rule Is Not Supported by Scientific Principles or Maintained with Sufficient Scientific Evidence

Vietnam would have a strong claim that there is not sufficient scientific evidence to justify the protectionist shift in oversight of catfish imports based on (1) the lack of an established risk, (2) the theoretical nature of the risk, and (3) the expert opinions that disavow the existence of the risk.

Products (Hormones), ¶¶ 182–84, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *European Communities—Hormones*] (cautioning against using “probability” as an alternative meaning for “potential,” as the ordinary meaning of “potential” relates to possibility and is different from the ordinary meaning of “probability,” where “probability” implies a higher degree or a threshold of potentiality or possibility).

87. See, e.g., 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 9; 2012 FSIS RISK ASSESSMENT, *supra* note 61, at 9 (“[L]imited information on the distribution of microbial contamination and chemical residues on catfish limit [the FSIS’s] ability to make strong statements about the baseline risk. Furthermore, the lack of experience with implementing continuous inspection programs in the context of aquaculture makes estimating the impact of such a program on risk difficult. As such, the risk assessment [the] FSIS presents . . . simply provides insight into the risk reductions that *might* accompany the implementation of the type of continuous inspection program now required for catfish under the FMIA.”) (emphasis added).

88. SPS Agreement, *supra* note 13, art. 5.1.

89. See Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶ 180 (emphasizing that articles 2.2 and 5.1 should constantly be read together because “the elements that define the basic obligation set out in article 2.2 impart meaning to article 5.1”).

90. See SPS Agreement, *supra* note 13, art. 2.2 (requiring that Members ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal, or plant life or health, is based on scientific principles, and is not maintained without sufficient scientific evidence).

91. See Panel Report, *U.S.—Poultry*, *supra* note 84, ¶ 7.180 (explaining how the Panel determines if an SPS measure is “based on” a risk assessment).

For scientific evidence to support a measure sufficiently under article 2.2, it must first establish the existence of the risk that the SPS measure is created to address.⁹² For example, in *U.S. – Poultry*,⁹³ the Panel determined that the scientific evidence was not sufficient within the meaning of article 2.2 because the evidence put forward by the United States did not precisely address the risks associated with China’s poultry inspection system.⁹⁴

In this case, just as in *U.S. – Poultry*, the evidence promulgated by the FSIS in its risk assessment fails to establish the existence of the risk of *Salmonella* contamination in catfish and catfish products.⁹⁵ In fact, the risk assessment ultimately reaches the conclusion that “if Siluriformes were truly responsible for tens of thousands of *Salmonella* illnesses each year, it is expected that there would be more evidence of this food source based on epidemiological data”⁹⁶

Moreover, a risk assessment must evaluate an ascertainable risk; the scientific evidence is not to be based upon hypothetical scenarios.⁹⁷ For example, the WTO Appellate Body in *European Communities – Hormones*⁹⁸ refused to accept the opinion of an expert advising the Panel because his estimate was, at best, a “rough guess” in light of the limited scientific evidence

92. See Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, ¶¶ 143–216, WT/DS245/AB/R (Nov. 26, 2003) [hereinafter *Japan—Apples*].

93. Panel Report, *U.S.—Poultry*, *supra* note 84.

94. See *id.* ¶¶ 7.200–7.202.

95. See 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 95 (noting that salmonellosis from consuming a serving of fish is an “uncommon event”); 2012 FSIS RISK ASSESSMENT, *supra* note 61, at 11 (presenting evidence suggesting that the baseline risk of catfish is unknown, emphasizing that the likelihood of catfish being contaminated by *Salmonella* is low, and estimating an average probability of illness of 1.5×10^{-6} salmonellosis cases per serving; when, in fact, according to the risk assessment, *all* seafood accounts for just two percent of all *Salmonella* illnesses nationwide); Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75595, 75599 (reporting that the CDC lists that catfish *may* have been the vehicle in “at least *one* outbreak of salmonellosis” in 1991. It further provides an update from the CDC’s outbreak database, stating that it does not indicate that any additional outbreaks have occurred recently) (emphasis added); Mandatory Inspection of Catfish and Catfish Products, (proposed Feb. 24, 2011) 76 Fed. Reg. at 10440 (noting that since implementation of the FDA’s mandatory seafood HACCP controls in 1998, “no cases of salmonellosis linked to catfish have been reported”).

96. 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 93 (emphasis added).

97. See Appellate Body Report, *Australia—Salmon*, *supra* note 85, ¶ 125 (“Theoretical uncertainty is not the kind of risk which . . . is to be assessed”) (internal quotation marks omitted); Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶¶ 187, 207 (holding that while a theoretical framework may represent the beginning of a risk assessment, the risk must be both ascertainable in a science laboratory operating under strictly controlled conditions, and apparent in human societies as they actually exist).

98. Appellate Body Report, *European Communities—Hormones*, *supra* note 86.

available.⁹⁹ The Appellate Body determined that the scientific evidence was insufficient because the expert's inexperienced opinion¹⁰⁰ neither purported to be the result of his own scientific studies nor specifically focused on the risks of hormones to meat and meat products.¹⁰¹

Here, akin to the expert in *European Communities – Hormones*, the FSIS's lack of expertise in this area is evidenced by its hypothetical risk assessment.¹⁰² The indeterminate and uncertain nature of the data concerning the presence of *Salmonella* in catfish caused the FSIS to use data from its experience with poultry as a proxy in its analysis of the possible effectiveness of an FSIS continuous inspection program for controlling *Salmonella* in catfish.¹⁰³ Yet nowhere in the risk assessment does the FSIS explain how poultry, a land-based bird, has any relationship to catfish, a water-based fish, in terms of predicting the risk of *Salmonella*.¹⁰⁴ In fact, the risk of *Salmonella* contamination in poultry and catfish differs substantially.¹⁰⁵ As such, the WTO Panel would find that the use of poultry data amounts to the creation of a theoretical risk.

Furthermore, while analyzing the sufficiency of the scientific evidence, the Panel would consider the views and opinions of experts.¹⁰⁶ During its

99. See *id.* ¶ 198.

100. *Id.*; see also Panel Report, *European Communities—Hormones*, ¶ 6.17, WT/DS26/R/USA (Aug. 18, 1997).

101. See Panel Report, *European Communities—Hormones*, *supra* note 100, ¶ 6.17.

102. See 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 12 (finding substantial uncertainty regarding “the extent to which the experience associated with controlling *Salmonella* in poultry is applicable to controlling *Salmonella* in Siluriformes.”).

103. See *id.* at 10–12.

104. See Williams, *supra* note 62, at 6 (“FSIS inexplicably assumed that the distribution of number of *Salmonella* is exactly the same distribution as is found in poultry . . . There is no justification given for this assumption, and it seems implausible that catfish have any more relationship to chickens than they do to elephants.”) (citations omitted).

105. See, e.g., 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 55 (acknowledging the risks associated with using its experience with poultry as a surrogate); Michael B. Batz et al., RANKING THE RISKS: THE 10 PATHOGEN-FOOD COMBINATIONS WITH THE GREATEST BURDEN ON PUBLIC HEALTH, at 63 (2011), available at <https://folio.iupui.edu/bitstream/handle/10244/1022/72267report.pdf> (reporting that, statistically, the risks of salmonellosis in poultry and seafood are far from equivalent because, in a recent study, *Salmonella*-Poultry ranked as the number four pathogen-food combination in terms of annual disease burden, and *Salmonella*-Seafood ranked eighteenth); FSIS IMPACT ANALYSIS, *supra* note 18, at 99 (“The number of human illnesses associated with catfish and catfish products is relatively small compared to that associated with meat and poultry products”); see also Comments of the American Soybean Ass’n et al. on Proposed Rule for Mandatory Inspection of Catfish and Catfish Prods. 5 (June 24, 2011) (on file with FSIS) (“It is clear that the conclusions drawn by any risk assessment are only as good as the data and assumptions used. In this case, since the inputs are largely speculative, so must be the results.”).

106. See, e.g., Appellate Body Report, *India—Quantitative Restrictions on Imports of Agric, Textile and Indus. Products*, ¶ 142, WT/DS90/AB/R (Aug. 23, 1999) (finding that the Panel was entitled to take into the account the view of the experts to determine if a case has been made); Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶ 198 (analyzing the scientific evidence developed by experts on a specific topic).

consideration, the Panel enjoys discretion as the trier of fact¹⁰⁷ and is not obliged to give precedence to the importing Member's scientific evidence.¹⁰⁸ Thus, if Vietnam were to bring a complaint, the Panel would evaluate both the opinions expressed in the FSIS's risk assessment and the opinions of additional experts testifying on behalf of Vietnam.¹⁰⁹ In this case, the greater scientific community does not consider the potential risks of *Salmonella* contamination in catfish to be an identifiable, ascertainable risk requiring intensified inspection procedures.¹¹⁰ The twelve authors of the risk assessment, moreover, seem to agree.¹¹¹

107. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 161, WT/DS135/AB/R (Mar. 12, 2001) (finding that the Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements).

108. See Appellate Body Report, *Japan—Apples*, *supra* note 92, ¶¶ 165–67 (holding that a Panel is not obliged to give precedence to the importing Member's approach to scientific evidence when analyzing and assessing scientific evidence to determine whether a complainant established a case under article 2.2).

109. See *supra* notes 107–108 (concerning how the Panel is under no obligation to hear only evidence from the importing member and that it may use its discretion to afford weight to that evidence).

110. See Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. at 10438 (proposed Feb. 24, 2011) (acknowledging that the CDC finds commercially raised catfish to be a low-risk food); Food and Agric. Org. [FAO], *Report of the FAO Expert Workshop on Application of Biosecurity Measures to Control Salmonella Contamination in Sustainable Aquaculture*, FIPM/R937, at 2 (Jan. 19–21 2010) (“Although *Salmonella* is a major foodborne pathogen, products of aquaculture are rarely involved in outbreaks of salmonellosis. Very low level prevalence of *Salmonella* can be seen in raw products from aquaculture systems in developed countries, but this has not led to any particular public health problems in these countries”); Erica McCoy et al., *Foodborne Agents Associated with the Consumption of Aquaculture Catfish*, 74 J. OF FOOD PROTECTION 352, 500, 502 (2011) (finding the results unclear about whether catfish served as the primary vehicle of illness for reported outbreaks of *Salmonella* or whether other foods played a role); Tom McCasky et al., *Safe and Delicious: Study Shows Catfish is Low Risk for Foodborne Illness*, 45 HIGHLIGHTS OF AGRIC. RESEARCH, 1998, at 2–3 (concluding that health hazards from *Salmonella* and other bacteria in catfish were practically zero); Marcia Wood, *In-Demand Fish: Making Sure They're Safe to Eat*, AGRIC. RESEARCH MAGAZINE, Oct. 2010, at 19 (explaining that foodborne illnesses are not commonly associated with catfish); see generally GAO REPORT, *supra* note 30, at 10–14 (2012) (showcasing that the FSIS used outdated and limited information as its scientific basis for implementing a catfish inspection program).

111. See 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 70 (finding that “*Salmonella* illnesses attributable to *Siluriformes* are rare”); 2012 FSIS RISK ASSESSMENT, *supra* note 61, at 11, 36, 40 (concluding consumption of catfish does not pose a substantial risk of *Salmonella*, because of the lack of illnesses reported by public health agencies and because public health data, when plugged into models used to predict future outbreaks, yield extremely low results). See also, RISK ASSESSMENT PEER REVIEW COMMENTS, *supra* note 61, at 14 (disagreeing with the conclusion: “Our analyses indicate that the implementation of an FSIS inspection based program will have a beneficial public health impact by decreasing the number of such adverse effects experienced by [U.S.] consumers.” This disagreement, according to one author, is due to the lack of sufficient current data.).

Given the United States' failure to prove a risk of *Salmonella* contamination in catfish and catfish products, the theoretical nature of the scientific assessment, and the overwhelming opinion of the scientific community,¹¹² Vietnam would assert that this regulatory shift in oversight is neither supported by scientific principles nor maintained with sufficient scientific evidence and thus violates article 2.2.

2. *The FSIS's Risk Assessment Does Not Sufficiently Warrant the Rule and Therefore the Rule Is Not "Based on" a Risk Assessment*

In conjunction with the determination that the rule is not founded on sufficient scientific evidence, Vietnam could allege that the rule fails to fulfill article 5.1 because the rule is not sufficiently warranted by the risk assessment.¹¹³ In examining claims under article 5.1, WTO Panels have explained that SPS measures must be "based on" a risk assessment; in other words, there is a substantive requirement that there be a rational, objective, proportionate relationship between the SPS measure and the risk assessment.¹¹⁴ In short, the scientific conclusions reached in the risk assessment must conform to and reflect the scientific conclusions implicit in the SPS measure.¹¹⁵

Therefore, to justify the regulatory shift in this case, there must be a legitimate food safety threat that the current FDA regulations cannot handle. Although the risk assessment purports to establish that *Salmonella* is one such food safety threat, Vietnam would argue that the scientific evidence promulgated in the risk assessment and the level of oversight required by the rule are disproportionate to the actual risk of *Salmonella* contamination in catfish and catfish products.¹¹⁶

This disproportionality is particularly apparent when considering the uncertainty of the success of the USDA's inspection program in preventing *Salmonella* from adulterating catfish and catfish products.¹¹⁷ The risk

112. See Connelly, *supra* note 35, at 29 (arguing that the justification for the proposed rule is unpersuasive, which is why so many of the expert conclusions in the risk assessment are either "unsupportive of aggressive FSIS regulation or studiously neutral").

113. See *supra* note 91 and accompanying text.

114. See Appellate Body Report, *Japan—Apples*, *supra* note 92, ¶ 163 (concluding that the overall risk of fire blight presented in the risk assessment was negligible and disproportionate to the severity of the SPS measure proposed and therefore the measure was not "based on" a risk assessment within the meaning of article 5.1); Appellate Body Report, *Japan—Measures Affecting Agric. Products*, ¶ 73, WT/DS76/AB/R (Feb. 22, 1999) (explaining that there must be a sufficient or adequate relationship between the SPS measure and the scientific evidence); Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶¶ 193–94 ("[T]he results of the risk assessment must sufficiently warrant . . . the SPS measure at stake.").

115. See Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶¶ 192–94.

116. See *supra* note 95 and accompanying text (showing that the risk of *Salmonella* contamination in catfish is uncommon).

117. See 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 74; 2012 FSIS RISK ASSESSMENT,

assessment presented the estimates of the inspection program's potential effectiveness relative to the number of *Salmonella* illnesses estimated to be associated with catfish.¹¹⁸ However, given the substantial uncertainty regarding the number of *Salmonella*-related illnesses attributable to catfish,¹¹⁹ the determination concerning the effectiveness of the FSIS's catfish inspection program is similarly plagued with uncertainty.¹²⁰ Despite this uncertainty, the rule, in line with the statute, requires the shifting of jurisdiction over catfish from the FDA to the USDA's FSIS.¹²¹ If the rule was truly "based on" the FSIS's risk assessment, it would be clear that there is no need for such a burdensome regulatory shift, particularly because the risk of contamination is unknown and unsupported by available data.

Given the uncertainty of both the risk and the effectiveness of the program, the lack of scientific data, and the absence of any expert testimony expressing significant concern about the risks of *Salmonella*, it would be difficult for the United States to contend before a WTO Panel that an SPS measure implementing such a dramatic shift is founded on scientific principles, maintained with sufficient scientific evidence, and sufficiently warranted by the risk assessment in accordance with articles 2.2 and 5.1.

B. The FSIS's Rule Amounts to a Disguised Barrier to Trade

Beyond asserting the invalidity of the risk assessment, Vietnam would claim that the rule amounts to a disguised barrier to trade in violation of article 5.5 of the SPS Agreement.¹²² In an attempt to maintain balance between the competing interests of promoting international trade and protecting human life

supra note 61, at 40 ("The true effectiveness of FSIS inspection for reducing catfish-associated human illnesses is unknown. Also, the rate at which FSIS inspection will achieve its ultimate reductions is unknown. Consequently, the model incorporates substantial uncertainty about program effectiveness. A plausible range [of effectiveness] might be from more than 90% effective to less than 10% effective.").

118. See 2012 FSIS RISK ASSESSMENT, *supra* note 61, at 33.

119. See *id.* at 12 ("This risk assessment's outputs are subject to substantial uncertainty regarding... the estimated baseline number of salmonellosis cases attributable to catfish consumption.").

120. See *id.* at 41 ("Predicting the effectiveness of [the] FSIS inspection for the reduction of illness from catfish consumption is uncertain because data are . . . unavailable.").

121. See *id.* ("The role of daily FSIS inspection of catfish processing establishments in reducing potential contamination events is expected to be important.").

122. See SPS Agreement, *supra* note 13, art. 5.5.; see also SPS Agreement, *supra* note 13, art. 2.3; Panel Report, *Australia—Salmon*, ¶ 8.52 WT/DS18/R (June 12, 1998) (holding that articles 2.3 and 5.5 "may be seen to be marking out and elaborating a particular route leading to the same destination").

and health,¹²³ article 5.5 requires WTO Panels to make a searching analysis of whether a measure is a disguised form of protectionism.¹²⁴

WTO Panels have identified three conditions that must be satisfied in order to establish a violation of article 5.5: (1) the Member country has different levels of protection in comparable situations; (2) the levels of protection show arbitrary and unjustifiable differences in their treatment of different situations; and (3) these arbitrary or unjustifiable differences lead to discrimination or disguised restrictions on trade.¹²⁵ These three elements are to be distinguished and addressed separately, but all must be present.¹²⁶ Each is addressed here in turn.

1. *Element #1: Different Levels of Protection in Comparable Situations*

With regard to the first element, there are two closely related sub-elements: first, the existence of different products that can be compared to the SPS measure at issue; and second, the existence of different levels of protection associated with such comparable products.¹²⁷ For example, Canada, the complainant in *Australia – Salmon*,¹²⁸ alleged that Australia's restriction on the importation of salmon was a disguised barrier to trade.¹²⁹ Arguing that the different products to be compared under article 5.5 are those that involve some of the same disease agents at issue,¹³⁰ Canada submitted four non-salmonid seafood products that are also at risk of the same or similar diseases as those mentioned in Australia's risk assessment pertaining to salmon.¹³¹ The Panel,

123. See SPS Agreement, *supra* note 13, art. 5.5 ("With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health . . . each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.").

124. See Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT'L L. 323, 383 (2002) (explaining that although WTO Members enjoy discretion in the level of protection they set for themselves, they may not establish widely differing levels of protection in comparable situations because widely differing levels of protection may indicate protectionist intent).

125. Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶ 214.

126. See *id.* ¶ 215 (stating that the Panel considers these three elements to be cumulative in nature; all of them must be present if a violation of article 5.5 is to be found).

127. See Panel Report, *U.S.—Poultry*, *supra* note 84, ¶ 7.225 (enumerating the sub-elements).

128. Appellate Body Report, *Australia—Salmon*, *supra* note 85.

129. See Panel Report, *Australia—Salmon*, *supra* note 122, ¶¶ 4.180–4.216.

130. See *id.* ¶ 8.117 (finding the Panel can compare situations under article 5.5 if the situations involve either a risk of entry, establishment, or spread of the same or similar disease).

131. See *id.* ¶ 8.113 (holding that Australia's import ban on salmon can be compared with the treatment it provides to non-salmonids (1-2) uncooked Pacific herring, cod, haddock, Japanese eel, and plaice for human consumption; (3) herring in whole, frozen form for use as bait; and (4) live ornamental finfish, which represent a risk of entry, establishment, or spread of the same or a similar disease).

and later the Appellate Body, upheld these products as comparable because each had at least one disease agent in common.¹³²

Similarly, Vietnam would present different seafood products with a risk of *Salmonella* contamination comparable to that of catfish and catfish products.¹³³ Although there is not much epidemiological data on the presence of *Salmonella* in catfish, there is a considerable amount of information available regarding the presence of *Salmonella* in seafood generally.¹³⁴ In fact, mollusks, shrimp,¹³⁵ and finfish (such as tuna)¹³⁶ are all at risk for *Salmonella* contamination.¹³⁷ Therefore, a Panel would uphold these as comparable products because they all have the same risk of *Salmonella* in common.¹³⁸

The Panel would next determine whether there is a distinction in the levels of protection associated with each of these comparable products by examining the current laws and regulations imposed upon them.¹³⁹ It is the duty of the Panel to assess the sanitary regimes and the corresponding level of protection imposed on the comparable seafood products in contrast to the sanitary regime and level of protection for the SPS measure at issue.¹⁴⁰ For example, in *Australia – Salmon*, where Australia banned the importation of salmon, imports of the four comparable seafood products exported by Canada continued to reach Australian markets despite the fact that all of the products, including salmon, were at risk for similar diseases.¹⁴¹ Based on this difference, the Panel found a distinction in levels of protection.¹⁴²

In this case, Vietnam would argue that the heightened regulatory requirement mandated by the FSIS indicates that the level of protection deemed

132. See *id.* ¶ 8.121 (stating the Panel's finding); Appellate Body Report, *Australia—Salmon*, *supra* note 85, ¶ 153 (upholding the Panel's finding).

133. Cf. *supra* note 131 and accompanying text (listing Canada's comparable products).

134. See generally G. Amagliani et al., *Incidence and Role of Salmonella in Seafood Safety*, 45 *FOOD SERV. INT'L* 780, 780 (2011).

135. See, e.g., M.N. Wan Norhana et al., *Prevalence, Persistence, and Control of Salmonella and Listeria in Shrimp and Shrimp Products: A Review*, 21 *FOOD CONTROL* 344, 354 (2010) (acknowledging the widespread prevalence of *Salmonella* in shrimp production chains).

136. See, e.g., Bill Tomson, *Tuna Blamed in Salmonella Outbreaks is Recalled*, *WALL ST. J.*, Apr. 16, 2012, <http://online.wsj.com/news/articles/SB10001424052702304299304577348030392954406> (highlighting a recent example of a *Salmonella* outbreak due to contaminated tuna).

137. See generally Amagliani, *supra* note 134, at 780–82.

138. Cf. *supra* note 132 and accompanying text (upholding Canada's proposed comparisons as they all had the same or similar diseases in common).

139. See Panel Report, *Australia—Salmon*, *supra* note 122, ¶¶ 8.123–8.124.

140. See *id.* ¶¶ 8.123–8.124.

141. See *id.* ¶ 8.129.

142. See *id.*

appropriate for these catfish and catfish products is very high. This is particularly apparent given that catfish would be singled out as the only seafood product subject to the FSIS's mandatory and continuous inspection regime.¹⁴³ Moreover, the unique treatment of catfish does not coincide with the level of protection deemed appropriate for comparable seafood products also at risk of *Salmonella* contamination, such as mollusks, shrimp, and finfish, which are all overseen (and will remain overseen) by the FDA's seafood HACCP program.¹⁴⁴ Thus, there is a substantial difference between the level of protection for catfish in the FSIS's rule and the levels of protection deemed appropriate for similar seafood products also at risk of *Salmonella* contamination.

2. *Element #2: Arbitrary or Unjustifiable Differences in Levels of Protection*

Having found that the risks associated with catfish are comparable to those of other seafood products, and having found that the United States is applying different levels of protection to these types of products, the Panel would proceed with the second element of its analysis and determine whether this disparity in the level of protection for the products is arbitrary or unjustifiable.¹⁴⁵

There are two ways to accomplish this analysis; the Panel could either examine the justification for increased regulatory oversight by verifying whether it is based on scientific evidence,¹⁴⁶ or it could look to the comparable products to determine if a justification for the disparity in regulatory measures and corresponding levels of protection exists, such as a scientifically higher-risk product.¹⁴⁷ If the Panel were to evaluate the rule based on the former method, it would likely conclude that the appropriate level of protection for catfish and catfish products is arbitrary and unjustifiable within the meaning of article 5.5. This is true given that the rule is neither maintained with sufficient scientific evidence, nor is it proportional to the risk assessed, as set forth above.¹⁴⁸

143. See Senator John McCain, Floor Statement (Feb. 3, 2014) (transcript available at <http://www.mccain.senate.gov/public/index.cfm/2014/2/statement-by-senator-john-mccain-on-farm-bill-conference-report>) (emphasizing that catfish would be the only seafood product singled out for inspection by the FSIS).

144. See Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, 60 Fed. Reg. 65096, 65109 (Dec. 18, 1995) (codified in 21 C.F.R. Pts. 123 and 1240) (requiring fish (fresh or saltwater finfish, molluscan shellfish, crustaceans) and fishery products (any edible human food derived in whole or in part from fish) be produced in accordance with HACCP-type control procedures).

145. See Panel Report, *U.S.—Poultry*, *supra* note 84, ¶¶ 7.255, 7.259.

146. See *id.* ¶ 7.267 (finding the United States' SPS measure was arbitrary or unjustifiable based on the lack of scientific evidence and the lack of a risk assessment).

147. See Panel Report, *Australia—Salmon*, *supra* note 122, ¶ 8.134 (analyzing the comparable situations put forth by Canada, from which the Panel found that there is no scientific explanation for treating salmon as a higher risk product).

148. Cf. *supra* note 146 (finding the United States' SPS measure arbitrary or unjustifiable because it did not comport with articles 2.2 and 5.1).

However, if the Panel were to consider the treatment of the comparable seafood products under the latter method, the result would be the same. The Panel would recall that the rule imposes on catfish and catfish products heightened inspection requirements due to the risk of *Salmonella* contamination.¹⁴⁹ It might, therefore, be expected that some justification for this distinction in comparable products and corresponding levels of protection exists, such as a higher risk related to the imports of catfish and catfish products.¹⁵⁰

As the Panel stated in *Australia – Salmon*, if one comparison put forward by a complainant involved arbitrary or unjustifiable distinctions in levels of protection, no further findings or analyses would be necessary.¹⁵¹ Under this standard, Vietnam could propose comparisons between the presence and risk of *Salmonella* in catfish to the presence and risk of *Salmonella* in mollusks, finfish, or, most persuasively, shrimp.¹⁵² Americans consume more shrimp than any other seafood product,¹⁵³ and ninety percent of shrimp is imported.¹⁵⁴ Further, the risk of *Salmonella* contamination in shrimp is well documented,¹⁵⁵ and unlike the low-risk nature of catfish,¹⁵⁶ the research concerning shrimp indicates that it is at high-risk for *Salmonella* contamination.¹⁵⁷

149. See 2015 FSIS RISK ASSESSMENT, *supra* note 61, at 10; 2012 FSIS RISK ASSESSMENT, *supra* note 61, at 9 (explaining that the risk assessment focused on “*Salmonella* because a broad hazard identification study found *Salmonella* as a potential concern in catfish”).

150. Cf. Panel Report, *Australia—Salmon*, *supra* note 122, ¶ 8.133 (expecting salmon to be a higher risk product based on this distinction in sanitary measures and corresponding levels of protection).

151. See *id.* ¶ 8.143.

152. See *id.*

153. Paul Greenberg, *Why Are We Importing Our Own Fish?*, N.Y. TIMES, June 20, 2014, at Sunday Review Desk 6 (“Americans eat nearly as much [shrimp] as the next two most popular seafoods (canned tuna and salmon) combined.”).

154. See *The Surprising Sources of Your Favorite Seafoods: Shrimp*, FISHWATCH.GOV (2011), http://www.fishwatch.gov/features/top10seafoods_and_sources_10_10_12.html (last visited Aug. 4, 2014) (finding that although shrimp fisheries are among the largest and highest valued in the United States, over 90 percent of it is farmed overseas).

155. See, e.g., N. Bhaskar, *Incidence of Salmonella in Cultured Shrimp Penaeus Monodon*, 138 AQUACULTURE 257, 263–64 (1995) (concluding that *Salmonella* is a part of the natural flora of the shrimp culture environment); P.J.A. Reilly & D.R. Twiddy, *Salmonella and Vibrio Cholerae in Brackish Water Cultured Tropical Prawns*, 16 INT’L J. OF FOOD MICROBIOLOGY 293, 293 (1992) (displaying results that indicate that *Salmonella* can be found in shrimp farms irrespective of the culture methods); see generally Norhana, *supra* note 135, at 348 (discussing several authors’ findings on the prevalence of *Salmonella* in the shrimp production chain).

156. See *supra* note 110 (identifying catfish as a low-risk food).

157. See JANE ALLSHOUSE ET AL., INT’L TRADE AND SEAFOOD SAFETY: ECONOMIC THEORY AND CASE STUDIES, 109, 116 (J. Buzby ed. 2003), available at www.ers.usda.gov/publications/aer828/ (demonstrating that most *Salmonella* contamination in fish and fishery products is with shrimp, as is showcased by the 2001 data where fifty-eight percent of the FDA’s *Salmonella*-

The FDA has been very concerned about combating the entry of contaminated shrimp. The agency initiated a procedure under which shrimp processing facilities, or even entire countries, with a history of *Salmonella*-positive products are placed on a list for “detention without physical examination.”¹⁵⁸ Interestingly, this solution was pursued instead of legislatively mandating a shift in oversight to the FSIS, as was done with catfish.

Considering the popularity of shrimp, its high rate of importation, and the well-documented risk of *Salmonella* contamination, particularly when compared to the unknown risks of catfish, the United States would not be able to justify a more stringent and scrutinized inspection of catfish. This indicates that the rule establishes an arbitrary and unjustifiable level of protection.¹⁵⁹

3. *Element #3: Distinctions in Levels of Protection That Result in a Disguised Restriction on International Trade*

Vietnam’s final assertion would be that the rule constitutes a disguised restriction on international trade.¹⁶⁰ While considerations pertinent to deciding whether the application of a particular SPS measure amounts to arbitrary or unjustifiable discrimination may be taken into account during this evaluation,¹⁶¹ a separate analysis is required to determine if the measure itself results in discrimination or a disguised restriction on trade.¹⁶²

In examining the rule, the Panel will consider “warning signals,” including: (1) the arbitrary or unjustifiable character of the differences in levels of protection, (2) the rather substantial difference in levels of protection between the previously identified comparable situations, and (3) the inconsistency of the SPS measure with articles 5.1 and 2.2.¹⁶³ These warning signals are further

related detentions were for shrimp and only two percent were for catfish or catfish products).

158. FDA, *Import Alert 16-18: “Detention Without Physical Examination of Shrimp,”* June 25, 2014, http://www.accessdata.fda.gov/cms_ia/importalert_35.html; see Norhana, *supra* note 135, at 345 (explaining that this means every shipment of shrimp from these countries or their subsidiary facilities will be detained automatically and denied entry into the United States unless evidence is provided that the shipment is free of *Salmonella*).

159. Cf. Panel Report, *Australia—Salmon*, *supra* note 122, ¶ 8.143 (finding the distinctions in levels of protection reflected in Australia’s treatment of salmon products, as compared to herring as bait and live ornamental finfish, are “arbitrary or unjustifiable” because the latter products present a higher risk).

160. See Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶¶ 214–15 (explaining that the last element refers to the SPS measure resulting in a disguised restriction on international trade).

161. See *id.* (stating that the presence of the an arbitrary or unjustifiable difference in levels of protection “may in practical effect operate as a ‘warning’ signal that the implementing measure . . . might be a discriminatory measure or might be a restriction on international trade disguised as an SPS measure for the protection of human life or health”) (emphasis omitted).

162. See *id.* ¶ 215.

163. Appellate Body Report, *Australia—Salmon*, *supra* note 85, ¶¶ 161–65.

informed by additional factors, such as an abrupt change in conclusions or an evaluation of a country's internal policies.¹⁶⁴

Utilizing these warning signals and additional factors, Vietnam would allege that requiring increased oversight for catfish qualifies as a disguised restriction on international trade. Looking to the first warning signal, the Panel would recall the arbitrary or unjustifiable distinctions in levels of protection imposed by the United States for comparable seafood products.¹⁶⁵ In this case, the evidence shows that imports of shrimp, rather than posing less risk and thus warranting a less stringent SPS measure, actually represent a higher risk than the uncertain risks related to *Salmonella* in catfish imports. Yet it is catfish that will be subject to more stringent inspection procedures under the FSIS.¹⁶⁶

Second, the Panel would recall that this arbitrary difference in levels of protection imposed by the United States for comparable seafood products is substantial.¹⁶⁷ Namely, the Panel would find that catfish, and catfish alone, would be subject to heightened regulatory inspection under the FSIS, unlike comparable products that will continue to be subject to inspection by the FDA.¹⁶⁸ The fact that the United States applies substantially different inspection measures for products that represent the same or greater risk suggests that it is effectively discriminating against other seafood products by requiring additional and increased oversight for catfish absent a logical, scientific explanation.¹⁶⁹

Finally, with respect to the third warning signal, the Panel would consider the rule's inconsistencies with article 2.2 (requiring sufficient scientific evidence) and article 5.1 (requiring the measure be "based on" a risk assessment).¹⁷⁰ In this case, Vietnam would again assert that the rule was neither founded on sufficient scientific evidence nor based on a risk assessment. This is indicative of the fact that the rule is protectionism masquerading as a legitimate food safety regulation.¹⁷¹

164. See, e.g., *id.* ¶¶ 170, 174 (considering the "substantial, but unexplained" change in conclusion which resulted in the import prohibition and the absence of controls on the internal movement of salmon products within Australia as additional factors).

165. See Panel Report, *Australia—Salmon*, *supra* note 122, ¶ 8.149.

166. See *supra* notes 155–157 and accompanying text.

167. See *supra* note 144 and accompanying text.

168. See generally Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish, 80 Fed. Reg. at 75590.

169. Cf. Panel Report, *Australia—Salmon*, *supra* note 122, ¶ 8.150 (finding the substantial difference between Australia's import prohibition on salmon and its simultaneous tolerance of imports of herring for use as bait and of live ornamental finfish despite comparable risks).

170. See *id.* ¶ 8.151 (stating that an analysis under articles 5.1 and 2.2 may, together with other facts, lead to the conclusion that the measure at issue results in a disguised restriction on international trade).

171. Cf. Appellate Body Report, *Australia—Salmon*, *supra* note 85, ¶¶ 161–65 ("[F]inding an

In conjunction with these warning signs, the Panel would consider additional factors proposed by Vietnam, provided they constitute new evidence.¹⁷² At this point, Vietnam would raise the United States' abrupt legislative change to catfish policy,¹⁷³ which suggests elements of domestic protectionism.¹⁷⁴

For the past decade, catfish have been a constant source of trade friction between the United States and Vietnam.¹⁷⁵ This friction is best seen through the enactment of the 2008 Farm Bill, for which there was no scientific explanation indicating that catfish posed a food safety threat substantiating the need for heightened regulatory oversight.¹⁷⁶ In light of this history, Vietnam would argue that the United States catfish industry is once again seeking a roadblock to oppose imports from Vietnam, not heightened oversight.¹⁷⁷ In fact, many supporters of the domestic catfish industry have made statements urging the implementation of the FSIS's inspection program and the broadening of the definition of catfish, emphasizing the need to provide commercial comfort to a struggling industry rather than the need to improve food safety.¹⁷⁸

SPS measure is not based on an assessment of the risks to human, animal or plant life or health . . . is a strong indication that this measure is not really concerned with the protection of human, animal or plant life or health but is instead a trade-restrictive measure taken in the guise of an SPS measure.”).

172. See *id.* ¶ 168 (requiring that the additional factors be differentiated from the warning signals in the determination of whether an SPS measure results in a disguised restriction on international trade).

173. Compare Farm Sec. and Rural Inv. Act of 2002, Pub. L. No. 107-171, § 10806(a)(1), 116 Stat. 134, 526 (May 13, 2002) (defining “catfish” as only those of the species *Ictaluridae*), with Agricultural Act of 2014, Pub. L. No. 113-79, § 12106, 128 Stat. 649, 981 (2014) (defining “catfish” as encompassing all species of the order Siluriformes); see also Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11016(b), 112 Stat. 1651 (June 18, 2008) (shifting regulatory oversight from the FDA to the USDA).

174. Compare Panel Report, *Australia—Salmon*, *supra* note 122, ¶ 8.154 (determining that the change in recommendations between the 1995 Draft Report and the 1996 Final Report, which went from allowing fresh, chilled or frozen salmon under specified conditions to prohibiting its importation or requiring heat treatment, was not sufficiently explained and thus might have been inspired by domestic pressures to protect the Australian salmon industry against import competition), with *A Fish By Any Other Name*, *supra* note 11 (explaining that the “linguistic backflip” of the United States emphasizes the protectionist nature of the legislation).

175. See MICHAEL F. MARTIN, CONG. RESEARCH SERV. R40755, U.S.-VIETNAM ECONOMIC TRADE RELATIONS: ISSUES FOR THE 111TH CONGRESS 11 (2009).

176. See *id.*

177. Ben Evans & Mary Clare Jalonick, *Catfish Wars Heat Up Over Inspection Feud*, ASSOCIATED PRESS (Mar. 23, 2011), <https://sg.news.yahoo.com/catfish-wars-heat-over-inspection-feud-20110323-001136-340.html>; see also GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS228S86, FOOD SAFETY PROVISIONS OF THE 2008 FARM BILL, at 3 (2008) (reporting that the inspection program was urged by the U.S. catfish industry, which has faced strong opposition from foreign catfish producers in Vietnam).

178. See Press Release, Senator Thad Cochran, Cochran Hears Miss. Delta Views on Farm Bill Implementation (Aug. 4, 2014), available at <http://www.cochran.senate.gov/public/index.cfm/2014/8/cochran-hears-miss-delta-views-on-farm-bill-implementation> (“The U.S. catfish industry has taken hits from unfair foreign competition.”); Press Release, Senator Jeff Sessions, Sessions Sends Letter to OMB On Catfish Inspection Program, Urges Fairness For Domestic Producers (July 17,

Moreover, throughout the rulemaking process, the United States had countless opportunities to ensure the rule's compliance with the SPS Agreement. Particularly given the millions of dollars already spent in creating the catfish inspection program and its corresponding office within the USDA,¹⁷⁹ one could conclude that a reasonable course of action would be to ensure that the rule included a lengthy transition period to equivalence in which parties compliant with the FDA's HACCP program should remain unaffected.¹⁸⁰ This lengthy transition period would have provided foreign catfish producers, such as Vietnam, with the time necessary to accomplish the historically difficult task of achieving equivalence with the inspection procedures of the United States.¹⁸¹ However, by providing a mere 18-month transition period, during which foreign governments would have to fundamentally alter their respective nation's food safety procedures and processes through legislation, rulemaking, or otherwise, the United States made it nearly impossible for foreign exporters of catfish to be deemed equivalent.

Individually, these warning signals and additional factors may not constitute evidence of a disguised restriction on international trade. However, when taken together, a Panel would find the rule requiring mandatory and continuous inspection of catfish to be a disguised restriction, therefore fulfilling the third element under article 5.5.¹⁸²

2014), available at <http://www.sessions.senate.gov/public/index.cfm/2014/7/sessions-sends-letter-to-omb-on-catfish-inspection-program-urges-fairness-for-domestic-producers> ("The catfish industry is critical to many of our rural communities and important to our state's economy"); Townsend Kyser, Address at the Pub. Meeting Concerning the USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Products (May 26, 2011) (on file with FSIS) ("Catfish is about the only money being pumped into [the] economy; it's the economic engine that drives the black belt in west Alabama."); Dr. Lester Spell, Address at the Pub. Meeting Concerning the USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Products (May 26, 2011) (on file with FSIS) ("This is a big industry in our state; it [is] important to our state."); Congressman Bennie Thompson, Address at the Pub. Meeting Concerning the USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Products (May 24, 2011) (on file with FSIS) ("[T]he rule will have tremendous impact on jobs in . . . Mississippi.").

179. Ron Nixon, *Number of Catfish Inspectors Drive Debate on Spending*, N.Y. TIMES, July 27, 2013, at A11 ("Since 2009 the [USDA] said that it has spent \$20 million to set up the catfish inspection office . . . The department said that it expects to spend about \$14 million a year to run it.").

180. *Contra* Letter from Jeff Sessions, U.S. Senator, to Brian Deese, Acting Director, Office of Mgmt. and Budget (July 17, 2014), http://www.sessions.senate.gov/public/_cache/files/10f78c55-d92f-4868-b2f2-e9f93615ff50/catfish-inspection-letter-7.17.14.pdf ("Once the final regulations are issued, [Congress] look[s] forward to seeing . . . that the transition to the inspection program occurs concurrently for both domestic and foreign catfish.").

181. See, e.g., Engle *supra* note 54 (exemplifying the never-ending nature of the equivalency process). China has been attempting to develop an equivalent system for its poultry processing since 2004 and the methods, according to FSIS, are still not equivalent.

182. See Appellate Body Report, *European Communities—Hormones*, *supra* note 86, ¶ 240

III.

“DEEP FRY” THE RULE: THE NECESSITY OF REPEAL

Ultimately, the rule will likely prompt a costly response from one or more of the United States’ trade partners.¹⁸³ To eliminate the possibility of a WTO sanction, to enhance the effectiveness of food safety, and to avoid duplication of effort and cost, Congress should repeal section 11016 of the 2008 Farm Bill that assigned the USDA responsibility for inspecting catfish and catfish products. Though it has already been tried,¹⁸⁴ the enactment of new legislation containing language repealing section 11016 would allow those foreign countries and their subsidiary companies to continue to be inspected under the FDA’s HACCP program as opposed to having to attempt to develop an equivalent system to that of the FSIS.

The United States will soon begin experiencing the negative impacts, economic and otherwise, associated with implementing this rule. For example, amidst the negotiations for the Trans-Pacific Partnership (TPP), Vietnam pressed its opposition to the new inspections. The trade deal, which awaits congressional approval, notably contained an assurance from the Office of the United States Trade Representative that the new catfish inspection program would be “consistent with its obligations” under the WTO’s rules.¹⁸⁵ However, implementing the program as written will likely violate that promise by singling out one product for uniquely difficult regulatory treatment without a compelling scientific reason.¹⁸⁶ Moreover, the rule raises serious questions and concerns about the United States’ commitment to fair play and fair trade on the international stage, potentially opening up the United States to retaliation from other TPP member nations.¹⁸⁷

(“[T]he degree of difference . . . in the levels of protection, is only one kind of factor which, along with others, may cumulatively lead to the conclusion that . . . a disguised restriction on international trade in fact results from the application of a measure.”).

183. See Nixon, *supra* note 6, at A15 (“[Ten Asian and Pacific nations] say that the inspection program is a trade barrier erected under the guise of a food safety measure and that it violates the United States’ obligations under World Trade Organization agreements.”).

184. Ron Nixon, *New Inspections for Catfish Stoke Debate Over Safety vs. Trade*, N.Y. TIMES, Nov. 26, 2015, at A24 (explaining that the Obama administration opposed the new inspection program and tried to eliminate it in numerous budgets); Press Release, Senator Jeanne Shaheen, *Shaheen, McCain to Introduce Amendment to Repeal Duplicative Catfish Inspection Program* (May 21, 2013), available at <http://www.shaheen.senate.gov/news/press/release/?id=c23e7d0e-ba91-4c48-849d-e6fcbac8a32e> (announcing that Senators Shaheen and McCain were introducing an amendment to eliminate the catfish inspection program as created by the 2008 Farm Bill).

185. Letter from Michael B.G. Froman, Ambassador, Office of the United States Trade Representative to Vu Huy Hoang, Minister of Industry and Trade, Vietnam (on file at <https://ustr.gov/sites/default/files/TPP-Final-Text-US-VN-Letter-Exchange-on-Catfish.pdf>).

186. *A Catfish Trade Ambush*, WALL ST. J. (Nov. 26, 2015), <http://www.wsj.com/articles/a-catfish-trade-ambush-1448575357?alg=y>.

187. See *id.* (illustrating that a loss before a WTO Panel would give any exporter of Asian catfish the right to retaliate against a range of exports such as beef and soybeans); see also Nixon, *supra* note 184 (quoting James Bacchus, the former chief judge at the court for the World Trade

Concerns such as these will have much broader implications than whatever good may be done by propping up a small number of domestic catfish farmers.¹⁸⁸ As John McCain warned, “[i]f we do not repeal the USDA Catfish Inspection Program, hardworking farmers and ranchers across the United States may find themselves reeling from the effects of a multi-billion dollar trade war.”¹⁸⁹ However, if the sentiment held by the domestic catfish industry is truly based on a deep concern for food safety, the repeal of section 11016 of the 2008 Farm Bill could be accompanied by a statutory effort to replace that intention within the confines of the FDA. This would involve providing the FDA with additional funding to bolster inspections of catfish and ensure their sanitary safety.

Absent a decision to repeal the rule through enacting new legislation, there is a timely alternative that may take shape. Under the Congressional Review Act,¹⁹⁰ Congress is granted the authority to disapprove of “major” rules issued by federal agencies within sixty days of Congress having received the rule.¹⁹¹ If a resolution of disapproval is enacted by both chambers of Congress within that timeframe and signed by the President, the rule may not take effect and the agency may not issue a substantially similar rule without subsequent statutory authorization.¹⁹² This would be an efficient and effective means for Congress to eliminate this wasteful program.¹⁹³ However, given the intense partisanship in Washington, such an outcome seems difficult to achieve.

Organization, who said that the new catfish inspection office “will not only be inviting a [WTO] challenge to the rule; it will be giving other nations an opening to enact ‘copycat legislation’ which will further disadvantage our exports.”).

188. Nixon, *supra* note 6, at A23 (stating that Vietnamese trade officials wrote to Secretary of State John Kerry and threatened trade retaliation if the program was not repealed).

189. Press Release, Senator John McCain, McCain Requests Vote on Repeal of Wasteful Catfish Program (Jan. 8, 2014), *available at* <http://www.mccain.senate.gov/public/index.cfm/2014/1/senator-john-mccain-requests-farm-bill-conference-vote-on-repealing-wasteful-and-duplicative-catfish-inspection-program>; *see also* Letter from The Honorable Jeff Merkley, Senator, United States Senate and The Honorable Ron Wyden, Senator, United States Senate, to The Honorable Debbie Stabenow, Chairman, Committee on Agriculture, Nutrition & Forestry, United States Senate (Oct. 16, 2013), <https://repealcattfish.files.wordpress.com/2013/10/usda-catfish-letter.pdf> (noting that choking off the supply of imported catfish will “pave the way for retaliation against U.S. agricultural exports, including \$1.3 billion worth of Oregon fruits, vegetables, seeds, greenhouse and nursery products, and beef”).

190. 5 U.S.C. §§ 801–808 (2012).

191. *Id.* § 801(a)(2)(A).

192. *Id.* § 801(b).

193. On December 7, 2015, Republican Senators John McCain and Kelly Ayotte introduced a resolution disapproving of the rule. The resolution would nullify the USDA’s final rules should it pass through both chambers and be signed by President Obama. *See* S.J. Res. 28, 114th Cong. (2015).

In the meantime, Vietnam and other nations that are being unduly burdened by this unnecessary regulatory switch are likely to take action. While an effort to bolster catfish inspections at the FDA may address the food safety concerns, there is little evidence to suggest that additional oversight is necessary, and although a lengthy transition period would be helpful, the process is exceedingly difficult and additional time can only go so far. The rule's lack of necessity, its invalid risk assessment, and its effect as a disguised trade barrier still stand in both of these instances. Therefore, WTO proceedings may still be a viable remedy for foreign catfish exporters who feel they have been disenfranchised. The only path forward that is guaranteed not to result in a United States appearance before a WTO Panel requires the repeal, through either the enactment of new legislation or a resolution of disapproval, of section 11016 of the 2008 Farm Bill.

CONCLUSION

The rule requiring the continuous and mandatory inspection of catfish and catfish products unmistakably violates the WTO SPS Agreement and contradicts recent public policy efforts to engage with Asian nations, many of which would face significant setbacks now that the rule has become a reality. There is no scientific evidence supporting this regulatory shift and its arbitrary and unjustifiable nature. Inspecting catfish should not be assigned to the USDA. In order to avoid a dispute before the WTO Panel, section 11016 of the 2008 Farm Bill, which mandated the rule, must be repealed.

“We Didn’t Want to Hear the Word ‘Calories’”: Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure*

Aeyal Gross** and Tamar Feldman***

“Everybody is hungry, nobody is starving.”

Chirster Nordhal¹

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1. Director of UNRWA Gaza Operations, quoted in LAILA EL-HADDAD & MAGGIE SCHMITT, *THE GAZA KITCHEN: A PALESTINIAN CULINARY JOURNEY* 26 (2013).

ABSTRACT

In the summer of 2007 Israel imposed a yet-to-be lifted closure on the Gaza Strip, restricting the movement of goods and people into and out of Gaza. Israel holds its closure policy to be legal under international law so long as it meets the humanitarian minimum standard and allows the entry of what is necessary for the subsistence of Gaza's population. Israel has repeatedly asserted that since there is no starvation in the Gaza Strip, there is no humanitarian crisis and no violation of international law.

This stance disregards power relations and the broader contexts of the closure and its effects. *Food power* is exercised not only through direct control over food supply and food availability, but also by impacting people's access to adequate food. The restrictions on the inflow of raw materials and construction materials, exports, and the movement of people have had a significant long-term effect. By crippling the Gaza economy, Israel's closure policy has impoverished the civilian population and considerably diminished *food security*.

Analyzing the situation through the framework of International Humanitarian and Human Rights Law, the article examines the relationship between food security, food power, and *food sovereignty* and the right to food. It argues that the concept of food power should be expanded to include situations like Israel's closure on Gaza. It also puts "sovereignty" back into the concept of "food sovereignty" and refers to it as a framework that complements, rather than replaces, food security.

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INTRODUCTION

In the summer of 2007, the Israeli government imposed a yet-to-be-lifted closure on the entire Gaza Strip, restricting the movement of goods and people into and out of the Strip to a “humanitarian minimum.” This came in response to the Palestinian Islamist Hamas Movement seizing control of the Gaza Strip and ousting the Fatah Movement, which had ruled there since 2005 following Israel’s disengagement from the territory, which it had occupied since 1967.² Israel holds its “economic warfare” policy to be legal under international law provided it adheres to a humanitarian minimum standard and allows what is necessary for the basic survival of the population. By sustaining a “just-above-minimum” level, made possible largely due to the involvement of international aid organizations, Israel has managed to quell international pressure to lift the restrictions. The Israeli government has repeatedly asserted that there is no starvation or hunger³ in the Gaza Strip and thus no humanitarian crisis necessitating international intervention. In other words: it is all much ado about nothing.

Official bodies of review, Israeli and international alike, have either implicitly or explicitly affirmed this stance. On a number of occasions the Israeli Supreme Court has approved the humanitarian-minimum standard and refrained from a review of the legality of the closure policy in general. The Turkel Commission, which was appointed by the Israeli government to investigate the Israeli raid on the Gaza aid flotilla in May 2010 and to examine the legality of the naval blockade of Gaza, was more direct in its concurrence with the official Israeli line. The Commission concluded that since the closure had not been imposed for the purpose of starving the civilian population, and given the Israeli government’s implementation of monitoring and protection mechanisms

2. See Iain Scobbie, *Gaza*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 280 (Elizabeth Wilmshurst ed., 2012), for a review of the disengagement and shift of power in Gaza from Fatah to Hamas.

3. As in the quote in the epigraph, “starvation” is usually used in reference to a longer-term phenomenon and the effects on the body of not having enough food, whereas the term “hunger” usually refers to the physical experience of a desire for food, which may be more short term in nature. In practice, however, the two are often used interchangeably. In this Article, we use the term that appears in the source we are citing. The humanitarian legal sources we draw on usually refer to starvation, which is considered a prohibited policy under international law. In this context, the distinction between the two terms could be the difference between the one that describes the aims of a policy (“starvation”) and the one that refers to its consequences (“hunger”). Our thanks to Harry West for helping clarify this point.

designed to prevent a humanitarian crisis in the Gaza Strip, the closure was lawful and met the proportionality requirement. The Commission significantly downplayed the data submitted by human rights organizations regarding the extremely high levels of food insecurity in Gaza that had resulted from the closure's complete devastation of the Gazan economy. The United Nations (UN)-appointed Palmer Committee reached similar conclusions in its inquiry into the closure and flotilla raid.

This Article examines the legality of the Gaza closure, in the particular form it took between 2007 and 2009, the period on which the Turkel Commission and Palmer Committee reports focused. It explores the holes and legal flaws in the Israeli stance and the two reports, all of which alluded to a minimum-humanitarian standard and assessed the closure's legality based on reductive costs-benefit and causality tests. These tests, we will argue, disregard power relations and the broader, more nuanced contexts of the closure and the food insecurity the closure generates. In contrast, we propose examining the closure and its effects in a broader and less restricted context, not only from the perspective of international humanitarian law, but also in terms of the right to food. This examination will focus on food security, food power, and food sovereignty and the role of food within the complex matrix of power relations. In the course of this analysis, we propose a revised conception of food power and food sovereignty and of their relationship to food security. In addressing food security, we adhere to the Food and Agriculture Organization (FAO) World Summit definition of the concept, namely, that food security exists "when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life."⁴

In Part I, we will discuss the Israeli policies relating to the inflow of foodstuffs into the Gaza Strip and describe the legal struggle that was waged for these policies to be made public. In Part II, we will present and analyze empirical findings on the state of food insecurity that has emerged in the Gaza Strip and the connection to the Israeli closure policy. We argue that "starvation" and "humanitarian crisis" may not be the appropriate frameworks for understanding the profound impact of the closure on the lives and, in particular, the food security of the Gaza Strip's more than 1.5 million residents. In Part III, we will focus on the findings of the Turkel Commission and Palmer Committee on the legality of the closure in general and the naval blockade in particular. We then proceed, in Part IV, to propose alternative frameworks for analyzing the issue of food security given the profound deficiencies of the "humanitarian-

4. Food & Agric. Org. [FAO], *Rome Declaration on World Food Security, Plan of Action*, ¶ 1 (Nov. 13, 1996), available at <http://www.fao.org/docrep/003/w3613e/w3613e00.htm> [hereinafter *Rome Declaration*].

minimum” standard. We will argue that while the notion of *food security*, as a corollary to the *right to food*, is crucial to fully understanding the violations of human rights entailed by the Gaza closure, the focus in this context should shift from which foodstuffs were allowed into Gaza to the impact of the closure on the population’s buying power. The arbitrary restrictions on the entry of foodstuffs undoubtedly played an important role in Israel’s show of power and significantly affected food security, which relates to people’s food preferences as well. But restrictions on the inflow of raw materials, construction materials, and exports and on the free movement of people have had a more significant long-term impact, particularly on the population’s buying power. By successfully crippling the Gaza Strip economy, Israel’s closure policy has impoverished the Gazan civilian population, considerably diminished food security there, and increased dependence on international aid. The Gaza closure thus is a unique context for examining the concept of food security, in that it involves policy aimed at undermining, rather than ensuring, food security. Understanding this is critical for comprehending why the lifting of restrictions on the entry of foodstuffs after the 2010 flotilla incident, addressed in the Article, did not remedy the problem of food security in Gaza—a crucial background factor in the most recent round of hostilities between Israel and Hamas, in the summer of 2014.

In our analysis, we will examine how food-power mechanisms are used to manipulate food transfers as a means of warfare, punishment, and humiliation of civilian populations. We will argue that the concept of “food power,” generally considered archaic and obsolete, should be revived, revised, and expanded to include situations like Israel’s exercise of power over food in Gaza, which resulted in violations of Gazans’ right to food. In the past, the term food power was usually used in reference to situations in which one State sought a coercive advantage over other States by manipulating the volume and timing of its food exports, for example by imposing a selective embargo on food exports to a target country so as to punish the latter or force it to make a policy change. In contrast, we argue that there is a need to breathe new life into this concept by expanding its scope to encompass a broader range of contexts. With regard to “food sovereignty,” we will argue that its current articulation is too narrow in scope. This is most prominent in the case of the Gaza closure, which illustrates the need for a shift in the analysis of food sovereignty, from emphasis on the ability to locally produce food and be protected against the forces of globalization to the ability to make decisions about food in ways that guarantee food security—perhaps putting the “sovereignty” back into “food sovereignty” and viewing food sovereignty as a framework that complements, rather than replaces, food security. The Conclusion will wrap up the discussion by reflecting on how the story of the Gaza closure and food security is not *only*

about food. The Israeli restrictions on the entry of foodstuffs into Gaza and, consequently, the supply of food there was only one of a number of factors—and not necessarily the most significant one—that impacted access to food and, therefore, food security.

As the Article will show, the closure of the Gaza Strip and its effect on food security raise a host of complex issues lying at the heart of contemporary international humanitarian law and international human rights law. These issues include: the application of the law of occupation in Gaza; the parallel application of international humanitarian law and international human rights law and the interrelationship between the two; extraterritorial obligations relating to human rights and, specifically, social and economic rights; and the law of armed conflict, particularly concerning naval blockades, and its relationship to the law of occupation and international human rights law. Naturally, the discussion here cannot exhaust all of these broad issues; instead we take specific stances on aspects of these issues where germane to the legal analysis of the issues and note the relevant legal sources for these stances. In the case of the Gaza closure, arguments from international law played a central role in the Israeli justification of policies whose purpose and outcome were the undermining of food security. Accordingly, we suggest that our study illustrates how legal positions taken at various junctures in time have served to entrench—and how alternative legal positions could have undermined—the legal “stamp of approval” given to these policies by the Turkel Commission and Palmer Committee. We maintain that in order to fully grasp the role of international law in protecting (or, as we argue, undermining) food security in this situation, we must examine not only the path taken by these two bodies, but also the path not taken. To this end, the Article critiques some of the prevalent modes of analysis in international humanitarian law as applied by the Turkel Commission and Palmer Committee, while proposing an alternative route anchored in humanitarian and human rights law. Under the latter approach, the usefulness of the concept of food security in assessing such situations emerges, made especially apparent by the risk that actually materialized in the Gaza case, in which a humanitarian-law analysis will consider only whether the bare minimum has been met.

I.

THE CLOSURE OF GAZA: BACKGROUND

On September 19, 2007, the Israeli Security Cabinet issued a statement declaring the Gaza Strip to be hostile territory and its decision to impose a closure on it.⁵ This decision validated a policy that had, in fact, been in force

5. Press Release, Israel Ministry of Foreign Aff., Security Cabinet Declares Gaza Hostile Territory (Sept. 19, 2007), *available at*

since Hamas had taken control of the Gaza Strip in June 2007, whereby the movement of goods and people into and out of the Gaza Strip was restricted to a so-called humanitarian minimum. Israel's declared intention was to block the passage of goods in excess of what it deemed "essential for the survival of the civilian population," thereby halting exports, economic activity, and production and preventing the entry into Gaza of items deemed "luxury."⁶ Although framed at first as "sanctions," the policy was subsequently referred to as "economic warfare."⁷ In essence, it was designed, according to Israel, to press the residents of the Gaza Strip to pressure Hamas to cease firing rockets at Israel and to release the Israeli soldier Gilad Shalit, held captive by Hamas since June 2006.⁸

Israel's ability to enforce its closure policy and determine almost entirely what and who enters or leaves the Gaza Strip is the result of its control over the Gaza Strip's borders and land crossings. Since its occupation of Gaza following the 1967 Arab-Israeli War, Israel has controlled the land crossings as well as Gaza's airspace and territorial waters. Israel has exercised this control in various manners and to different degrees over the years, in line with policy changes and the different restrictions it has enforced. This control is usually justified by reference to security needs. Despite Israel's "disengagement" from the Gaza Strip in 2005 and its subsequent declaration that it had thereby ended its occupation there, it has in fact maintained control over Gaza's borders and other significant elements of civilian life, most notably the population registry and major components of the tax system.⁹ As part of its closure policy, for example,

<http://www.mfa.gov.il/MFA/Government/Communications/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

6. Letter from Brigadier-General Eitan Dangot, Coordinator for Gov't Activities in the Territories (COGAT), IDF, to Gisha, Legal Center for Freedom of Movement (Jan. 13, 2010) (on file with authors).

7. State's Response at ¶¶ 43–44, HCJ 9132/07 Al-Bassiouni v. Prime Minister [Jan. 30, 2008] (unpublished) (Isr.), *available at*

http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/state_response_2_11_07.pdf. An unofficial English translation of these passages is available at <http://www.gisha.org/UserFiles/File/Israelusestheclosureaseconomicwarfare.pdf>.

8. See Sari Bashi, *Controlling Perimeters, Controlling Lives: Israel and Gaza*, 7 LAW & ETHICS HUM. RTS. 243, 272–73 (2013). Gilad Shalit was released on October 18, 2011, in exchange for 1027 Palestinians held in Israeli prisons as part of a prisoners-exchange deal. Ethan Bronner, *Israel and Hamas Agree to Swap Prisoners for Soldier*, N.Y. TIMES, Oct. 11, 2011, <http://www.nytimes.com/2011/10/12/world/middleeast/possible-deal-near-to-free-captive-israeli-soldier.html?ref=giladshalit&r=0>.

9. Sari Bashi & Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza* 29–62 (Gisha: Legal Center for Freedom of Movement, Position Paper, Jan. 2007), *available at* [http://www.gisha.org/userfiles/File/Report for the website.pdf](http://www.gisha.org/userfiles/File/Report%20for%20the%20website.pdf). [hereinafter Gisha, *Disengaged Occupiers*]; Sari Bashi & Tamar Feldman, *Scale of Control: Israel's Continued Responsibility in the Gaza Strip* 12–25 (Gisha, Nov. 2011), *available at* http://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf [hereinafter Gisha, *Scale of*

all border crossing points between Israel and the Gaza Strip have been shut except for the Erez Crossing, where the passage of Palestinian residents has been limited to a bare minimum, and the Kerem Shalom Crossing, which is the sole passageway for consumer goods. Moreover, since 2005, very limited movement of people has been allowed through the Rafah Crossing connecting Gaza with Egypt, and it no longer serves as a passageway for goods, as it had in the past.¹⁰ It is noteworthy, however, that the tunnels built by Palestinians underneath the Gaza-Egypt border, which were primarily used for smuggling weapons during the two intifadas, were gradually converted into passageways for smuggling goods in demand after the Israeli disengagement in 2005. This practice intensified after the tightening of the closure in 2007.¹¹ This tunnel-trade, which began as an unregulated market, evolved into a lucrative, albeit dangerous, enterprise governed by Hamas. Egypt's own closed-border policy and Hamas' control of the tunnel-trade have had some impact on the local Gaza economy and food market and contributed, in some measure, to Israel's closure of Gaza.¹² However, since their effect on the availability and accessibility of

Control].

10. Until its disengagement from the Gaza Strip in September 2005, Israel held full control of the Rafah Crossing, which was used for the limited passage of some goods, mostly aggregates, into the Gaza Strip. The Agreement on Movement and Access (AMA) between Israel and the Palestinian Authority (PA), signed in 2005, established that the Rafah Crossing would be used for the movement of people only. Israel has maintained a high degree of influence on the extent to which the Crossing is opened, which has been periodic and on an ad-hoc basis only, for a few days at a time. See Noga Kadman, *Rafah Crossing: Who Holds the Keys?* 26–27 (Gisha, Mar. 2009), available at http://www.gisha.org/UserFiles/File/publications/Rafah_Report_Eng.pdf [hereinafter Gisha & PHR, *Who Holds the Keys*]. Israel's control over the opening of the Rafah Crossing lessened after the May 2010 Gaza aid flotilla events and even further following the Egyptian Revolution of 2011, when the new Egyptian government opened the Crossing to the movement of people on a regular basis, except when security considerations required otherwise. For an overview of changes in policy on the movement of people and related data, see *Movement of People via Rafah Crossing*, GISHA, http://www.gisha.org/graph.asp?lang_id=en&p_id=1235 (last visited Aug. 27, 2014). More recently, with the ousting of President Morsi and following Islamist attacks on Egyptian security forces in the Sinai Peninsula, the Egyptian Army closed the Rafah Crossing, and it has since been operating under restricted conditions. *Restricted Access at Rafah Crossing Blocks Gaza Residents' Main Route Abroad*, GISHA (July 15, 2013), http://www.gisha.org/item.asp?lang_id=en&p_id=2037.

11. The transfer of goods through underground tunnels became a lifeline for the Gaza population and a means of bypassing the blockade imposed by Israel and supported by Egypt. These tunnels gave Gaza's residents access to a wide range of commercial goods, including livestock, food, fuel, clothes, car parts, and building supplies. In 2010, it was estimated that approximately 7000 people worked on constructing over 1000 tunnels. *Egypt Strengthens Blockade on Gaza*, ALT. INFO. CTR. (Oct. 7, 2013), <http://www.alternativenews.org/archive/index.php/politics/palestinian-society/7125-egypt-strengthens-blockade-on-gaza>. Since 2011, the Egyptian military has overseen the demolition of over a thousand tunnels, most of which were destroyed in 2013, particularly in the aftermath of Morsi's ousting in July 2013. See *Egypt Sharply Increased Destruction of Tunnels to Gaza after Morsi*, WORLDTRIBUNE.COM (Oct. 7, 2013), <http://www.worldtribune.com/2013/10/07/egypt-sharply-increased-destruction-of-tunnels-to-gaza-after-morsi/>.

12. For a discussion of the responsibility of different actors, including third parties such as the

goods in Gaza has been secondary, and Israel's closure policy—particularly in the period in which restrictions were tightened—has been the primary factor, our discussion in this Article will center on the latter.

In a September 2007 decision, the Israeli Security Cabinet stated, “The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the desire to avoid a humanitarian crisis.”¹³ Hence, the closure policy was aimed at causing damage to the Gaza economy and bringing the population to the *verge* of a humanitarian crisis (a term we elaborate on below), by preventing the entry of “luxuries” but ensuring the “humanitarian minimum.”¹⁴ From the outset, then, this policy was characterized by considerable obfuscation. Other than this Cabinet decision, no information or documents on the policy and its on-the-ground implementation were released to the public. Attempts to uncover what the referred to “minimum” included and why were met with very vague, general responses. The Coordinator of Government Activities in the Territories (COGAT)¹⁵ consistently stated that Israeli “policy changes from time to time, in response to security and political circumstances.” In general, Israel allowed the entry of the basic commodities necessary for the survival of the population, including basic foodstuffs, medicine, and hygiene products.¹⁶

The underlying principles of this policy were challenged early on, in October 2007, in a petition brought before the Israel Supreme Court by a group of ten Palestinian and Israeli human rights organizations together with residents of the Gaza Strip. In *Al-Bassiouni v. Prime Minister*, which focused on the restrictions on the supply of fuel and electricity to the Gaza Strip,¹⁷ the petitioners argued that the deliberate worsening of the quality of life of the inhabitants of the Gaza Strip to a state of minimal existence for the sole purpose

European Union and the United States, for the closing of the Rafah Crossing, see Gisha & PHR, *Who Holds the Keys*, *supra* note 10, at 143–75.

13. See *supra* note 5.

14. Adi Ophir, *The Politics of Catastrophization: Emergency and Exception*, in CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS 59, 77–82 (Didier Fassin & Mariella Pandolfi eds., 2010). See also ARIELLA AZOULAY & ADI OPHIR, *THE ONE-STATE CONDITION: OCCUPATION AND DEMOCRACY IN ISRAEL/PALESTINE* 170–79 (2012).

15. This is a high-ranking army officer in charge of the implementation of the Israeli government's policy vis-à-vis the Occupied Palestinian Territory, including the blockade imposed on the Gaza Strip.

16. COGAT, Response to Gisha's Freedom of Information Request to Reveal Closure Policy Documents (Jan. 13, 2010), available at <http://www.gisha.org/UserFiles/File/LegalDocuments/meida/COGATresponse.pdf>.

17. HCJ 9132/07 *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.), unofficial English translation available at http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/english/ElectricityPetition9132-07_English.pdf.

of putting pressure on Hamas constitutes collective punishment which is strictly prohibited under international law regardless of whether or not a humanitarian crisis has arisen on the ground.¹⁸ In its response, the state claimed that its closure policy is a legitimate form of “economic warfare,” and it presented a set of calculations it had used to establish the minimum humanitarian fuel needs in the Gaza Strip, including industrial diesel for the power plant.¹⁹ Yet this minimum was knowingly calculated based on figures below the average, but above the minimum need for electricity in the Gaza Strip and, therefore, reflected an intentional policy to exacerbate the chronic shortage of electricity in Gaza.²⁰

The Supreme Court ruled that Israel’s positive obligations towards the Gaza Strip are based on three factors: (1) its control over the land crossings and borders; (2) Gaza’s almost complete dependency on Israel to supply its electricity, which had developed over the course of the prolonged occupation; and (3) the ongoing state of belligerence in Gaza.²¹ In the end, however, the Court authorized the electricity and fuel restrictions, based on the State’s calculations. In so doing, it gave its stamp of approval to the closure policy in its entirety and de facto accepted the “humanitarian-minimum standard” as a legitimate benchmark.²²

The *Al-Bassiouni* case brought a host of legal issues to the forefront, including the legitimacy of using a closure as a means of war to weaken a civilian population, and the obligations a State bears when it yields power and control over such a population. Moreover, it raised questions regarding the very use of the humanitarian minimum as a standard, but this issue was addressed only in the context of its calculations with regard to fuel supplies and not regarding the limitations placed on foodstuffs and other civilian commodities.

18. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 43, Aug. 12, 1949, 75 U.N.T.S. 287 (explicitly prohibiting collective punishment); *See also* Brief for Petitioner, *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.) *unofficial English translation available at* http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/english/ElectricityPetition9132-07_English.pdf.

19. *See* State’s Response, *supra* note 7.

20. For Gisha’s response to the State’s position in *Al-Bassiouni*, including the calculations of electricity consumption, *see* http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/response_27_11_07_no_detail.pdf.

21. *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.) *unofficial English translation available at* <http://www.gisha.org/UserFiles/File/LegalDocuments/fueloct07/english/HCI913207EnglishVerdictfinal.pdf>. *See also* Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, 42 ISR. L. REV. 10 (2009) (analyzing the verdict).

22. *See* *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) (unpublished) (Isr.), *supra* note 20.

Although never officially made public, over time, the details of the closure policy became more apparent from its implementation in practice. Coordination officers and merchants on the Palestinian side gradually learned through direct experience which imports into the Gaza Strip were permitted and which were forbidden.²³ The list of permitted items expanded over time. In the beginning, in 2007, imports were restricted to fifteen very basic categories of items.²⁴ This gradually increased to approximately thirty categories by 2008 and forty-one by 2009.²⁵ Imports continued to expand more intensively until June 2010, when many of the restrictions on the entry of civilian goods were completely lifted following the May 2010 flotilla events.²⁶

In the period between 2007 and 2010, some products were excluded from the list of permitted imports apparently because they were designated a “luxury” by the Israeli government, such as chocolate and sweets. Other changes could be explained as an attempt to hurt the local industry and cripple the economy, such as banning the import of industrial margarine but allowing margarine in small consumer packages. However, some of the changes seemed completely arbitrary

23. Merchants as well as Palestinian coordination officers became familiar with the details of Israel’s policy through trial and error and gradually adjusted their orders to match the restrictions. For example, a local merchant who knew that Israel had not been allowing the transfer of biscuits and stationery for a long time simply stopped ordering those products. The coordination officers who knew that Israel was systematically preventing the entry of toys simply did not make requests for their transfer. According to these officers, they occasionally made requests for products that they knew Israel had been denying for a long time in order to check whether the policy had changed. If their requests were denied, they knew not to request the items for the time being. *See Partial List of Items Prohibited/Permitted into the Gaza Strip*, GISHA (June 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=1110.

24. These included wheat and flour, sugar, frozen foods (including frozen meat), dairy products, rice, fruits and vegetables, vegetable oil, pharmaceuticals, and fuel supplies. *See WFP, Rapid Food Security Needs Assessment in Gaza Strip: Effect of Import Restrictions and Freeze on Exports on the Food Security in Gaza Strip—Survey Report 6* (Dec. 2007), available at <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp171915.pdf>.

25. Israel expanded this list using information from the Palestinian Authority’s coordination and liaison office. Since 2009, more accurate lists have been compiled by PALTRADE and Gisha, *see supra* note 23. For lists of permitted goods obtained from COGAT following a freedom of information petition filed by Gisha, Physicians for Human Rights-Israel, and HaMoked: Center for Defense of the Individual, see AdminC (TA) 22775-02-11 Gisha v. COGAT (unpublished) (Isr.). Links to the documents obtained from COGAT can be found on the Gisha Info Sheet, *A Guide to the Gaza Closure: In Israel’s Own Words 6* (Gisha Info Sheet, Sept. 2011), available at http://www.gisha.org/UserFiles/File/publications/gisha_brief_docs_eng_sep_2011.pdf.

26. Press Release, Isr. Ministry of Foreign Aff., Prime Minister’s Office Statement Following the Israeli Security Cabinet Meeting (June 20, 2010), available at http://www.mfa.gov.il/mfa/pressroom/2010/pages/prime_minister_office_statement_20-jun-2010.aspx. *See also* *Reconstructing the Closure: Will Recent Changes to the Closure Policy Be Enough to Build in Gaza?* (Gisha, Dec. 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=1106. *See infra* notes 60-67 an accompanying text for an elaboration on the shift in the closure policy following the flotilla event of May 2010.

and unrelated to any of the declared or attributed rationales for the closure. Such was the case with ground coriander, which was no longer allowed into Gaza, whereas other herbs, like hyssop, were permitted.²⁷

The list of items permitted for import into Gaza was, therefore, never a fixed one. Even in the period during which the list expanded, it was subject to constant change, with some products added and others removed. This instilled in Gazans a strong sense of uncertainty and complete lack of control over their food choices.²⁸ Some of the additions to the list were even made to further Israeli economic interests, such as protecting the market prices of local Israeli farmers with excess agricultural produce.²⁹ Other items were added purely due to international political pressure. For example, Israel had continuously banned the entry of pasta into the Gaza Strip until the direct intervention of John Kerry, at the time a U.S. Senator, when he discovered this item was prohibited while rice was being allowed in.³⁰

27. Amira Hass, *Why Won't Israel Allow Gazans to Import Coriander?*, HAARETZ, May 7, 2010, <http://www.haaretz.com/print-edition/news/why-won-t-israel-allow-gazans-to-import-coriander-1.288824>.

28. See Bashi, *supra* note 8, at 258–63, describing some of these fluctuations as reflected in documents released pursuant to the freedom of information petition after the easing of the closure, and see further discussion at *infra* notes 41–53 and accompanying text. Some of the documents included weekly instructions to military officials as to which goods should be permitted. Bashi argues that these documents expose the “hyper-categorization” of the quota policy.

29. See Uri Blau & Yotam Feldman, *Gaza Bonanza*, HAARETZ, June 11, 2009, <http://www.haaretz.com/gaza-bonanza-1.277760> (exposing the different Israeli economic interests involved in the closure policy and identifying its economic beneficiaries). The authors noted,

Summaries of the discussions about entry of food into Gaza show just how deeply the captains of the defense establishment seem to care about the income of Israeli farmers. Hence, in a discussion that took place in the office of Deputy Minister Vilnai, it was decided that every day, 15 trucks filled with agricultural produce would be brought in. “The problem right now is the emphasis on melons and fruit in general,” Agriculture Ministry Director General Yossi Yishai said at the meeting. At the conclusion of the discussion, Vilnai instructed that three trucks with melons be brought into Gaza each week, “So as not to cause a market failure in Israel.”

Furthermore, a senior COGAT officer was quoted in the article as saying, “There was a vague, unclear policy, influenced by the interests of certain groups, by this or that lobby, without any policy that derived from the needs of the population. . . . What happened was that the Israeli interest took precedence over the needs of the populace.”

30. See Avi Issacharoff & Barak Ravid, *Clinton Warns Israel over Delays in Gaza Aid*, HAARETZ, Feb. 25, 2009, <http://www.haaretz.com/print-edition/news/clinton-warns-israel-over-delays-in-gaza-aid-1.270882>:

[W]hen Senator John Kerry visited the Strip, he learned that many trucks loaded with pasta were not permitted in. When the chairman of the Senate Foreign Affairs Committee inquired as to the reason for the delay, he was told by United Nations aid officials that “Israel does not define pasta as part of humanitarian aid—only rice shipments.” Kerry asked Barak about the logic behind this restriction, and only after the senior U.S. official’s intervention did the defense minister allow the pasta into the

Some food products were dropped from the list for no apparent reason. Fresh meat and cattle were initially allowed in, albeit subject to strict quotas, but prohibited altogether after the Israeli “Cast Lead” military operation in the Gaza Strip in early 2009.³¹ This ban, compounded by the widespread damage to livestock, sheep, and poultry farms in Gaza during the military operation,³² and the restrictions on access to grazing land in the “buffer zone” along the Israel-Gaza border significantly reduced the availability of fresh meat in Gaza.³³ The frequent power cuts in Gaza—resulting from Israel’s “humanitarian minimum” policy—also contributed to the shortage, since meat and dairy products could not be properly stored.³⁴ Although limited amounts of cattle and small ruminants were brought into Gaza from Egypt through the tunnels, much of the livestock was diseased and posed a public health risk, exacerbated by the unreliable veterinary vaccines in Gaza due to the closure.³⁵ As a consequence, fresh meat became scarce and unaffordable for most Gazan households,³⁶ who were forced to resort to frozen meat, thereby reducing the quality of their food.

Strip.

31. Initially, Israel restricted the entry of cattle into Gaza to 300 calves per week, with some exceptions, for example, during Ramadan. However, after Operation Cast Lead, Israel decided to halt all imports of calves into the Gaza Strip, except for occasional “humanitarian gestures” on Muslim holidays. Consequently, the Israeli company Mitrael and its Palestinian business partner in Gaza, Al-Afana Brothers, petitioned the Israel Supreme Court to revoke the ban. H CJ 2650/09 Mitrael vs. Ministry of Agric. (Apr. 1, 2009) (unpublished) (Isr.). The Court rejected the petition saying that the closure policy is a political-security matter and that since the humanitarian needs of the population are not compromised, there is no justification for the Court to intervene in the government’s decision.

32. WFP & FAO, *2010 Socio-Economic and Food Security Survey: West Bank and Gaza Strip, Occupied Palestinian Territory* 16 (Feb. 2011), available at <http://home.wfp.org/stellent/groups/public/documents/ena/wfp232398.pdf> [hereinafter WFP & FAO, 2010 Socio-Economic and Food Security Survey]; WFP & FAO, *Report of the Rapid Qualitative Emergency Food Security Assessment (EFSA)—Gaza Strip* 4, 12 (Feb. 24, 2009) [hereinafter WFP & FAO, EFSA], available at http://www.ochaopt.org/documents/opt_food_wfp_fao_rapid_food_security_assessment_efsa_feb_2009.pdf.

33. FAO, *Gaza’s Farmers Unable to Recover from Operation Cast Lead* (Mar. 2009), <http://unispal.un.org/UNISPAL.NSF/0/6E287317A63CA2FA8525759100436788#sthash.LbUkyjq6.dpuf>.

34. Palestinian Center for Human Rights, *Food Prices Double in Besieged Gaza*, THE ELECTRONIC INTIFADA (Mar. 27, 2008), <http://electronicintifada.net/content/food-prices-double-besieged-gaza/3343>.

35. See Special Focus Rep. of the U.N. Office for the Coordination of Humanitarian Aff. [OCHA], *Locked In: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip* 10 (Aug. 2009), available at <http://unispal.un.org/UNISPAL.NSF/0/0DFF75BB11E6929285257612004B4859>.

36. See, e.g., FAO, *The Humanitarian Situation in Gaza and FAO’s Response* (Jan. 23, 2009), available at http://www.fao.org/fileadmin/templates/tce/pdf/FAO_brief_on_Gaza_23_Jan_09.pdf; Erica Silverman, *Festive Season Highlights Deprivation in Gaza*, AL-JAZEERA (Nov. 9, 2011, 5:14 PM),

Israeli policymakers gave no consideration to whether omitting fresh meat from Gazans' daily menu would accord with the local culinary culture or how it might impact their preferences and, thus, diets. As policymakers repeatedly stated, the basic "food basket" was designed to meet the "humanitarian needs" in Gaza³⁷—no more, and no less. The effect of this indifference is exemplified by the case of tahini, ground sesame paste. In Gaza, red tahini is a staple made from toasted sesame with a distinct color and rich flavor. During some periods, sesame seeds were banned as an import into Gaza and entered mostly by way of the tunnels from Egypt. This drove the price of Gazan-made tahini above that of Israeli-produced tahini, which was allowed as an import into Gaza, making the Gazan product unaffordable to those who cherished it. The dependency on tahini imported from Israel thus undermined local traditions³⁸ in a way that impaired food security, as we explore below. Even more impactful to the Gazan diet has been the fact that the international aid agencies in Gaza distribute mainly white flour and fewer traditional grains, like frika (green wheat), burghul, and barley. Due to the Gazan population's dependence on aid agencies for food, these nutritive grains have been almost entirely eliminated from their diet,³⁹ undermining both the local cultural cuisine and nutrition.

For over two years, the Israeli government denied the existence of lists of permitted and forbidden products. In 2010, a freedom-of-information petition to the Tel Aviv Administrative Court forced it to admit to and publicize these lists as well as other, ancillary documents concerning the closure policy.⁴⁰ The documents were released by the Coordinator of Government Activities in the Territories (COGAT) only after the amendment of the closure policy subsequent to the May 2010 flotilla incidents. This also led to the disclosure of the mechanisms used to implement the closure. The list of allowed and prohibited items presented by the State was the expanded one in effect on the eve of the flotilla incident on May 30, 2010 and was a significant improvement relative to the 2008–2009 restrictions on imports. The two other documents that were disclosed along with the list were entitled "Permission to Transfer Goods into the Gaza Strip" and "Procedure for Monitoring and Assessing Inventories in the

<http://www.aljazeera.com/indepth/features/2011/11/2011119132516295366.html>. See also OCHA, *supra* note 35.

37. See the State's response to the *Mitrael* petition. HCJ 2650/09 *Mitrael* vs. Ministry of Agriculture unpublished, ¶ 3 [2009] (Isr.).

38. EL-HADDAD & SCHMITT, *supra* note 1, at 5, 31.

39. *Id.* at 56.

40. AdminC (TA) 2744/09 *Gisha* v. Ministry of Defense (unpublished [2009]) (Isr.). Due to *Gisha's* Petition: Israel Reveals Documents Related to the Gaza Closure Policy, GISHA (Oct. 21, 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=517. An unofficial English translation of these documents is available at <http://www.gisha.org/UserFiles/File/HiddenMessages/DefenseMinistryDocumentsRevealedFOIAPetition.pdf>.

Gaza Strip.” These documents described the policy on the entry of goods into Gaza and included formulas applied in its implementation. Although both documents were officially classified as drafts, they, in practice, constituted instructions for Israeli authorities and were in effect until the government changed its policy.⁴¹ As explained in the first document, the rules and formulas were designed to allow the entry into Gaza of goods that would “supply the basic humanitarian needs of the Palestinian population.” The document enumerates seven considerations to be weighed when determining which goods should be permitted: (1) security needs; (2) the necessity of the product to meet humanitarian needs, including public health (in the Gaza Strip and Israel); (3) the perception of the product as a luxury or non-luxury item; (4) legal obligations; (5) the consequences of the use made of the product (for preservation, reconstruction, or development), with an emphasis on the impact of its transfer on the status of the Hamas government; (6) sensitivity to the concerns of the international community; and (7) the existence of alternative products.⁴²

The quantities of goods to be allowed into the Gaza Strip were determined using a “breathing room” formula developed by COGAT authorities to calculate the number of days remaining until the supply of any given product ran out in Gaza. There were two types of thresholds: the “upper warning line” and the “lower warning line.” The “upper warning line,” which identified surpluses, was defined as an inventory exceeding twenty-one days for products with a short shelf life and eighty days for those with a long shelf life. COGAT maintained, however, that this parameter was never put to any practical use. The second “lower warning line” identified shortages; it was defined as an inventory of less than four days for products with a short shelf life and less than twenty days for products with a long shelf life. If supplies dropped below the determined threshold, there was a set of procedures in place to ensure entry of the product into Gaza, unless it was subject to a policy of targeted restriction. The formula was based on data gathered weekly on food products, animal feed, and fuel supplies entering Gaza, as follows:⁴³

Daily consumption per capita per product = A

Gaza Strip population = B

41. Amira Hass, *Israel Releases Papers Detailing Formula of Gaza Blockade*, HAARETZ (Oct. 26, 2010, 1:35 AM), <http://www.haaretz.com/print-edition/news/israel-releases-papers-detailing-formula-of-gaza-blockade-1.321154>.

42. *Id.*

43. COGAT, PROCEDURE FOR MONITORING AND ASSESSING INVENTORIES IN THE GAZA STRIP, App. B (Apr. 2009), available at <http://www.gisha.org/UserFiles/File/HiddenMessages/DefenseMinistryDocumentsRevealedFOIAPetition.pdf> (unofficial English translation).

Daily Consumption = C

A x B = C

Daily quantity of relevant product entering the Gaza Strip = X

Existing reserves in the Gaza Strip (minus amount transferred the same day) = Y

Quantity of reserves in the Gaza Strip = Z

X + Y – C = Z

Breathing space (in days) = D

Z / C = D⁴⁴

The documents further revealed that the Israeli government had approved “a policy of deliberate reduction” of the supply of basic goods in the Gaza Strip even below the lower warning line.⁴⁵ The government claimed that such a reduction had never been authorized in practice, and it did not specify just what these “basic goods” were.⁴⁶

COGAT was also eventually forced to release another document, “Food Consumption in the Gaza Strip—Red Lines” (the “Red Lines Document”). This document, first exposed in a June 2009 investigative report in the Israeli daily *Haaretz*,⁴⁷ was only fully and formally released to the public in September 2012.⁴⁸ Drafted in January 2008, it summarized work that security authorities conducted in collaboration with the Israeli Ministry of Health analyzing the

44. Eyal Weizman translates this formula into what he calls “simple language” as follows: “[I]f you divide food in the Strip by the daily consumption needs of residents, you will get the number of days it will take before people run out of basic provisions and start dying.” EYAL WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA* 84-85 (2012).

45. See COGAT, *supra* note 43, art. 4.h.4.

46. See Gisha, *supra* note 40.

47. See Blau & Feldman, *supra* note 29 (exposing the various Israeli economic interests involved in the closure policy and identifying its beneficiaries).

48. “Red Lines” Presentation: New Details About the Old Policy, While the Current Policy Remains Shrouded in Secrecy, GISHA (2012), http://www.gisha.org/item.asp?lang_id=en&p_id=1699. This occurred following the Israeli Supreme Court’s decision in *Ministry of Defense v. Gisha*, APA 11/3300 *Ministry of Defense v. Gisha* unpublished [2012] (Isr.), in which it held that the army must release the document under the Freedom of Information Act. An unofficial English translation of the Red Lines Document is available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>.

regular food consumption of Gaza Strip residents. The document presented calculations made by the Ministry of Health determining the number of calories and quantities of various basic food items Gaza residents required to subsist, by age and gender. These figures were, in turn, used to calculate the number of trucks needed daily and the details of their contents to meet this consumption level, taking into account local production of vegetable produce, dairy, and meat products.⁴⁹

COGAT claimed that this was simply a draft document that had never been used in actual decision-making.⁵⁰ Yet the quantities calculated and presented therein corresponded precisely to some of the quotas set for imported goods during the relevant time period. In fact, in the early stages of the closure, immediately after Hamas took control of the Strip, even fewer quantities of goods were cleared for entry into Gaza than what the Red Lines Document allowed for. The calculations in the Document led to the conclusion that 106 trucks transporting food from Israel five days a week would be necessary to supply Gaza's residents with the "daily humanitarian portion."⁵¹ In the first year after Hamas' takeover and the tightening of the closure (July 2007 to June 2008), however, an average of only 90 trucks entered the Strip every scheduled working day.

These heavy restrictions, deemed "economic warfare" by Israeli government officials, did, indeed, cause the collapse of the local economy in Gaza. The closure policy not only led to shortages of basic affordable commodities, but also created a constant cloud of uncertainty as to their future availability. The policy also had a devastating impact on local industry and other means of self-sufficiency. The prevention of entry of raw materials for local industry created an acute shortage, which forced the Palestinian Federation of Industries to close or operate at minimum capacity over ninety percent of the factories it owned in Gaza.⁵² This significantly diminished self-sufficiency in

49. *Reader: Food Consumption in the Gaza Strip—Red Lines 6–7* (Gisha Position Paper, Oct. 2012), available at <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>. See slides 6 and 7 in the unofficial English translation, available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>.

50. In an appeal to the Israel Supreme Court, contesting the District Court's decision ordering the release of the Red Lines Document, the State claimed that rather than adopting the "red lines" model, it had adopted a uniform model for determining the passage of essential goods into the Gaza Strip and assessment of their supply, while identifying any deficiencies and determining thresholds as had been elaborated in the previously released documents APA11/3300 Ministry of Defense v. Gisha unpublished at ¶ 16 [2012] (Isr.).

51. Gisha, *supra* note 48.

52. Immediately following the enforcement of the closure policy, between June and October of 2007, half of the food production plants that belonged to the Palestinian Federation of Industries in Gaza ceased operation. The rest of the plants continued to operate but at 30% of their capacity. The Palestinian Central Bureau of Statistics (PCBS) documented a 26.6% drop in the rate of

Gaza and intensified dependence on imported, primarily Israeli-made products.⁵³

In addition to restricting the entry of goods, Israel also restricted Gaza residents' access to farmlands located on the Gaza-Strip side of what is known as the "Green Line"⁵⁴ and to fishing areas off the Gazan coast,⁵⁵ allegedly for

employment in the agriculture and fishing sectors in Gaza. Gisha, *supra* note 49, at 7. With the partial easing of the closure in June 2010, the renewed access to formerly restricted goods, including raw materials, resulted in a limited reactivation of the manufacturing sector. According to the PCBS, between the second and fourth quarters of 2010, approximately 1200 new jobs were added in the manufacturing sector, increasing the number of employees from 7300 to 8500. This, however, was less than half the number of employed workers in the second quarter of 2007, prior to the blockade (18,500 people). Special Focus Rep. of OCHA, *Easing the Blockade—Assessing the Humanitarian Impact on the Population of the Gaza Strip* (Mar. 2011), available at http://www.ochaopt.org/documents/ocha_opt_special_easing_the_blockade_2011_03_english.pdf.

53. According to Gisha, as part of its "economic warfare" on Gaza, Israel prohibited the transfer of large blocks of margarine intended for industrial usage but allowed in small packages of margarine for household consumption; it banned the transfer of rubber, glue, and nylon, which are used in the production of diapers in the Strip, yet allowed the transfer of diapers produced in Israel; and it prevented the transfer of industrial salt, glucose, and plastic containers used to produce tahini paste, but allowed in Israeli-made tahini. *Three Years of Gaza Closure—By the Numbers*, GISHA (June 14, 2010), http://www.gisha.org/item.asp?lang_id=en&p_id=537.

54. The Agreement on the Gaza Strip and the Jericho Area between Israel and the Palestine Liberation Organization (PLO) from May 4, 1994 (known as the "Gaza-Jericho Agreement"), which was a follow-up treaty to the 1993 Oslo Accords, established a 1000-meter-wide "security perimeter" on the Gaza side of the Green Line, designed to prevent the entry of people into Israel. In practice, restrictions on access to land have gradually increased since the beginning of the Second Intifada in September 2000; Israel has been enforcing a "no-go zone" of 0–500 meters, where access is totally prohibited and poses an extreme threat to life and a "high-risk zone," which encompasses the area stretching between 500 to 1000–1500 meters from the fence, depending on location. Between November 2012 and August 2013, 5 Palestinians were killed by Israeli forces and 125 injured when they entered one of these zones. Rep. of OCHA, *Protection of Civilians Weekly Report*, Aug. 6–12, 2013 OCHA (Aug. 2013), available at http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2013_08_15_english.pdf. See also OCHA & WFP, *Between the Fence and the Hard Place: The Humanitarian Impact of Israeli-Imposed Restrictions on Access to Land and Sea in the Gaza Strip* (Aug. 2010), available at <http://unispal.un.org/UNISPAL.NSF/0/E7B7B421E7EFB3E585257784004D704A>; OCHA, *The Monthly Humanitarian Monitor*, at 6 (Nov. 30, 2011), available at http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2011_12_15_english.pdf. Following the Egyptian-brokered ceasefire agreement between Israel and Hamas in early February 2013, Israel announced that Gazan farmers would be allowed access to land up to 100 meters from the fence, but a few weeks later moved this back to 300 meters and clarified that those wanting to farm closer to the fence needed to coordinate with the Israeli authorities. Fares Akram & Jodi Rudoren, *Gaza Farmers Near Fence with Israel Remain Wary*, N.Y. TIMES, June 7, 2013, http://www.nytimes.com/2013/06/08/world/middleeast/palestinian-farmers-in-gaza-buffer-zone-remain-wary.html?_r=3&.

55. Restrictions on access to maritime areas were imposed, in varying forms, throughout Israel's occupation of the Gaza Strip. Under the terms of the 1994 Gaza-Jericho Agreement, *supra* note 54, maritime areas twenty nautical miles off Gaza's coast into the Mediterranean Sea were to be open (under certain conditions) to Palestinians for fishing, recreation, and economic activities.

security reasons.⁵⁶ Overall, the restricted areas on land were estimated, in 2010, as amounting to seventeen percent of the Strip's total land mass and thirty-five percent of its agricultural lands. Gazan fishermen, in turn, were completely prevented from accessing almost eighty-five percent of the maritime areas to which they are entitled access under the 1994 Gaza-Jericho Agreement.⁵⁷ The deep channel through which great schools of fish migrate runs nine miles off the coast of Gaza, so the limitations on access dramatically reduce available catches, "forcing today's fishermen to cull from shoreline waters the undersize and juvenile fish that would guarantee future prosperity."⁵⁸ These restrictions have had a direct impact on many Gazans and hinder overall economic self-sufficiency in Gaza.⁵⁹

In June 2010, bowing to the international pressure generated by the flotilla incident, which had been part of a symbolic attempt to break the naval blockade

However, over time, the fishing zone was further reduced, first to twelve miles of the Gaza coast, then to ten and six, and, up until recently, to three. Violators of these restrictions face violent harassment from the Israeli navy, including gunfire, arrest, and seizure of their vessels. *See* OCHA & WFP, *supra* note 54.

56. Israel claims that these security needs include in particular prevention of the entry of contraband by sea. However, the frequent changes to the restrictions and their correlation with general trends in the closure policy indicate that these measures are a means of control and not driven solely by a concrete military objective. For example, in November 2012, the ceasefire agreement between Israel and Hamas following Operation Pillar of Defense eased the restrictions on the movement of farmers and fishermen in the Gaza Strip. Among other things, it was agreed that the Israeli military would allow Gaza farmers to cultivate plots located up to 100 meters from the Israel-Gaza perimeter fence and that fishermen would be able to fish up to six nautical miles off the Gaza coast, as opposed to the three-mile limit imposed prior to Operation Pillar of Defense. *Access Eased for Gaza Farmers and Fisherman*, B'TSELEM (Nov. 27, 2012), http://www.btselem.org/gaza_strip/20121127_restrictions_eased. *See also The Gaza Cheat Sheet: Real Data on the Gaza Closure* (Gisha, Jan. 21, 2013), available at http://www.gisha.org/UserFiles/File/publications/gaza_info/Info_Gaza_Eng.pdf.

57. *See also supra* note 55.

58. EL-HADDAD & SCHMITT, *supra* note 1, at 108. In March 2013, in response to rockets fired from the Gaza Strip into southern Israel by Palestinian militant groups, Israel reinstated tighter restrictions, which were then relaxed again in May 2013. OCHA, *The Monthly Humanitarian Monitor* (Mar. 2013), available at http://reliefweb.int/sites/reliefweb.int/files/resources/ocha_opt_the_humanitarian_monitor_2013_04_29_english.pdf; *see also Israel Expands Fishing Zone from Three to Six Nautical Miles*, GISHA (May 21, 2013), http://www.gisha.org/item.asp?lang_id=en&p_id=1984.

59. According to a UN study conducted in 2010, an estimated 178,000 people—twelve percent of the Gaza Strip population—were directly affected by the access regime implemented by the Israeli military. OCHA & WFP, *supra* note 54, at 5. Currently, according to the Gaza fishermen's union, more than 12,000 individuals earn their living directly in the fishing industry, and many others earn their living indirectly from it, such as carpenters, boat owners, and merchants. *Gaza 2013: Snapshot*, GISHA (June 2, 2013), <http://www.gazagateway.org/2013/06/gaza-2013-snapshot/>. Inland fish farms have sought to compensate for the lack of sea fish, but the local population is less inclined to consume farmed fish, as locals claim "it tasted like mud!" EL-HADDAD & SCHMITT, *supra* note 1, at 108.

on Gaza, the Israeli authorities released a long list of goods banned from import, including dual-use items and commodities such as construction materials, and declared that all other civilian goods would now be allowed into Gaza.⁶⁰ Thus, rather than prohibiting the entry of all commodities except those specifically permitted, the new policy generally allowed the transfer of all civilian commodities except those specifically prohibited. Over the last few years, further changes have been made to ease the restrictions.⁶¹ For example, there are no longer restrictions on the entry of food into the Gaza Strip, and Israel is no longer counting calories. However, many restrictions do remain in place, mainly on exports from the Gaza Strip into Israel,⁶² on the marketing of goods from the Gaza Strip in Israel and the West Bank,⁶³ and on the movement of people between Gaza and the West Bank.⁶⁴ The Kerem Shalom Crossing between Gaza and Israel is still the only crossing point open for the movement of goods in and out of the Strip. Gaza's dependence on the goods coming in from Kerem Shalom has increased over the last few years, as the Egyptian military has been systematically demolishing the underground tunnels connecting Gaza and Egypt, particularly since mid-2013.⁶⁵ These tunnels were used to transport whatever was short on supply and high in demand in Gaza.⁶⁶ With the easing of the Israeli closure in June 2010 and the subsequent increase in availability of consumer goods, the tunnels were used mainly to bring in fuel, which is much cheaper in Egypt than in Israel, and construction materials, which were still highly restricted by Israel.⁶⁷

Thus, although there is no shortage of food in Gaza, the poverty rate, which peaked at almost 50% in 2007,⁶⁸ was still a staggering 38.8% in 2011,⁶⁹ because

60. The updated policy and list of prohibitions can be found at the COGAT website, COGAT, RESTRICTED IMPORT LIST: GAZA STRIP 2013 (2013), available at http://www.cogat.idf.il/Sip_Storage/FILES/4/4014.pdf.

61. Sari Bashi, *What's Changed Since the Gaza Ceasefire*, DAILY BEAST, Jan. 17, 2013, <http://www.thedailybeast.com/articles/2013/01/17/what-s-changed-since-the-gaza-ceasefire.html>.

62. In 2012, approximately twenty-two truckloads of goods exited Gaza per month, about two percent of what had been exiting monthly prior to the closure. *The Gaza Cheat Sheet: Real Data on the Gaza Closure*, GISHA (Gisha, Jan. 21, 2013), available at http://www.gisha.org/UserFiles/File/publications/gaza_info/Info_Gaza_Eng.pdf.

63. *Id.*

64. *What Is the "Separation Policy"?* 5 (Gisha Position Paper, June 2012), available at <http://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf>. See also *Graphing 5 Years of Closure* (Gisha Info Sheet, June 2012), available at <http://www.gisha.org/UserFiles/File/publications/5years/5-to-the-closure-eng.pdf>.

65. See *supra* note 11.

66. See discussion in notes 10–12, *supra*, and accompanying text.

67. OCHA, *The Monthly Humanitarian Monitor* (Dec. 2012), available at http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2013_01_28_english.pdf.

68. THE WORLD BANK, *COPING WITH CONFLICT: POVERTY AND INCLUSION IN THE WEST*

of commerce and movement restrictions that hindered the rehabilitation of infrastructures and economic development in Gaza. Today, over 70% of the population still relies on humanitarian aid.⁷⁰ This dire economic situation, caused to a large extent by the Israeli closure, has been the major cause of food insecurity in the Gaza Strip, which subject we now proceed to, in Part II.

II.

FOOD INSECURITY IN GAZA: ON THE VERGE OF A HUMANITARIAN CATASTROPHE

Much of the debate on food security in Gaza has focused on the prohibitions on the entry of certain foodstuffs into Gaza, as described in Part I. Yet *food insecurity*⁷¹ in the Gaza Strip is in fact the result, first and foremost, of the lack of economic access to, rather than the unavailability of, food in the local markets. According to the Food and Agriculture Organization (FAO) and the World Food Programme (WFP), Gaza residents' economic access to food is constrained by a combination of "(i) artificially high food prices due to inflated transportation costs and dependence on Israeli imported goods, and (ii) low purchasing power due to the lack of well-paid jobs, business and investment

BANK AND GAZA (2011), available at <http://go.worldbank.org/JKWJB8XGB0>.

69. PALESTINIAN CENTRAL BUREAU OF STATISTICS, ON THE EVE OF THE INTERNATIONAL POPULATION DAY (July 11, 2012), available at http://www.pcbs.gov.ps/Portals/_pcbs/PressRelease/int_Pop_2012e.pdf. According to the UN Development Programme, in 2012, 79.4% of the Gaza Strip population was living below the poverty line (\$2 per day). U.N. Development Programme, *Fast Facts* (Nov. 2012), <http://www.undp.ps/en/newsroom/publications/pdf/other/Gazafactsheet2012.pdf>.

70. *The Gaza Cheat Sheet: Real Data on the Gaza Closure* (Gisha, Jan. 19, 2015), available at http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf.

71. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32, at 5:

The definition of food insecurity in the [occupied Palestinian territory] combines income and consumption levels measured in USD per adult equivalent per day. It also includes whether there has been no change or a decrease in food and non-food expenditures. As such, the measurement of food insecurity considers only the problem of economic access to food and essential non-food items resulting from the lack of income-earning possibilities for Palestinian households. Other dimensions of food security, including food availability and food consumption, are generally less problematic. Food is generally supplied in sufficient quantities and with an acceptable variety in local markets, mainly from imports. Yet, current availability of food on the market could be hampered given the volatility of the peace process and the high dependency on Israeli and international markets.

The Annex to this report, *id.* at 23, specifies the criteria used by international aid agencies to categorize households into one of the four following groups: food insecure, vulnerable, marginally secure, and food secure. In 2010, for example, a household would be considered "food insecure" if its income and consumption were below \$5.1 per adult equivalent/day or if it were indicating a decrease in total food and nonfood expenditures, including in households unable to further reduce their expenditure patterns. *Id.*

opportunities.”⁷² Certainly, the prevention of access to certain foodstuffs has symbolic meaning and impacts food preferences, which are also a component of food security. However, to the extent that the availability of food plays a role in food insecurity, this is more due to a lack of *security* about availability, which is mostly dependent on imports and aid,⁷³ than to an actual shortage of food at any given point in time. At the core of food insecurity in the Gaza Strip, then, is the overall impoverishment of the population, caused by restrictions on imports and exports, restrictions on the access to agricultural and fishing areas, and destruction of local industry and other means of self-sufficiency.⁷⁴

While food insecurity in Gaza predated the Israeli closure,⁷⁵ the problem intensified substantially and became particularly harsh between 2007 and 2010, especially after Operation Cast Lead in 2009, when sixty percent of the population were defined as food insecure.⁷⁶ In addition, nine percent were vulnerable to food insecurity in 2009,⁷⁷ meaning that at the time, a total of sixty-

72. WFP & FAO, *Food Security and Vulnerability Analysis Report*, (Dec. 2009), available at <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp213663.pdf>. See also FAO, URWA, WFP & PCBS, *2011 Socio-Economic and Food Security Survey* (May 2012), available at <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp249301.pdf>; OCHA, *Fragmented Lives: Humanitarian Overview 2011*, at 56–57 (May 2012), available at http://www.ochaopt.org/documents/ocha_opt_fragmented_lives_annual_report_2012_05_29_english.pdf.

73. WFP & FAO, *Socio-Economic and Food Security (SEFSec) Survey Report 2—Gaza Strip* (Nov. 2009), available at http://reliefweb.int/sites/reliefweb.int/files/resources/CBCD0E051E978998C125766A0039933D-Full_Report.pdf.

74. See OCHA, *supra* note 35, at 5; Reham Al Wehaidy, *Private Sector: Impact of the Gaza Blockade and Strategies to Cope with the Consequences* (Pal-Think for Strategic Studies, Oct. 22, 2012), available at <http://palthink.org/en/wp-content/uploads/2012/11/Private-Sector.pdf>.

75. Special Rapporteur on the Right to Food, *Addendum: Mission to the Occupied Palestinian Territories*, U.N. Doc. E/CN.4/2004/10/Add.2 (Oct. 31, 2003), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/164/89/PDF/G0316489.pdf?OpenElement> (by Jean Ziegler) [hereinafter Special Rapporteur on the Right to Food, *Addendum*]. See the Israeli response to the Report Submitted by the Special Rapporteur on the Right to Food submitted to the United Nations High Commissioner for Human Rights on Nov. 5, 2003, U.N. Doc. E/CN.4/2004/G/14 (Nov. 26, 2003), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/169/14/PDF/G0316914.pdf?OpenElement>. Violations of the right to food in the oPt were already addressed by the same Special Rapporteur in an earlier report, Special Rapporteur on the Right to Food, *Report Submitted in Accordance with Commission on Human Rights Resolution 2001/25*, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/100/79/PDF/G0210079.pdf?OpenElement> (by Jean Ziegler).

76. This is compared to 53% in 2006 and 41% in 2003. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32; OCHA, *supra* note 35, at 9; WFP & FAO, *Report of the Food Security Assessment: West Bank and Gaza Strip* (2003), available at <http://www.fao.org/docrep/006/j1575e/j1575e00.htm>.

77. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32.

nine percent of Gazan households—over one million people—were either food insecure or vulnerable to food insecurity, and around half were further identified as having poor diets.⁷⁸ In conjunction with the significant rise in unemployment rates in Gaza immediately following the implementation of the closure,⁷⁹ most households have reported a diminished ability to produce or purchase sufficient food for consumption since June 2007.⁸⁰ The food items most frequently mentioned as having been cut out of the daily diet were fresh fruit, sweets, and meat products.⁸¹ After Operation Cast Lead, certain basic food products, such as poultry, red meat, and eggs, became unaffordable for many households due to their scarcity and rising prices.⁸² During this period, unemployment climbed to over forty percent,⁸³ and at least half of the total household expenditures were on food. As a result, the population was highly vulnerable to fluctuations in food prices and income levels.⁸⁴ Consequently, consumption patterns shifted towards cheaper food commodities and there was an overall reduction in the quantity of food purchases made by consumers. Many households, having lost their source of income due to private sector lay-offs, were reported to have reduced the number of meals and quantities of food they consumed daily and to have sold disposable assets.⁸⁵

78. WFP & FAO, *supra* note 72. By some estimates, the levels of food insecurity and vulnerability were even higher in the aftermath of Operation Cast Lead, peaking at approximately seventy-five percent or seventy-seven percent of Gazan households. *See* OCHA, *supra* note 35, at 9; WFP & FAO, *Food Security and Vulnerability Analysis Report*, *supra* note 72. Food insecurity levels were highest among the rural population, at sixty-nine percent of households, with an additional ten percent identified as vulnerable to food insecurity. This was largely attributed to the massive destruction of assets this population suffered during Operation Cast Lead, compounded by Israel's direct restrictive control over one-third of the rural areas (the stated "no-go zone") and over Gaza's territorial waters. WFP & FAO, *2010 Socio-Economic and Food Security Survey*, *supra* note 32, at 11–12.

79. From 16.9% in 1999, they rose to an average of 29.7% in 2007. PCBS, LABOR FORCE SURVEY 79 (2011), available at http://pcbs.gov.ps/portals/_pcbs/downloads/book1878.pdf. Immediately following the implementation of the closure, in June 2007, 13,000 people lost their jobs. WFP, *supra* note 24.

80. *See* WFP, *supra* note 24, at 12.

81. *Id.* at 15.

82. WFP & FAO, EFSA, *supra* note 32. Adequate fresh animal protein, including dairy products, and imported fruits and vegetables are virtually unattainable for many in Gaza because of prohibitive prices. *See* RAMI ZURAYK & ANNE GOUGH, CONTROL FOOD, CONTROL PEOPLE: THE STRUGGLE FOR FOOD SECURITY IN GAZA 2 (2013).

83. They then fluctuated between thirty-six and thirty-seven percent in 2009. WFP & FAO, *supra* note 72.

84. *See* WFP & FAO, *supra* note 72, at 36.

85. WFP & FAO, EFSA, *supra* note 32. UNRWA's chief in Gaza reported that families reduced the number of meals they ate per day, cut back on the amount of food at each meal, and did without basic products due to the high prices. He noted that a huge proportion of the population would have been vulnerable to hunger without food allocations from the agency. EL-

As some sources and evaluation reports noted, Israel's restrictions on Gazans' commercial access to goods, and the resulting effect on workers' access to labor markets, induced a state of de-development in which the shrinking of the private sector and stagnation of the economy drove the population into deep poverty and food insecurity.⁸⁶ Due to these dismal economic conditions and the ongoing erosion of the purchasing power of most households in the Gaza Strip, the vast majority of residents became dependent on aid. This aid was provided primarily by the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), and other international agencies.⁸⁷ The dependency rate stood at approximately seventy percent throughout most of the tight closure period from 2007 to 2010⁸⁸ and was as high as eighty-five percent during crisis points, as in early 2009, in the immediate aftermath of Operation Cast Lead.⁸⁹

Israel's relaxation of its restrictions on imports into Gaza in mid-2010 led to a significant increase in the volume and variety of goods entering the Strip and a decline in the prices of some products.⁹⁰ There has been a limited positive effect on the access to sources of livelihood for the population, despite improvements in the availability of consumer goods and certain raw materials.⁹¹

HADDAD & SCHMITT, *supra* note 1, at 26.

86. See EL-HADDAD & SCHMITT, *supra* note 1, at 6; OCHA, *supra* note 35. The term de-development was first coined, in the context of Gaza, by Sara Roy. See SARA ROY, *THE GAZA STRIP: THE POLITICAL ECONOMY OF DE-DEVELOPMENT* (1995).

87. In the past decade, UNRWA has provided humanitarian aid to registered refugees comprising approximately three-thirds of Gaza's population (almost 1.2 million people out of approximately 1.7 million residents as of January 2012), and it is the biggest relief agency operating in the Gaza Strip. With more than 11,000 staff in over 200 installations across the Strip, UNRWA provides education, healthcare, relief and social services, microcredit, and emergency assistance to registered Palestinian refugees. The United States is its largest single donor, followed by the European Union. *Frequently Asked Questions*, UNRWA, <http://www.unrwa.org/who-we-are/frequently-asked-questions> (last visited May 26, 2015). See also ZURAYK & GOUGH, *supra* note 82, at 2–3.

88. See WFP & FAO, *supra* note 73.

89. WFP, FAO & EFSA, *supra* note 32.

90. Overall, in the second half of 2010, the monthly average of truckloads of goods entering Gaza increased by sixty-six percent compared to the first half of the year, but was only thirty-five percent of the monthly average during the first five months of 2007, prior to the imposition of the closure. The proportion of nonfood items among all imports continued to be low, ranging between forty and fifty percent, compared to over eighty percent prior to the closure. OCHA, *supra* note 52, at 5.

91. During the second half of 2010, the unemployment rate in Gaza decreased by less than two percentage points, from 39.3% to 37.4%. The unemployment rate decreased to 28.7% in 2011. Gisha, *supra* note 56. Yet, "new job opportunities are mainly in low pay jobs, meaning that more people are finding work but earning less than during the pre-blockade period." UNRWA, WFP & PCBS, *supra* note 72.

As a result, the majority has continued to suffer from food insecurity⁹² and remained critically dependent on food assistance.⁹³

All this notwithstanding, the harsh effect of the prevention of the entry of goods into Gaza should not obscure the equally detrimental effect that the restrictions on exports have had on the economic situation and, therefore, food security. The easing of restrictions on importing goods into Gaza in the aftermath of the flotilla events created the false impression that the closure had been lifted. In some respects, this had been indirectly facilitated by the Gaza aid flotilla. Although the proclaimed goal of the flotilla organizers had been to bring about the termination of the closure on the Gaza Strip altogether, its emphasis on imports detracted attention from the restrictions on exports to and commerce with the West Bank. This is the deeper issue in terms of development and self-sufficiency. By focusing on the entry and availability of food per se, the flotilla drew attention away from the bigger story of food security, which remained at issue even after restrictions on certain food imports were lifted.

It is clear that no major food crisis arose in Gaza throughout the years of the closure despite Israel's policy, not because of it.⁹⁴ Between 2007 and 2010, this policy, as articulated in the Red Lines Document, allowed living conditions and human life in the Gaza Strip to deteriorate to the minimum that is deemed necessary for subsistence.⁹⁵ As the Document implied, malnutrition would have

92. The levels of food insecurity dropped only slightly, to 65% of the residents, who were either food insecure (52%) or vulnerable to food insecurity (13%). This slight reduction relative to 2009 has been attributed to the partial rehabilitation of Gaza after Operation Cast Lead through massive support from international aid agencies. However, as a comprehensive food security survey conducted in 2010 showed, the proportion of the population that is food secure fell from 24% to 19% percent in the space of one year (between 2009 and 2010), suggesting a possible exhausting of the coping mechanisms for those who were better off. Although the level of food insecurity in the Gaza Strip decreased again in 2011, it was still high, at a level of 44%, compared to 17% in the West Bank. Moreover, the level of food security more or less stabilized between 2009 and 2011, leveling off at about 23%. This means that despite certain improvements in livelihood conditions, the majority of people in Gaza still do not meet the food-security threshold. URWA, WFP & PCBS, *supra* note 72.

93. *See id.* Dependency on aid remains high to this day. In January 2013, it was reported that more than seventy percent of the population are still dependent on humanitarian aid. Gisha, *supra* note 56. As the Director of UNRWA Gaza Operations, Christer Nordahl, stated in an interview: It would be so easy to reduce the number of aid recipients. It would just be a matter of lifting the blockade and so many jobs would crop up! For example in the construction sector: there are thousands of projects on hold, and people waiting for work in construction. The day the blockade is lifted the food aid dependency will fall down immediately. . . .

EL-HADDAD & SCHMITT, *supra* note 1, at 26.

94. PHR-ISRAEL, "HUMANITARIAN MINIMUM": ISRAEL'S ROLE IN CREATING FOOD AND WATER INSECURITY IN THE GAZA STRIP (Dec. 2010), *available at* http://www.phr.org.il/uploaded/Humanitarian%20Minimum_eng_webver_H.pdf.

95. Yotam Feldman, *Kavim Adumim* [Red Lines], 22 MITA'AM 132 (2010) (Isr.).

been rampant without the international humanitarian aid efforts: “[t]he stability of the humanitarian effort is critical to prevent the development of malnutrition.”⁹⁶

Thus, as Adi Ophir has poignantly framed it, Israel has been keeping the Occupied Palestinian Territory, in particular the Gaza Strip, on “‘the verge’ of a humanitarian catastrophe,”⁹⁷ a term first used by the UN Special Rapporteur on the Right to Food in the context of the Occupied Territories.⁹⁸ At the same time, Israel has asserted that it will do its utmost, if required, to avoid crossing the threshold of such catastrophe. And indeed, even prior to the closure of Gaza, consistent Israeli policy kept the Palestinian population just at the threshold of famine.⁹⁹ “The idea is to put the Palestinians on a diet, but not to make them die of hunger,” Dov Weisglass, Advisor to the Israeli Prime Minister, reportedly stated.¹⁰⁰ This point is crucial for understanding the conditions in the Occupied Palestinian Territory in general but more significantly, during the post-disengagement Gaza period. Throughout the years of the closure, particularly from 2007 to 2010, the reassuring mantra that there is no hunger in Gaza has been emphatically repeated by Israeli authorities and, as we will discuss in Part III, echoed by the Turkel Commission.

Although the observation is correct, we maintain that the tacit implication—that the situation is legitimate and tolerable—is wrong. This framing of the conditions in Gaza pacified both internal and international criticism and pressure regarding the closure policy, which would have significantly intensified if the threshold of “starvation” or “humanitarian crisis” had been crossed or if the hungry people “look[ed] the part.”¹⁰¹ Unfortunately, the binarism of catastrophe/starvation on the one hand, and acceptable policy on the other, misses the more subtle elements of control and subordination. This may be just as catastrophic for the local population. Thus, although Israel has used its power to cripple Gaza’s economy, bring its residents to the edge of catastrophe, and create soaring poverty rates and extreme levels of food

96. An unofficial English translation of the Red Lines Document is available at <http://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf>.

97. Ophir, *The Politics of Catastrophization*, *supra* note 14.

98. Special Rapporteur on the Right to Food, *Addendum*, *supra* note 75, ¶ 8.

99. Ophir, *The Politics of Catastrophization*, *supra* note 14, at 77–82. *See also* AZOULAY & OPHIR, *supra* note 14, at 170–79.

100. Conal Urquhart, *Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite*, *GUARDIAN*, Apr. 15, 2006, <http://www.guardian.co.uk/world/2006/apr/16/israel>. Weisglass later denied saying this, Ronny Sofer, *Hamas Sworn In—Israel to Cut off Funds*, *YNET NEWS* (Feb. 15, 2006), <http://www.ynetnews.com/articles/0,7340,L-3216790,00.html>.

101. MICHAEL CAROLAN, *RECLAIMING FOOD SECURITY* 4 (2013).

insecurity, it could continue to insist that its policy meets humanitarian law standards.¹⁰²

This claim was put to the test in the framework of the Turkel Commission, appointed by the Israeli government as the “Public Commission to Examine the Maritime Incident of 31 May 2010.”¹⁰³ Although the Commission determined in its inquiry that the requirements of international law were satisfied since there was no starvation in Gaza, it left the question of food security open. Since the Turkel Commission’s report is the central legal analysis of the closure conducted by an Israeli quasi-judicial forum to date, its findings and determinations merit closer scrutiny.¹⁰⁴

III.

THE TURKEL COMMISSION AND THE HUMANITARIAN MINIMUM

A. *Findings and Legal Analysis*

The Turkel Commission was appointed to investigate, amongst other things, whether Israel’s naval blockade on Gaza, imposed in January 2009, conformed to international-law standards. In its analysis of the Gaza aid flotilla incident of 2010 and the broader context of the blockade, the Commission relied on the San Remo Manual on International Law Applicable to Armed Conflict at Sea (San Remo Manual),¹⁰⁵ a 1994 codification of customary law on the matter.

102. Ophir, *supra* note 14; Feldman, *supra* note 95. For humanitarianism’s use of the same language as the military, see DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* ch. 8 (2005).

103. Government Resolution No. 1796 (June 14, 2010) (Isr.), available at <http://www.turkel-committee.com/content-50.html>.

104. Concurrent to the Turkel Commission of Inquiry, a Turkish National Commission of Inquiry was also appointed, which published its own report in February 2011, Turkish Nat’l Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza* 1, 8 (Feb. 12, 2011), available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>. Two reports were also published by UN bodies. See Human Rights Council, 15th Sess., *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, U.N. Doc. A/HRC/15/21 (Sept. 27, 2010) [hereinafter HRC Report], available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf; *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident* (Sept. 2011) (by Geoffrey Palmer, Alvaro Uribe, Joseph Ciechanover Itzhar & Süleyman Özdem Sanberk) [hereinafter Palmer Report], available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

105. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (International Institute of Humanitarian Law June 12, 1994) [hereinafter SAN REMO MANUAL], available at <https://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/5B310CC97F166BE3C12563F6005E3E09/FULLTEXT/IHL-89-EN.pdf>.

The Commission cited the requirements in the Manual that prohibit a naval blockade if its sole purpose is the starvation of the civilian population¹⁰⁶ and if a proportionality requirement is not met; that is, the damage to civilians should not be disproportionate to the concrete and direct *military advantage* expected from the blockade.¹⁰⁷ Accordingly, the party imposing the blockade must, subject to certain conditions, allow for the free passage of food and other essential goods if the civilian population does not have proper supplies of these items.¹⁰⁸ The Turkel Commission acknowledged the dual purpose of the Israeli naval blockade, noting that although its underlying justification was military needs, it was also an element of Israel's political strategy against the Hamas in Gaza.¹⁰⁹ Yet the Commission found that the naval blockade met the conditions stipulated by international law, even though the Israeli government had not followed the San Remo Manual's requirement that the blockade have an end date.¹¹⁰

The San Remo Manual also addresses humanitarian requirements relating to food. The Turkel Commission noted the difficulty of distinguishing the humanitarian effect of the blockade from the effect of Israeli restrictions on land passage into Gaza,¹¹¹ and it therefore examined the humanitarian ramifications of the closure policy in its entirety. In this context, the Commission noted that the Israeli policy on the entry of goods into Gaza was aimed at two goals: the direct security objective of preventing the entry of weapons and military supplies and the broader strategic goal of "indirect economic warfare."¹¹² The Commission examined the closure policy as implemented at the time of the flotilla events, prior to the overall easing of restrictions.¹¹³

The Turkel Commission also noted that the information it was provided with by Israeli government officials and civil society representatives seemed to, at times, describe two very different realities. The situation depicted by the human rights and humanitarian groups was a genuine humanitarian crisis, whereas the government representatives denied such a crisis. The Commission cited UN data according to which 60.5% of Gaza households suffered from food

106. THE TURKEL COMMISSION, TURKEL REPORT—COMM'N, THE PUB. COMM'N TO EXAMINE THE MAR. INCIDENT OF 31 MAY 2010, PART ONE, ¶ 36, (Jan. 2011), [hereinafter TURKEL REPORT], available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> (citing Rule 102(a)).

107. *Id.* ¶ 36 (citing Rule 102(b)).

108. *Id.* ¶ 36 (citing Rule 103).

109. *Id.* ¶¶ 48, 50.

110. *Id.* ¶¶ 59–60.

111. *Id.* ¶ 62.

112. *Id.* ¶ 67.

113. *Id.* ¶¶ 66–68.

insecurity,¹¹⁴ defined as a state in which “people lack sustainable physical or economic access to adequate safe, nutritious and socially accepted food to maintain a healthy and productive life.”¹¹⁵ Civil society organizations, stated the Commission, attributed this situation to inflation in food prices, poverty, diminished income sources, and “erosion of coping mechanisms, leading to increased difficulties of households to afford sufficient quantities of quality food.”¹¹⁶

The Commission more generally cited data according to which more than one million Gazans existed on humanitarian assistance. It also noted the assessment made by human rights and humanitarian groups that Israel’s prohibition on exports from Gaza alongside the strict restrictions on imports had paralyzed its private sector. Thus, the Commission concluded that the collapse of Gaza’s economy was a result of both the naval blockade and Israel’s land passage policy.¹¹⁷ In relation to its land closure policy, Israel presented its decisions on the entry of goods into Gaza as guided by the security and political considerations underlying the closure policy on the one hand, and the survival needs of the Palestinian population in Gaza on the other.¹¹⁸ They argued that these decisions were made on a periodic basis, with the items allowed into Gaza detailed in lists of so-called humanitarian goods.¹¹⁹

In response to the claim of a lack of food security in Gaza, the Israeli authorities argued that the requests submitted by the Palestinian Authority usually matched the Israeli determinations regarding the needs of the

114. *Id.* ¶ 72 (citing U.N. Office for the Coordination of Humanitarian Aff., *Consolidated Appeal: Occupied Palestinian Territory*, 2, 23 (Nov. 30, 2009) [hereinafter U.N. Consolidated Appeal], available at http://www.ochaopt.org/documents/ocha_opt_consolidated_appeal_process_2010_english.pdf. See also WFP & FAO, *supra* note 73, at 7.

115. TURKEL REPORT, *supra* note 106, ¶ 72. The definition is taken from OCHA, *supra* note 35, at 9, and is compatible with the FAO definition we invoked at the outset of the Article:

Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life. . . . Food insecurity exists when people do not have adequate physical, social or economic access to food as defined above.

Rome Declaration, *supra* note 4.

116. TURKEL REPORT, *supra* note 106, ¶ 72 (citing U.N. 2010 Consolidated Appeal, *supra* note 114, at 2, 23).

117. *Id.* ¶ 72.

118. This was based on formulas described in length at *supra* notes 43–46 and accompanying text.

119. Transcript of session no. 7, Testimony by Maj. Gen. Eitan Dangot, Coordinator of Government Activities in the Territories, before the Turkel Committee (Aug. 31, 2010), at 27–28 [hereinafter Dangot Testimony], available at <http://www.turkel-committee.gov.il/files/wordocs/6656cgat-eng.doc>.

population.¹²⁰ They further asserted that there were discrepancies between the positions expressed by humanitarian groups in working meetings with Israeli authorities and the public statements that they made. The Israeli government emphasized that the Gazan population did not suffer from starvation.¹²¹

In assessing the official Israeli position and the assertions of the civil society groups, the Turkel Commission relied on both the San Remo Manual rules as well as Article 54(1) of the first Additional Protocol to the Geneva Conventions of 1949 (Additional Protocol I), which prohibits the starvation of civilians as a means of warfare.¹²² The Commission determined that nothing in the materials it had examined indicated that Israel was attempting to deny the Gazan population food or annihilate or weaken the Gazan population through starvation. It emphasized that even the humanitarian and human rights groups described the situation in Gaza as one of food insecurity, in the sense of a lack of physical and economic access to food sources, as opposed to starvation.¹²³ The Commission stated that Israeli policy was in fact designed to prevent starvation, and it noted that a lack of food security differed from hunger or starvation.¹²⁴ As to the duty set forth in the San Remo Manual to provide the means necessary for the survival of the civilian population, which, under Additional Protocol I, includes food, the Commission was persuaded that Israel allowed the entry of such necessary means.¹²⁵ This determination was crucial to the Commission's conclusion that the naval blockade did not violate the proportionality principal. The Commission explained that the suffering it caused the civilian population must be assessed primarily in reference to the prohibition on starvation. Thus, the absence of starvation in Gaza was determinative in measuring proportionality.

The Commission did note, however, that the restrictions on food were "especially worrying" not only because of the unequivocal prohibition on starvation, but also because of the potential widespread effect on the civilian population. It noted that this raised questions of the legitimacy of restricting access to food products even when it did not lead to starvation; the Commission was also concerned about the unspecified duration of the naval blockade.¹²⁶

120. This disregards the chilling effect the closure had on Palestinian merchants, who gradually adapted their orders to Israel's restrictions, *see supra* note 23.

121. TURKEL REPORT, *supra* note 106, ¶ 73.

122. *Id.* ¶ 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts International Armed Conflicts (Protocol I) art. 54, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

123. *Id.* ¶ 77.

124. *Id.* ¶ 78.

125. *Id.* ¶ 80.

126. *Id.* ¶ 91.

Nonetheless, the Commission stated that, given the Israeli monitoring procedures for determining the types and quantities of goods allowed into Gaza, there was no violation of international-law standards.¹²⁷

The Commission's failure to delve into the problematic issue of restricting access to food and the use of the "humanitarian minimum" as a benchmark also emerged in its proceedings. During testimony given by one of the authors (Tamar Feldman) on behalf of the Israeli NGO *Gisha* (Legal Center for Freedom of Movement),¹²⁸ one of the Commission members, Professor Miguel Deutsch, asked how food security is defined and measured. To explain his query, Commissioner Deutsch referred to the presentation Major-General Dangot, the head of COGAT, had made, recalling that the latter had spoken about a scale of calories: "1700 calories per day, or something of that order." Another member of the Commission, Ambassador Merhav, interrupted, "No, no. He didn't talk about that. We didn't want to hear the word calories from him." Professor Deutsch insisted that the Commission members might wish they had not heard it, but they had.¹²⁹ There were no references to calories or details regarding the humanitarian-minimum standard in the protocols of Dangot's public testimony, but these issues may have arisen behind closed doors in the confidential part of his testimony, or these issues may have appeared in the documents he later submitted. In any event, the Commission did not return to the issue of calories, nor was any mention of this made in its final report.

It is noteworthy that the Commission chose not to examine the legality of the naval blockade from the perspective of human rights law, holding that the rules of international humanitarian law, particularly those pertaining to naval blockades, apply as *lex specialis*. It asserted, moreover, that the two legal regimes "share a common 'core' of fundamental standards which are applicable at all times."¹³⁰ We now critique this position and consider its significance.

B. Critique

The Turkel Commission's legal analysis of the naval blockade was grounded on three premises. First, that there was an ongoing armed conflict between Israel and Hamas that was of an international nature. Second, that Israel's "effective control" of the Gaza Strip ended with the disengagement and

127. *Id.* ¶¶ 94–97.

128. Transcript of session no. 12, Testimony of Gisha Representatives (Tamar Feldman & Sari Beshi) (Oct. 13, 2010), at 140, *available* at <http://www.turkel-committee.com/files/wordocs/634909823-yp-09736-en.doc>.

129. *Id.* at 140–41.

130. TURKEL REPORT, *supra* note 106, ¶ 100 (citing *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 149 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (Celebici Case)).

that Israel henceforth ceased to bear the duties of an occupying power towards the residents of the Gaza Strip. The third premise was that the international law on human rights was not applicable because the law of armed conflict, particularly the law on naval blockades during armed conflict, was the applicable *lex specialis*.¹³¹ The first premise implicates the applicability of the law of naval blockades as codified in the San Remo Manual,¹³² whereas the second and third premises imply the (non)applicability of other potentially relevant normative frameworks. While we do not dispute that the armed conflict between Israel and Hamas should be classified as international, we reject the second and third premises. The application of the law of belligerent occupation and international human rights law concurrently with the law of armed conflict would significantly alter the legal analysis of the Gaza closure, on which we elaborate in Part IV. But before proceeding to our analysis of the closure, we will first critique the legal analysis in the Turkel Commission report (Turkel Report), by its own parameters, and pinpoint some of its flaws.

1. *Assessing the Turkel Report's Legal Analysis from Its Own Perspective*

If we assume the law of armed conflict at sea to, indeed, be the sole relevant normative framework for assessing the lawfulness of the naval blockade on Gaza, with the San Remo Manual as the predominant set of applicable rules, then the prime difficulty with the Turkel analysis is its evaluation of proportionality. Under Article 102(b) of the Manual, “The declaration or establishment of a blockade is prohibited if: . . . (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”¹³³

Yet as Shany and Cohen have observed,¹³⁴ the Turkel Commission failed to explain how the use of the blockade as “economic warfare” against Hamas

131. TURKEL REPORT, *supra* note 106, ¶ 100.

132. Since the laws of naval blockades were developed within the framework of international armed conflict (IAC), this classification allowed for the straightforward application of the San Remo rules. However, the Commission noted that given the level of the Hamas’ de-facto control of the Gaza Strip and the security risks this poses for Israel, the laws of naval blockade would be applicable even if the conflict were classified a non-international armed conflict (NIAC). See TURKEL REPORT, *supra* note 106, ¶ 44. Cf. Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 BRIT. Y.B. INT’L L. 171 (2011). Guilfoyle argues that the laws of naval blockades are applicable only to international armed conflicts and are therefore not applicable to the conflict between Israel and Hamas, which should be classified a NIAC. See also Kevin Jon Heller, *Why Is Israel’s Blockade of Gaza Legal?* (Updated), OPINIO JURIS (June 2, 2010, 7:36 AM), <http://opiniojuris.org/2010/06/02/why-is-israels-blockade-of-gaza-legal/>.

133. SAN REMO MANUAL, *supra* note 105, 102(b).

134. Amichai Cohen & Yuval Shany, *The Turkel Commission’s Flotilla Report (Part One): Some Critical Remarks*, EJIL: TALK! (Jan. 28, 2011), <http://www.ejiltalk.org/the-turkel->

meets the requirement of “concrete and direct military advantage” specified in this provision. Although Shany and Cohen restrict their criticism to the context of the naval blockade, they connect it to the land-imposed closure: “while Israel may impose (proportional) economic sanctions against Hamas-controlled Gaza on the land, its ability to utilize a sea blockade to support such sanctions is limited to those restrictions which are needed to achieve a concrete and direct military advantage.”¹³⁵ Therefore, they conclude, “to the extent that the naval blockade was applied in a manner that exceeded strict military requirements in order to support such broader economic restrictions, its proportionality is questionable.”¹³⁶

The Turkel Report also fell short in its assessment of proportionality in terms of the damage caused to the civilian population, as set forth in Article 102(b) of the San Remo Manual. The Commission noted that the San Remo Manual does not provide criteria for determining whether this damage is excessive and so deduced from the Commentary to the Manual that the notion of damage is linked to starvation.¹³⁷ The Commentary states that “whenever the blockade has starvation as one of its effects, the starvation effectively triggers

commissions-flotilla-report-part-one-some-critical-remarks/.

135. *Id.*

136. *Id.* Cohen & Shany note,

It rather appears to us that parts of the economic warfare introduced by Israel – in particular, the restriction on the importation of “non-essential” food items, can only be understood as directed against the civilian population of Gaza (in the hope that the population’s support of the Hamas will be eroded consequently). . . So if indeed the maritime blockade and the land restrictions are interlinked, the latter’s collective harm features could affect the legality of the former – again, to the extent that the application of the blockade exceeded the requirements of strict military necessity in order to support the more problematic aspects of the land restrictions. *Id.*

In the discussion of collective punishment they argue that because of the effect on the civilian population, any distinction in this context between economic warfare and collective punishment collapses. The Turkel Commission’s incoherent approach to the connection between the land closure and naval blockade also shapes its discussion of the claims of collective punishment that have been made by various civil society organizations, most notably the ICRC. The Commission rejected these claims for two reasons. The first is that because a naval blockade is permitted, it cannot be considered prohibited collective punishment unless intended to starve the population. The second is that there has to be an element of “punishment,” whereas in this case, it determined that “[t]here is nothing in the evidence, including that found in the numerous humanitarian and human rights reports, that suggest [sic] that Israel is *intentionally* placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza.” TURKEL REPORT, *supra* note 106, ¶106. *But see* George Bishrat, Carey James & Rose Mishann, *Freedom Thwarted: Israel’s Illegal Attack on the Gaza Flotilla*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 85 (2011) (arguing that the naval blockade was illegal for a variety of reasons, for example, because it furthered the political purpose of pressuring Hamas, rather than a military goal, and that even if it were legal, it violated the principle of proportionality, amounted to prohibited collective punishment, and violated Israel’s duties as occupier).

137. *See* TURKEL REPORT, *supra* note 106, ¶ 90.

the obligation, subject to certain limitations, to allow relief shipments to gain access to the coasts of the blockaded belligerent.”¹³⁸ As expressed in Article 103 of the Manual, “If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies.”¹³⁹ It appears, therefore, that starvation is not the only trigger for a duty to allow passage of humanitarian consignments. The scope of this obligation is contingent on how the terms “essential” and “inadequate” are interpreted, but regardless, the damage to the civilian population could well be considered excessive under Article 102(b) even if it does not amount to starvation, especially when weighed against a less-than-clear-cut military advantage.

Furthermore, although the Turkel Commission, in assessing proportionality, took count of the overall humanitarian costs of Israel’s economic warfare against the Hamas, including the policy to restrict the land-crossings between Gaza and Israel,¹⁴⁰ it ultimately determined that given Israel’s supervision and monitoring mechanisms¹⁴¹ there was no disproportional damage to the civilian population in Gaza.¹⁴² Thus, the Commission essentially adopted the approach espoused by COGAT.¹⁴³ However, it seems to have confused the *mens rea* referred to in Article 102(a) of the San Remo Manual with the *actus reus* required in Article 102(b). Whereas Article 102(a) prohibits a blockade that is *intended* to starve the population even if it has not achieved that goal, Article 102(b) deals with the *outcomes alone*, regardless of the intended purpose of the blockading party: “a blockade is prohibited if . . . the damage *is, or may be expected to be*, excessive.”¹⁴⁴ Accordingly, the fact that Israel took measures to limit the suffering of the civilian population does not mean that it *actually* prevented it or limited its proportions, and the latter is the relevant point to be analyzed and assessed.

Clearly, then, the Turkel Commission’s analysis of the proportionality requirement reflects the minimum-obligations approach, as we have discussed

138. SAN REMO MANUAL, *supra* note 105, art. 102 cmt 102.3.

139. *Id.* art. 103. See also INT’L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL LAW, VOLUME 1: RULES 186 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2009), available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

140. See TURKEL REPORT, *supra* note 106, ¶ 91.

141. *Id.* ¶ 96.

142. *Id.* ¶ 97.

143. See Dangot Testimony, *supra* note 119.

144. SAN REMO MANUAL, *supra* note 105, art. 102(b) (emphasis added).

above.¹⁴⁵ More fundamentally, however, the analysis exposes some of the inherent limitations of the law of armed conflict as it relates to “economic warfare.”¹⁴⁶ It particularly exposes its inability to integrate complex elements of control and dependency, like those present in the conflict between Israel and Hamas. Indeed, the Israel Supreme Court’s position in *Al-Bassiouni* was that the law of armed conflict is not the only source of Israel’s obligations in relation to its Gaza closure policy, and that Israel also bears positive obligations due to its actual control over the land crossings and Gaza’s dependency on Israel due to the occupation.¹⁴⁷ And while, as Yuval Shany has noted, the Court did not specify on which legal sources it based these latter obligations, it did make clear that the law of armed conflict is not a sufficient legal framework in this context.¹⁴⁸

2. *Reevaluating the Legal Framework*

It is important to recall that, as conceded in the Turkel Report, Israel has controlled Gaza’s land borders, territorial waters, and airspace since the occupation began in 1967.¹⁴⁹ Its official declaration in January 2009 that it was imposing a “naval blockade” on Gaza does not alter the fact that Israel has actually been enforcing such a blockade consistently and continuously since 1967. This was able to continue even after the 2005 “disengagement” due to the provisions of the 1993 Oslo Accords that gave control of Gaza’s territorial waters to the IDF.¹⁵⁰ The Turkel Report noted that from the IDF’s perspective, following the disengagement, its actions were no longer subject to the law of

145. See *supra* notes 13–22 and accompanying text.

146. This is most evident in the Report’s discussion of collective punishment, which had been claimed by various civil society organizations, most notably the ICRC. The Commission rejected these claims, stating, “There is nothing in the evidence, including that found in the numerous humanitarian and human rights reports, that suggest [sic] that Israel is *intentionally* placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza.” TURKEL REPORT, *supra* note 106, ¶ 106 (emphasis in original). But as Cohen & Shany observe, *supra* note 134, “parts of the economic warfare introduced by Israel—in particular, the restriction on the importation of ‘non-essential’ food items, can only be understood as directed against the civilian population of Gaza (in the hope that the population’s support of the Hamas will be eroded consequently).” Indeed, this is the inherent difficulty with the legal concept of “economic warfare,” which, by definition, clashes with the basic international humanitarian law distinction between civilians and combatants and strict prohibition on collective punishment. For a general discussion of the problematic nature of this concept, see Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 ISR. L. REV. 117 (2009), describing IHL’s limitations in this regard and suggesting that economic sanctions be further regulated according to some guiding principles.

147. HCJ 9132/07 *Al-Bassiouni v. Prime Minister* (Jan. 30, 2008) ¶ 12 (Isr.).

148. Shany, *supra* note 21, ¶ 101.

149. *Id.* ¶ 25.

150. See Turkel Report, *supra* note 106, ¶ 20.

belligerent occupation. It claimed that instead, given the “armed conflict” with the Hamas regime in Gaza, the law of naval warfare now applied.¹⁵¹ In August 2008, the IDF took the further step of declaring the maritime zone near the coast of Gaza a “combat zone.”¹⁵² Then, later on in January 2009, during the Cast Lead Operation, the IDF imposed the naval blockade, thereby prohibiting the entry of any vessel into these waters.¹⁵³ Despite the culmination of the military operation in Gaza, the naval blockade declaration remained in force.¹⁵⁴

Israel’s control of Gaza’s territorial waters has thus been unbroken since 1967, albeit taking different forms. With only a few isolated exceptions, Israel has never allowed any vessel to enter or leave these waters¹⁵⁵ and has imposed significant restrictions on fishing activities along the Gaza coast.¹⁵⁶ The alleged context of the most recent legal form—a naval blockade as part of an armed conflict—camouflages the fact that this is simply a continuation of Israeli control of Gaza’s waters. This is yet another manifestation of Israel’s ongoing exercise of its power over Gaza even post-disengagement.

Delving into the full details of the debate over the legal status of Gaza post-disengagement, the main issue being whether it is occupied or not,¹⁵⁷ is beyond the scope of this paper. But we nonetheless contend that Israel is bound by the law of belligerent occupation, at least where it continues to exercise control. Support for this “functional approach,” as framed by Gross,¹⁵⁸ can be found in the *Al-Bassiouni* judgment, in which the Israel Supreme Court indicated the possibility of duties arising even in situations of “reduced” occupation or post-occupation. Moreover, the Court implied that given the degree of control Israel continues to wield over Gazans post-disengagement, Israel did, and still does, bear duties in relation to the economic conditions in Gaza, including with regard

151. *Id.* ¶ 21.

152. *Id.* ¶ 23.

153. *Id.* ¶ 26.

154. *Id.* ¶ 27.

155. *Id.* ¶ 53.

156. See discussion in *supra* notes 55–57 and accompanying text.

157. For the position that Gaza is still occupied, see, for example, Iain Scobbie, *An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 Y.B. ISLAMIC & MIDDLE E. L. 3, 4–7 (2004–2005). For a similar position, see Shane Darcy & John Reynolds, “Otherwise Occupied”: *The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SECURITY L. 211 (2010); YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 277–80 (2009). For the position that Gaza is no longer occupied, see Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement*, 8 Y.B. INT’L HUMANITARIAN L. 369 (2007).

158. Aeyal Gross, *Rethinking Occupation: The Functional Approach*, OPINIO JURIS (Apr. 23, 2012), <http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach>; AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (forthcoming 2016) [hereinafter GROSS, *WRITING ON THE WALL*].

to the impact of its actions on food security. Other sources also support the notion of duties deriving from occupation not as a matter of “all or nothing” but, rather, contingent on the extent to which control is exercised. One such source is the decision by the Ethiopia-Eritrea Claims Commission in the *Aerial Bombardment Case*. Addressing the Ethiopian military presence on the conflict’s western front—a presence it described as “more transitory”—the Commission determined that while not *all* of the obligations under the Fourth Geneva Convention relating to occupied territories can be reasonably applied to an armed force anticipating combat and present in an area for only a few days, some obligations could apply, presumably based on the *capacity* and *power* exercised by the occupying power.¹⁵⁹ Developing such a nuanced understanding is critical, especially given the shift by Israel to a form of occupation, which involves less direct friction between its army and the local population.¹⁶⁰

Accordingly, we claim that the analysis of the legality of Israel’s naval blockade on the Gaza Strip cannot be based solely on the law of armed conflict, but rather, the obligations deriving from the law of occupation as well as human rights law must also be examined.¹⁶¹ Restricting the legal evaluation to the framework of the San Remo Manual provisions creates a misguided, artificial differentiation between a land closure and maritime closure, and confines Israel’s obligations towards the Gaza civilian population in a way that is inconsistent with the reality of its power and control over that population.¹⁶² Since the land closure and naval blockade are closely interconnected, as the Commission rightly determined, they should both be scrutinized in light of Israel’s ongoing obligations deriving from its ongoing control. Accordingly, there is room to consider the requirement under Article 59 of the Fourth Geneva

159. EECC Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25, 26, ¶ 27 (Dec. 19, 2005) [hereinafter EECC Partial Award (Western Front)]. For a detailed discussion, see GROSS, *WRITING ON THE WALL*, *supra* note 158.

160. See GROSS, *WRITING ON THE WALL*, *supra* note 158.

161. In Part IV we argue that the analysis should take into account these three bodies of law, and limiting it to any one of them is not sufficient. The Turkish National Commission of Inquiry Report as well as the HRC Report rely almost entirely on the law of occupation while ignoring the law of armed conflict and were justly criticized for doing so. See Yuval Shany’s critique of the HRC Report in Yuval Shany, *Know Your Rights! The Flotilla Report and International Law Governing Naval Blockades*, EJIL: TALK! (Oct. 12, 2010), <http://www.ejiltalk.org/know-your-rights-the-flotilla-report-and-international-law-governing-naval-blockades>. See also Daniel Benoliel, *Israel, Turkey and the Gaza Blockade*, 33 U. PA. J. INT’L L. 615 (2011).

162. Tamar Feldman, *A Tale of Two Closures: Comments on the Palmer Report Concerning the May 2010 Flotilla Incident*, EJIL: TALK! (Sept. 20, 2011), <http://www.ejiltalk.org/a-tale-of-two-closures-comments-on-the-palmer-report-concerning-the-may-2010-flotilla-incident/>. See also Russel Buchan, *The Palmer Report and the Legality of Israel’s Naval Blockade of Gaza*, 61 ICLQ 264 (2012).

Convention, which explains that an occupying power allows and facilitates consignments “[i]f the whole or part of the population of an occupied territory is *inadequately* supplied.”¹⁶³ This obligation is unconditional, i.e., “consignments to occupied territories must be permitted to cross even a blockade line.”¹⁶⁴ Yet as Dinstein notes, “[u]nfortunately, no similar obligation exists outside of occupied territories.”¹⁶⁵ Indeed, Article 59 sets the bar higher than the “humanitarian-minimum” standard for measuring whether a belligerent has fulfilled its duties under the law of armed conflict, and it more closely resembles the human rights standard of ensuring adequate food and living conditions. Similarly, Article 55 of the Convention prescribes that an “Occupying Power” has a duty to ensure the supply of food to the civilian population and, in particular, must bring in the necessary foodstuffs if the resources of the occupied territory are inadequate.¹⁶⁶

In the next Part, we will discuss at length Israel’s duties in the context of food security in Gaza that derive from international human rights law. We will show that they are applicable in this case irrespective of the exact classification of the form of control Israeli exercises over Gaza.¹⁶⁷ It is interesting to note that the Turkel Report did not incorporate human rights law into its analysis because it deemed the provisions of the San Remo Manual the *lex specialis*, which supersedes the *lex generalis*, namely the applicable human rights law.¹⁶⁸ This reliance on the Manual not only created the illusion that one part of the closure policy can be legally analyzed independently from the other, but also constricted the applicability of the law of occupation and international human rights law, thereby lowering the legal bar to the bare minimum in assessing Israel’s obligations towards the Gazan population.

C. The Palmer Committee Report

The analytical path taken by the “Panel of Inquiry on the 31 May 2010 Flotilla Incident,” commissioned by the UN Secretary-General and known as the Palmer Committee,¹⁶⁹ was not only similar to the approach of the Turkel Commission in analyzing the legality of the naval blockade, but took the further

163. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (emphasis added).

164. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 226 (2d ed. 2010).

165. *Id.* (emphasis added). See also Darcy & Reynolds, *supra* note 157, at 17–18 (discussing in relation to Gaza).

166. Fourth Geneva Convention, *supra* note 163, art. 55.

167. See *infra* notes 181–203 and accompanying text.

168. See TURKEL REPORT, *supra* note 106, ¶¶ 98–100.

169. Palmer Report, *supra* note 104.

step of explicitly distinguishing between the land closure and naval blockade.¹⁷⁰ The Palmer Committee's Final Report (Palmer Report), which was published after both the Israeli and Turkish official national inquiries had been completed, also relied on the San Remo Manual. Accordingly, it determined that (1) the blockade was not intended to starve or collectively punish the civilian population in Gaza but, rather, was imposed for military objectives (in contrast to the Turkel Report, which recognized a dual purpose); and (2) that it was proportionate in the circumstances.¹⁷¹ The Palmer Report concluded, therefore, that "the naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law."¹⁷² Nonetheless, the Committee recommended that Israel conduct a regular annual review of the naval blockade, to assess whether it remained necessary and proportionate.¹⁷³

The land closure and humanitarian conditions in the Gaza Strip were discussed separately, in the last chapter of the Palmer Report, entitled "How to Avoid Similar Incidents in the Future."¹⁷⁴ It was noted that indeed, "the situation in Gaza, including the humanitarian and human rights situation of the civilian population, was unsustainable, unacceptable and not in the interests of any of those concerned."¹⁷⁵ The Report linked this dire state directly to the Israeli closure policy: "It is clear that the restrictions Israel has placed on goods and persons entering and leaving Gaza via the land crossings continue to be a significant cause of that situation."¹⁷⁶ Nevertheless, the Report refrained from passing judgment on the legality of the land closure. Instead, it commended the steps Israel had taken to ease the closure following the flotilla incident and encouraged it to continue its efforts to ease its restrictions on the movement of goods and people with a view to lifting the closure altogether.¹⁷⁷

The Palmer Committee also expressed its opinion that the land closure and the accompanying effect on humanitarian conditions in Gaza should not be a part of the proportionality calculations with regard to the naval blockade. The Report noted that the specific impact of the naval blockade on the civilian population in Gaza is difficult to gauge due to the overall closure on Gaza, but considered the absence of a commercial seaport in Gaza to be a determining factor in establishing that the naval blockade itself had a marginal impact, if any,

170. *Id.* ¶ 70.

171. *Id.* ¶¶ 77–78.

172. *Id.* ¶ 82.

173. *Id.* ¶ 150.

174. *Id.* ch. 6, at 97.

175. *Id.* ¶ 151.

176. *Id.*

177. *Id.* ¶¶ 154–56.

on humanitarian conditions there.¹⁷⁸ By dissociating the two means of closure, the Palmer Report avoided all discussion of the application of the law of occupation and its interrelation with the law of armed conflict in this situation. In this respect, the UN Security Council, which adopted the Report, did little to clarify the law on the ambiguous issue of economic warfare.¹⁷⁹

Both the Turkel Report and Palmer Report, then, emerged as accepting the position of the Israeli authorities that harm to the civilian population in the Gaza Strip is legitimate so long as it is proportional and that the blockade did not violate international law as there was no deliberate starvation of the population or hunger in Gaza. Neither report made any determination regarding food security, noting only that claims of food insecurity had been made and that Israeli authorities had made a general statement denying such conditions.¹⁸⁰ The reports' evaluation of the naval blockade in detachment from the general closure, using the legal framework applicable to armed conflicts at sea, regrettably shifted the focus of analysis from a standard of "adequacy" to "minimum," and from "food insecurity" to "starvation." The reports thereby lowered the threshold for assessing the lawfulness of the closure and the blockade in a way that, to a large extent, replicated Israel's "humanitarian minimum" approach.

IV.

FOOD SECURITY, FOOD POWER, AND FOOD SOVEREIGNTY

A. Food Security and the Right to Food

In this section, we move to a deeper consideration of food security, the missing piece of the legal analysis and a part of a broader human rights framework applicable in this case. We will consider *food security* in conjunction with the *right to food*, taking the position that the protection of food security is an element of the right to food or a corollary thereto.¹⁸¹ Then, after revisiting

178. *Id.* ¶ 78.

179. Noura Eraka, *It's Not Wrong, It's Illegal: Situating the Gaza Blockade Between International Law and the UN Response*, 11 UCLA J. ISLAMIC & NEAR E. L. 37 (2012).

180. See TURKEL REPORT, *supra* note 106, ¶ 73; PALMER REPORT, *supra* note 104 ¶ 47.

181. The UN Special Rapporteur on the Right to Food noted that food security is the corollary of the right to food. Special Rapporteur on the Right to Food, *Submitted in Accordance with Commission on Human Rights Resolution 2000/10*, U.N. Doc. E/CN.4/2001/53 (Feb. 7, 2001), available at <http://www.righttofood.org/wp-content/uploads/2012/09/ECN.4200153.pdf> (by Jean Ziegler). For a discussion of the connection between the right to food and food security and the respective development of the concepts, see Wench Barth Eide, *From Food Security to the Right to Food*, in 1 FOOD AND HUMAN RIGHTS IN DEVELOPMENT 67 (Wench Barth Eide & Uwe Kracht eds., 2005). See also Isabella Rae, Julian Thomas & Margret Vidar, *The Right to Food as a Fundamental Human Right: FAO's Experience*, in FOOD INSECURITY, VULNERABILITY AND HUMAN RIGHTS

the relevant provisions of international humanitarian law (IHL), we will introduce the concepts of *food power* and *food sovereignty*, which, although in need of revision, can be complementary to the right to food and food security or even integrated into the scope of the right to food.

International law recognizes the right to food¹⁸² as part of the right to an adequate standard of living and the health and well-being to which all are entitled, as set forth in Article 25 of the Universal Declaration of Human Rights and in the International Covenant on Economic, Social, and Cultural Rights (ICESR). As explicitly stated in Article 11(1) of the ICESR,

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.¹⁸³

Moreover, Article 11(2) states,

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by

FAILURE 266 (Basudeb Guha-Khasnobis, Shabd S. Acharya & Benjamin Davis eds., 2007).

182. For a comprehensive discussion of the right to food, see Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131 (2006); Flavio Luiz Schieck Valente & Ana Maria Suarez Franco, *Human Rights and the Struggle Against Hunger: Laws, Institutions, and Instruments in the Fight to Realize the Right to Adequate Food*, 13 YALE HUM. RTS. & DEV. L.J. 435 (2010); GEORGE KENT, FREEDOM FROM WANT: THE HUMAN RIGHT TO ADEQUATE FOOD 45–59 (2005); Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. INT'L L. 691 (2006). On the development of the right to food, see Madeleine Fairbairn, *Framing Resistance: International Food Regimes and the Roots of Food Sovereignty*, in FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE AND COMMUNITY 19 (Hannah Wittman, Anette Aurelie Desmarais & Nettie Wiebe eds., 2010); Bart Wernaart, *The Plural Wells of the Right to Food*, in GOVERNING FOOD SECURITY: LAW, POLITICS AND THE RIGHT TO FOOD 43 (Otto Hospes & Irene Hadiprayitno eds., 2010) [hereinafter GOVERNING FOOD SECURITY]; Bernd van der Meulen, *The Freedom to Feed Oneself: Food in the Struggle for Paradigms in Human Rights Law*, in GOVERNING FOOD SECURITY, *supra*, at 81; Asbjorn Eide, *State Obligations for Human Rights: The Case of the Right to Food*, in GOVERNING FOOD SECURITY, *supra*, at 105; JEAN ZIGLER, CHRISTOPHE GOLAY, CHALIRE MAHON & SALLY-ANNE WAY, THE FIGHT FOR THE RIGHT TO FOOD: LESSONS LEARNED (2011); Wench Barth Eide & Uwe Kracht, *The Right to Adequate Food in Human Rights Instruments: Legal Norms and Interpretations*, in 1 FOOD AND HUMAN RIGHTS IN DEVELOPMENT, *supra* note 181, at 99. For a discussion on the right to food and ways of realizing it, see Susan Randolph & Shareen Hertel, *The Right to Food: A Global Perspective*, in THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 21 (Lanse Minkler ed., 2013). On recognition at the state level, see LIDIJA KNUTH & MARGRET VIDAR, FAO, CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD (2011), available at <http://www.fao.org/docrep/016/ap554e/ap554e.pdf>.

183. International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.¹⁸⁴

As stated in Article 11(1), the right to food recognized in international human rights law is not confined to freedom from hunger (Article 11(2)) and encompasses a broader entitlement to “adequate food.”¹⁸⁵ It is important to recall that crisis situations often attract more attention than do widespread and persistent vulnerabilities that effect food security.¹⁸⁶ Whereas extremely malnourished people “look the part,” Carolan points out, people whose diets are lacking in certain essential micronutrients do not. But the results of malnutrition—reduced well-being and a shortened life-span—are no less detrimental.¹⁸⁷ The words of the Director of UNRWA Gaza Operations are more telling:

Here you don’t see kids with blown up bellies. . . . [H]ere they are not starving. But if you do a little research on the medical side you will find that there is malnutrition and a very high prevalence of anemia which has to do with the diet. . . . [T]hose who are keeping a very good household economy are eating, perhaps, one meal a day. Many families are eating every two days. But nobody is starving. Everybody is hungry, nobody is starving.¹⁸⁸

From this perspective, we can see how, for a population “on the verge of humanitarian disaster,” as discussed in the previous Part, the part is not played because their harms are not visible, and the spectators, be they the courts of law or the courts of public opinion, are not as alert to the harm as they would be if those who suffered “looked” their part. Thus, the deliberation of whether or not “hunger” exists in Gaza that was conducted, for example, by the Turkel Commission missed the “hidden hunger.” Hidden hunger exists even when people are not starving and perhaps not even experiencing hunger, yet their diets are typified by micronutrient deficiencies.¹⁸⁹ Eyal Weizman writes,

[T]he tragedy of Gaza cannot be wholly evaluated from the number of recorded deaths from violent reasons or from causes related to hunger. Rather it needs to factor a slower, more cumulative process in which deaths that might have been averted were actively not prevented. . . . [A]nother, rather more subtle form of killing has become

184. *Id.* art. 11(2).

185. On the relationship between the two parts of Article 11 to the ICESCR and on the limits of the part dealing with the concept of freedom from hunger, see Fairbairn, *supra* note 182, at 20.

186. See BRYAN McDONALD, *FOOD SECURITY* 26 (2010).

187. CAROLAN, *supra* note 101.

188. EL-HADDAD & SCHMITT, *supra* note 1, at 26.

189. Patrick Webb & Andrew Thorne-Lyman, *Entitlement Failure from a Food Quality Perspective: The Life and Death Role of Vitamins and Minerals in Humanitarian Crises*, in *FOOD INSECURITY, VULNERABILITY AND HUMAN RIGHTS FAILURE*, *supra* note 181, at 243.

commonplace; one that is undertaken through degrading environmental conditions to affect the quality of water, hygiene, nutrition and healthcare.¹⁹⁰

It is important to note that it is commonly accepted in international law that human rights standards apply extraterritorially; that is to say, a State is bound by these standards not only within its own territory but also when it acts outside its boundaries.¹⁹¹ Accordingly, the right to food has been specifically interpreted to include State obligations towards third countries in respect to the right to adequate food, based on a concept of shared responsibility.¹⁹² While the notion of international cooperation appears in the ICESCR as a general duty,¹⁹³ the right to food is the only specific right to which a duty of “international co-operation” is attached.¹⁹⁴ However, the source of the international-law duties (under both international humanitarian law and human rights laws) borne by Israel towards the Gazan population is far more specific than the general duty of international cooperation owed to a third country; that is because Israel’s duties derive instead from Israel’s control of significant aspects of life in Gaza.¹⁹⁵ This is supported by the growing international jurisprudence on the human rights duties of States occupying territory beyond their borders or otherwise exercising extraterritorial control. Because the context of our discussion is an armed conflict and occupation, human rights norms co-apply alongside international humanitarian

190. WEIZMAN, *supra* note 44, at 86.

191. See Wenonah Hauter, *The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization Under the Doha Round Negotiation*, 40 VAND. J. TRANSNAT’L L. 1071, 1092–96 (2007) for the extraterritorial application of the right to food. See also Narula, *supra* note 182, at 727–37; MARCO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011); GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford et al. eds., 2012); Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) [hereinafter Maastricht Principles], available at [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23) (addressing the extraterritorial application of human rights and, specifically, social rights).

192. See Loreto Ferrer Moreu, *Food Aid: How It Should Be Done*, in ACCOUNTING FOR HUNGER: THE RIGHT TO FOOD IN THE ERA OF GLOBALIZATION 239, 241–42, 246–47 (Olivier de Schutter & Katilin Y. Cordes eds., 2011). Moreu discusses the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (2005) [hereinafter FAO Voluntary Guidelines], available at <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>, which include the duty to take positive action through international assistance to realize the right to food elsewhere. On these duties, see Hauter, *supra* note 191; Narula, *supra* note 181.

193. ICESCR, *supra* note 183, art. 2(1).

194. *Id.* art. 11.

195. See discussion in *supra* notes 151–159 and accompanying text; HCJ 9132/07 Al-Bassiouni v. Prime Minister (Jan. 30, 2008) (unpublished) (Isr.); Gross, *supra* note 158; Gisha, *Disengaged Occupiers*, *supra* note 9; Gisha, *Scale of Control*, *supra* note 9; Al-Skeini and Others v. United Kingdom, App. no. 55721/07, Eur. Ct. H. R. (2011).

law.¹⁹⁶ While the relationship between the sets of duties is a complex one, it is clear that obligations stemming from the right to food are applicable in this situation given the degree and duration of the control exercised by Israel over the Gaza population.

As previously explained,¹⁹⁷ Israel's ongoing control over many aspects of life in Gaza and its exercise of this power calls for the continued application of law of occupation, alongside the applicable human rights norms. In regard to the latter norms, questions certainly arise as to the scope of the duties borne by a belligerent or occupying power that derive from social and economic rights. This might include, for example, whether a belligerent or short-term occupier can be considered as lacking the practical (and hence legal) capacity to develop an extensive healthcare or welfare system in the external territory under its control.¹⁹⁸ But these issues are not relevant to the duties we discuss here in the context of international human rights law. While there can generally be differences between the duties a State bears domestically in relation to social and economic rights and those it bears extraterritorially (and the scope of the latter can vary with the circumstances), in the Gaza context, the duration and

196. This position has been taken by the International Court of Justice concerning armed conflict in general, *see, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8), and specifically concerning occupation, *see* *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 102–14 (July 9); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J., ¶ 178 (Dec. 19). The same position has been taken by the European Court of Human Rights in a few of its judgments, notably in *Al-Skeini and Others v. United Kingdom*, App. 35765/97 Eur. Ct. H.R., ¶¶ 90–91, 131–38 (July 7, 2011), and by the Israel Supreme Court in some of its cases, such as *HCI 769/02 Public Committee Against Torture in Israel v. Gov't of Israel*, ¶ 18 (December 14, 2006) (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm. A similar view was expressed by the UN Treaty Bodies, *see* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2004); Noam Lubell, *Human Rights in Military Occupations*, 94 IRRC 317 (2012); YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW* 399–547 (2009); Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1 (2007). The literature on this topic is extensive, and these are only a few examples.

197. See discussion in *supra* notes 151–159 and accompanying text.

198. See Lubell, *supra* note 196. Lubell points to how in the context of occupation, practical and legal impossibilities may play a part in an occupier's limited ability to implement human rights obligations in the same manner it does so domestically. He suggests that although the starting point is the presupposition of a need to meet the entire range of obligations, the contextual circumstances should be taken into account in determining which obligations apply in each individual case. Territorial control, including occupation, does trigger the applicability of the full range of human rights obligations the State must uphold. However, the substantive elements of the obligation and the assessment of whether a violation has occurred must be determined in light of the factual and legal contexts, including issues of logistical ability to act or restrictions on the occupying power in the occupation regime. *Id.* at 322.

extent of the control are such that Israel is, *at a minimum*, obligated to *respect* the right to adequate food; that is to say, it is duty-bound *not* to take any measures that infringe on this right. Thus, even if, in the context of a State's extraterritorial obligations questions arise as to its positive obligations to *fulfill* the right, there is no doubt that it bears obligations of the former type ("to respect" the right), the violation of which we are addressing in this Article. Still, we go further and suggest that the length and degree of Israel's control generates obligations of the latter kind ("to fulfill" the rights).¹⁹⁹

The formulation of the norms relating to the right to food in General Comment No. 12, issued by the UN Committee on Economic, Social and Cultural Rights (CESCR), as an interpretation of the right to adequate food under ICESCR Article 11,²⁰⁰ is instructive as to what duty this right gives rise to:

The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.²⁰¹

The accepted international law understanding of the right to food thus rejects the "minimum standard" approach manifested in the Israeli Red Lines Document and inherent to the Turkel Commission's position on the matter, namely that Israel has met its duty towards the population in Gaza if conditions of starvation have not arisen.

As a corollary to the concept of food security, the right to adequate food, in its core contents entails that food be available in quantities and quality sufficient to meet the dietary needs of individuals, free from adverse substances and acceptable within the given culture, and that the access to this food be sustainable in a way that does not interfere with the enjoyment of other human rights.²⁰² As elaborated by the CESCR, the notion of sustainability is intrinsically linked to the ideas of adequate food or food *security*, implying the

199. For a discussion of the typology of obligations, see *infra* notes 247–249 and accompanying text. See also the Maastricht Principles, *supra* note 191, which address the "obligation to avoid causing harm" (Principle 13), but also the obligation of occupying States or States that otherwise exercise effective control over territory outside their territories to respect, protect, and fulfill the economic, social, and cultural rights of persons within that territory (Principle 18).

200. U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (art. 11 of the Covenant), U.N. Doc. No. E/C.12/1999/5 (May 12, 1999) [hereinafter CESCR General Comment No. 12].

201. *Id.* ¶ 6.

202. *Id.* ¶ 8.

notion of long-term availability and accessibility of food, for both present and future generations.²⁰³

Food security is defined in the FAO's Rome Declaration on World Food Security (Rome Declaration), adopted at the 1996 World Food Summit²⁰⁴ as existing "when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preference for an active and healthy life."²⁰⁵ This definition was readopted at the 2009 World Food Summit with the addition of the four pillars of food security: availability, access, utilization, and stability.²⁰⁶ The inclusion of the nutritional aspect of a population's diet is therefore integral to the concept of food security.²⁰⁷ Moreover, food insecurity—the absence of food security²⁰⁸—can occur when a person has sufficient food to survive, but no more than that; it can occur when he is dependent upon donations for his food; and it can exist when he is denied the ability to choose food in accordance with his preferences, which is very much in line with the situation in Gaza.

Using food security as the framework frees us not only from the narrow discussion of whether hunger or starvation exists in Gaza, but also from a perspective that assesses the situation as a matter of the availability of food in Gaza. As we discussed in Part II, food insecurity in Gaza is the result of broader Israeli policy and the economic pressure generated through this policy rather than on specific restrictions on certain types of foods. This understanding of the story of Gaza corresponds with Sen's observation that food insecurity is fundamentally an issue of *buying power* and not a mere matter of production or

203. *Id.* ¶ 7.

204. Rome Declaration, *supra* note 4.

205. *Id.* On the history of the term and previous definitions, see FAO, *Food Security: Changing Policy Concepts of Food Security*, at 1 (Policy Brief, June 2006), available at ftp://ftp.fao.org/es/ESA/policybriefs/pb_02.pdf; Simon Maxwell, *Food Security: A Post-Modern Perspective*, 21 FOOD POL'Y 155 (1996); Edward Carr, *Postmodern Conceptualizations, Modernist Applications: Rethinking the Role of Society in Food Security*, 31 FOOD POL'Y 14 (2006); JOHAN POTTIER, *THE ANTHROPOLOGY OF FOOD: THE SOCIAL DYNAMICS OF FOOD SECURITY* 11–40 (1999). For comprehensive analysis and the history of the concept, see MCDONALD, *supra* note 186. For a critique of the directions the term took and suggestions to "reclaim" it, see CAROLAN, *supra* note 101. For discussion of other definitions of food security, drawing on the World Bank's definition, see Daniel Maxwell & Keith Wiebe, *Land Tenure and Food Security: A Review of Concepts, Evidence, and Methods* 7–8 (University of Wisconsin-Madison Land Tenure Center Research Paper No. 129, Jan. 1998).

206. This amended definition was reiterated in the FAO Voluntary Guidelines, *supra* note 192. Guideline 15 provides that food aid should be supplied with a clear exit strategy and the creation of dependency should be avoided.

207. Declaration of the World Summit on Food Security, World Summit on Food Security (Nov. 2009), available at <ftp://ftp.fao.org/docrep/fao/Meeting/018/k6050e.pdf>.

208. MCDONALD, *supra* note 186, at 3.

total supply of food; food-insecure people in a state of poverty cannot afford to purchase available food. Sen's observations were made in the context of starvation but are very relevant to food security as well.²⁰⁹ "Starvation," he noted, "is the characteristic of some people not *having* enough food to eat" rather than there not "*being*" enough food to eat; it is about people's relationship to food rather than about the food itself.²¹⁰ Thus, starvation is a function of entitlements, not of food availability per se.²¹¹ Food supply is only one factor among many in the realm of entitlements that govern whether a person has the ability to acquire enough food to avoid starvation: income and purchasing power are the most relevant factors in most cases. But as Sen pointed out, to begin and end the story as a tale of a shortage of income and purchasing power is to leave it half-told, for we must also consider how people came to lack the necessary income.²¹² The Israeli occupation and closure of Gaza clearly have played a central role in reducing people's income and, more generally, their entitlements, thereby affecting their food security no less—and likely more—than the actual availability of food. Famines, noted Sen (and, we contend, food insecurity as well) should be regarded as *economic* disasters and not just as *food* crises.²¹³ Sen's "entitlement approach," as he calls it, therefore serves as a better framework for analyzing food security than an approach that considers only food availability, which, he has observed, has led to disastrous policy failures.²¹⁴

Accordingly, as scholars have argued, to successfully combat hunger, there is a need to focus not only on improving supply but, first and foremost, identifying the obstacles faced by the victims of hunger, with hunger construed

209. On food insecurity stemming from unevenness in access to food because of poverty or other social and political barriers, such as war or ethnic conflict, rather than created by insufficient amounts of food in the global food system, see McDONALD, *supra* note 186, at 88. According to this approach, malnutrition generally results not from a lack of food in the community but from a skewed distribution of available food, resulting from the fact that some people are too poor or too powerless to make an adequate claim on the food that is available. KENT, *supra* note 182, at 21.

210. AMARTYA SEN, *POVERTY AND FAMINES; AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 4 (1981). Sen points to the way a person's ability to avoid starvation depends on both his ownership and the exchange entitlement mapping that he faces.

211. *Id.* at 7.

212. *Id.* at 155–56.

213. *Id.* at 162.

214. *Id.* For a discussion of Sen's position and of the work of scholars who support his approach, see David Castle, Keith Culver & William Hannah, *Scenarios for Food Security*, in *THE PHILOSOPHY OF FOOD* 250, 254–56 (David M. Kaplan ed., 2012). As the authors of *The Gaza Kitchen* cookbook point out, "[w]ell-intentioned activists' representations of Gaza as starving and tattered because goods do not enter are false. Which is not to say that a large part of Gaza is not tattered and suffering malnutrition, but this is a question of poverty and distribution." EL-HADDAD & SCHMITT, *supra* note 1, at 95.

as primarily a problem of a lack of access to productive sources or of insufficient safety nets.²¹⁵ The same analysis, we claim, should be applied to food insecurity. Gazan economist Omar Shaban has argued that it is not so much the absence of products that is the problem, but people's inability to buy them: "It doesn't matter how many varieties of sodas there are. What matters is people can't buy them."²¹⁶ More generally, as the Gaza case exemplifies, a proper understanding of food security must focus not on food per se but on economic, social, political, and other types of interwoven relations.²¹⁷ As in many contexts, the issue of food security in Gaza is often approached as a matter of supply. This is manifested in the Israeli assertion and calculations of a sufficient supply of goods in Gaza and symbolized by the aid flotilla's goal of bringing goods into Gaza. At the same time, however, it leaves largely untouched issues of demand, namely the need to improve income levels and employment opportunities.²¹⁸ Food security, Michael Carolan has expressed, is about more than just food; it is not something you can simply "have,"²¹⁹ but rather a process that makes people (and the planet) better off.²²⁰ In the Gaza case, this highlights the need to address people's ability to exercise demand rather than look solely to supply.

The food security perspective exposes another problematic aspect of the Israeli position: there is no "hunger" in Gaza, as expressed in the Red Lines Document and accepted by the Turkel Commission. Food security has been described as entailing the *adequacy* of the food supply, in terms of nutritional requirements, food safety and quality, and cultural acceptability, along with the *stability* of the food supply and access, in terms of environmental and social sustainability.²²¹ Adequacy, cultural acceptability (which relates to the notion of food preferences), and stability are of particular relevance to food security in Gaza. In the sense of adequacy of the food supply, Carolan opposes what he calls the "calorization" of food security, meaning its reduction to a mere matter of number of calories and the treatment of food purely in terms of quantity at the expense of culture, preferences, and local socio-ecological conditions, amongst other things.²²² Food security, Carolan claims, must be examined through what

215. See Olivier de Schutter & Katilin Y. Cordes, *Accounting for Hunger: An Introduction to the Issues*, in ACCOUNTING FOR HUNGER, *supra* note 192, at 1, 6–7.

216. EL-HADDAD & SCHMITT, *supra* note 1, at 95.

217. See POTTIER, *supra* note 205, at 27.

218. On the suggested solution to food security problems as tackling supply while neglecting demand, see CAROLAN, *supra* note 101, at 44.

219. *Id.* at 155.

220. *Id.* at 142.

221. Robert S. Lawrence, Iris Chan & Emily Goodman, *Poverty, Food Security, and the Right to Health*, 15 GEO. J. ON POVERTY L. & POL'Y 583 (2008). See also Eide, *supra* note 181.

222. CAROLAN, *supra* note 101, at 13.

he calls the “*through food*” lens, where human well-being is the end measured and not calories per capita.²²³ These aspects of food security are lost if we only count calories and assess whether hunger categorically exists or not.

Moreover, a diet sufficient in energy and protein does not mean that the consumption of vitamins and minerals in the recommended quantities is assured, so that some calorically sufficient diets may not meet minimum daily-nutrient requirements.²²⁴ As we detailed in Part II, Gazan households have been forced to dramatically cut their consumption of fruits, sweets, and meat products, and general consumption patterns have shifted towards cheaper food commodities and an overall reduction in quantities of food purchases. Webb and Thorne-Lyman observe how in states of crisis, food prices typically rise, and poor households not only allocate a relatively higher share of their total expenditures to food, but also shift their consumption to “less desired” staple foods. As a result, people eat less on micronutrient-rich “quality” foods and decrease their overall consumption of food.²²⁵ The transition from traditional grains to white flour in Gaza due to the dependence on humanitarian aid is illustrative of this process in the form of a localized “nutritional transition,” whereby the food insecurity that is created is manifested in cultural and nutritional changes. This supports Webb and Thorne-Lyman’s point about the intersection of entitlement theory and humanitarian operations in times of crisis,²²⁶ which suggests a need to consider that the story of food insecurity in Gaza is driven by both purchasing power and availability of the food.²²⁷

Food security in Gaza has also been impaired in terms of cultural adequacy of the food supply, due to the population’s dependency on aid organizations for food, which has led to dietary changes. As noted, since these organizations tend to distribute white flour rather than the traditional nutritive grains, the latter have almost completely disappeared from the Gazan diet.²²⁸ This has been a combined cultural and nutritional change, and only a food security analysis—as opposed to the humanitarian minimum standard model—captures this impact, as a food security analysis considers issues of food preferences and the cultural

223. *Id.* at 4. For a discussion of the situation in Gaza through the prism of food security and of different strategies used by Gaza residents, see RAMI ZURAYK, ANNE GOUGH, AHMAD SOURANI & MARIAM AL JAAJAA, *FOOD SECURITY CHALLENGES AND INNOVATIONS: THE CASE OF GAZA, FOOD INSECURITY IN PROTRACTED CRISES – HIGH-LEVEL EXPERT FORUM* (Sept. 13–14, 2012), available at http://www.fao.org/fileadmin/templates/cfs_high_level_forum/documents/FS_Challenges_Innovation_Gaza_Arab_Group.pdf; ZURAYK & GOUGH, *supra* note 82.

224. Webb & Thorne-Lyman, *supra* note 189, at 246.

225. *Id.* at 247.

226. *Id.*

227. *Id.* at 246.

228. EL-HADDAD & SCHMITT, *supra* note 1, at 56.

aspects of food.²²⁹ Moreover, this cultural and nutritional sense of food insecurity is missed also by an approach that limits its analysis to buying power alone and its effects on the availability of certain products.²³⁰

Since food security requires stability, the analysis also takes into account the conditions that guarantee the stability of the food supply and access. The issue of stability is also a point neglected under the humanitarian-minimum approach. George Kent has pointed to the need to distinguish between “status” and “security” in the context of food and nutrition: *security* means freedom from fear or harm and refers to anticipated conditions, whereas *status* refers to current conditions.²³¹ This distinction, Kent claims, is particularly useful for assessing different kinds of intervention strategies for addressing nutrition problems. Feeding programs, for example, could be effective in improving people’s current nutrition status but do nothing to improve their nutrition security, as the feeding programs respond to the symptoms rather than underlying sources of the problem. By sustaining the problems rather than resolving them, these programs may therefore actually undermine nutrition security if people become dependent on them. Accordingly, improving nutrition security requires a change in institutional arrangements of long-term effect.²³²

This distinction provides insight into the role of humanitarian aid in Gaza. The humanitarian intervention unquestionably keeps Gaza from crossing over the “verge of disaster” in the form of starvation, which would warrant

229. See *supra* note 38 and accompanying text.

230. It is not only the availability of food itself that affects what is on the table. Electricity cuts make refrigeration in Gaza unreliable, leading to the proliferation of outdated preservation techniques, and the lack of gas for cooking stoves has led to the revived use of clay ovens. Laila El-Haddad & Maggie Schmitt describe these processes as creating “forced self-reliance.” EL-HADDAD & SCHMITT, *supra* note 1, at 24. On the cooking gas shortage, see *Israeli Imposed Restrictions Punish the People of Gaza*, PNN (June 27, 2013), <http://newsoftheworldnews.wordpress.com/2013/06/27/israeli-imposed-restrictions-punish-the-people-of-gaza/>.

231. Kent thus prefers the term “food *inadequacy*” over the term “food *insecurity*” to describe the conditions of inadequate food supplies when assessing current conditions at a given point in time, rather than conditions anticipated. KENT, *supra* note 182, at 21–23. He also points to food status as being only one factor, albeit a major one, for determining nutrition status. Kent suggests addressing “nutrition security,” which has been defined as “the appropriate quantity and combinations of inputs such as food, nutrition and health services, and caretaker’s time needed to ensure an active and healthy life at all times for all people,” with food security a necessary but not sufficient condition for achieving nutrition security. See also Lawrence Haddad, Eileen Kennedy & Joan Sullivan, *Choice of Indicators for Food Security and Nutrition Monitoring*, 19 FOOD POL’Y 329, 329–30 (1994). For a discussion of the significance of nutrition security, see KENT, *supra* note 182, at 21–22. For a comprehensive discussion of food security and nutrition security and human rights, see Arne Oshaug, Wenche Barth Eide & Asbjorn Eide, *Human Rights: A Normative Basis of Food and Nutrition-Relevant Policies*, 19 FOOD POL’Y 491 (1994).

232. KENT, *supra* note 182, at 21–23.

international attention and action. The intervention thus addresses food and nutrition *status* but not food and nutrition *security*. The dependency on aid, as well as the arbitrary nature of Israeli policy on what foodstuffs can enter Gaza²³³ and the very fact of Israel's sustained power to make these decisions, all attest to the *lack* of food and nutrition *security* (food insecurity) even for those individuals whose food and nutrition *status* at a given point in time may seem adequate. Since a comprehensive discussion of the topic of the humanitarian aid to Gaza is beyond the scope of this paper, we will simply highlight one point, which was well articulated in the Rome Declaration: food aid cannot serve as a substitute for long-term strategies for achieving food security and must be directed at rehabilitation, development, and cultivating the capacities to satisfy future needs.²³⁴ As stated in the FAO's 2005 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, food aid should be provided with a clear exit strategy and avoid the creation of dependency.²³⁵ Unfortunately Gaza seems to be a case in which the aid has taken the form of relief and been eschewed as a means of addressing the root causes of the food insecurity and advancing sustainable development.²³⁶ As Adi Ophir notes, organizations providing aid in this context have positioned themselves as a buffer between Israel's policies and the onslaught of "catastrophe,"²³⁷ whereby the aid serves as a mechanism that sustains, rather than transforms, the situation.²³⁸

B. The Duty to Ensure Adequate Food in International Humanitarian Law

We have seen, thus far, the preference for using food security and the right to food as a legal framework as opposed to the deficient measures that check only for the existence of hunger, consider supply rather than demand, and count

233. For the non-transparency of the regime governing the movement of people and goods into and out of Gaza, see Bashi, *supra* note 8, at 267–68.

234. Rome Declaration, *supra* note 4. For a discussion of this element, see Moreu, *supra* note 192, at 245. For a discussion of the limit of food rations given as aid in the Gaza context, see EL-HADDAD & SCHMITT, *supra* note 1, at 34.

235. FAO Voluntary Guidelines, *supra* note 192. For a discussion of this element, see Moreu, *supra* note 192, at 246–47.

236. For a discussion of this use of food aid, see Moreu, *supra* note 192, at 249–50.

237. Ophir, *The Politics of Catastrophization*, *supra* note 14, at 81. See also Ariella Azoulay, *Hunger in Palestine: The Event That Never Was*, in TERRITORIES: ISLANDS, CAMPS AND OTHER STATES OF UTOPIA (Anselm Franke & Eyal Weizman eds., 2003); THE FOOD CHAIN (Amit Goren Productions 2004) (Azoulay's film), available at <http://www.youtube.com/watch?v=iGpfq6COz38> and <http://www.youtube.com/watch?v=u7FEG8pJRU>.

238. For a discussion of the need for humanitarian intervention that not only saves lives but also enhances the efficacy of individuals' demands for access to nutrition and not just food, see Webb & Thorne-Lyman, *supra* note 189, at 259–60.

calories. The current approach may attend to status but it neglects the “security” in food security, which is undermined when food supply is contingent on aid. A focus on international human rights law, we maintain, should complement the international humanitarian law perspective, including, as discussed above, the norms of the law of occupation. Of particular relevance in this respect is Article 55 of the Fourth Geneva Convention, which provides: “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”²³⁹

Thus, similar to Article 12 of the ICESCR, Article 55—which applies to conditions of occupation—uses the standard of “adequacy” rather than a humanitarian-minimum standard. This is supplemented by Article 59 of the Convention (mentioned in Part III), which provides that if all or part of the population of an occupied territory is “inadequately supplied,” the occupying power is obligated to agree to relief schemes on behalf of that population and facilitate them with all means at its disposal.²⁴⁰ Therefore, under international humanitarian law, an occupier has a duty to guarantee the food supply of the occupied civilian population.²⁴¹ In addition to understanding food security as a corollary to human rights, we argue that a correlative duty to ensure “adequate food” exists within international humanitarian law in the context of occupation. Since, as we discussed above, we regard the law of occupation to be applicable

239. Fourth Geneva Convention, *supra* note 163, art. 55.

240. See *id.* art. 59, para. 1. For a discussion of the relevant IHL provisions, see Jelena Pejic, *The Right to Food in Situations of Armed Conflict: The Legal Framework*, 83 IRRC 1097, 1104–05 (2001). Another IHL provision relevant to food is Article 23 of the Fourth Geneva Convention, *supra* note 163, which concerns the duty of States to allow for the free passage and consignment of essential foodstuffs, clothing, and tonics intended for children under age fifteen, expectant mothers, and maternity cases. See Pejic, *supra*, at 1102–03. This narrow provision is not specific to situations of occupation where the broader provisions of Articles 55 and 59 would apply. Other provisions relevant to relief action to meet a population’s basic needs in occupied territories are Articles 68–71 of the Additional Protocol to the Geneva Conventions from June 8, 1977, *supra* note 122, to which Israel is not a party. See Pejic, *supra* note 240, at 1103–04. There are parallel provisions in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 18, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], which is applicable in non-international armed conflicts and to which Israel is also not a party. For an overview of the provisions relating to the right to food in international humanitarian law and international human rights law, see KENT, *supra* note 182. For detailed discussion of the humanitarian law provisions, see Pejic, *supra* note 240; see also Narula, *supra* note 182, at 782–84.

241. The international humanitarian laws duties, which include the occupier’s duty to guarantee the food supplies of the occupied civilian population, were moreover reiterated in the FAO Voluntary Guidelines, *supra* note 192, at 184 (Guidelines 16.2 and 16.3).

to Gaza, this provision complements the relevant norms of international human rights law.

Finally, some claim that international humanitarian law is more robust than human rights law with regard to the right to food, most notably in its specific and detailed rules governing the parties to armed conflict, which are subject to immediate implementation (unlike the “progressive realization” framework under the ICESCR) and cannot be derogated from.²⁴² Yet although the IHL provisions set forth concrete duties, in certain respects, as we detailed above, the human-rights and food-security framework might be broader. This is particularly so in the context of the relevant IHL clauses that deal with the prohibition on using starvation of individuals as a means of warfare.²⁴³ Even if, as Pejic notes,²⁴⁴ these provisions apply not only to starvation leading to death but also to any situation of hunger created by the deprivation of food sources or supply, they may still shift the discussion to a more minimal framework than that of human rights and food security.²⁴⁵ Indeed, it is only in the context of occupation, applicable in the Gaza context, that the standard is one of adequacy, as in human rights law.

C. Food Power

Another concept we propose introducing into the discussion is *food power*, namely, an examination of how Israeli policy, in terms of its impact on food security in the Gaza Strip, is a troubling exercise of food power. This term has traditionally been used to describe situations in which one State seeks a coercive advantage over a target country by manipulating the volume and timing of its own food exports, for example by placing a selective embargo on food exports, with the aim of punishing the target country or forcing it to change its policy.²⁴⁶ We contend that food power is also applicable to the context of the Israeli closure on Gaza. Israel’s restrictions on food imports into Gaza (not only from Israel) as part of its general closure policy, were intended, according to Israel, as

242. See Pejic, *supra* note 240, at 1097–98.

243. Additional Protocol I, *supra* note 122, art. 54(1); Additional Protocol II, *supra* note 240, art. 14 (discussed by Pejic, *supra* note 240, at 1099).

244. Pejic, *supra* note 240, at 1099.

245. For the argument that the application of human rights law in situations of occupation alongside international humanitarian law indicates that an occupier’s obligations vis-à-vis the right to food are not limited to the minimum set by IHL and must be considered from the perspective of the complementary contribution of human rights law, see Sylvian Vite, *The Interrelation of the Law of Occupation and Economic Social and Cultural Rights: The Examples of Food, Health and Property*, 90 IRRC 629, 642 (2008). On the relationship between human rights and IHL and a discussion of how human rights can in fact at times undermine IHL protections, see Gross, *supra* note 196.

246. ROBERT PAARLBERG, *FOOD POLITICS: WHAT EVERYONE NEEDS TO KNOW* 77–80 (2010).

a means of punishing the population and coercing the Hamas regime into ceasing rocket fire into Israel and releasing the captured Israeli soldier Gilad Shalit.

This type of exercise of food power is in fact prohibited under international law as a violation of the right to adequate food, as interpreted by the CESCR in Article 11 of General Comment No. 12:

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfill*. . . . The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfill* (*facilitate*) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfill* (*provide*) that right directly.²⁴⁷

The obligation to respect existing access to adequate food is especially prominent in the provision in Paragraph 37 of the Comment, obligating “States parties” to “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.”²⁴⁸ This mandate is further reinforced in the provision prescribing that “States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”²⁴⁹

While currently prohibited by human rights norms, food power is regarded by many as outdated and unsuccessful. Robert Paarlberg argues that governments seldom manipulate food exports in pursuit of a coercive advantage. This is because markets for food tend to offer little coercive leverage for exporters, since food is a renewable resource that most countries can and do produce for themselves or can begin to produce.²⁵⁰ In her own discussion of food power, Margaret Doxey similarly argued that agricultural products do not meet the necessary conditions for effective embargoes, as the variety in existing staples means that any one can be substituted for another, and most countries have some food growing capacity.²⁵¹ However, unlike in the typical case of the

247. CESCR General Comment No. 12, *supra* note 200, ¶ 15.

248. *Id.* ¶ 37. Additionally, the General Comments provides, “State should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.” *Id.* ¶ 36.

249. *Id.* ¶ 36.

250. PAARLBERG, *supra* note 246, at 80.

251. Margaret Doxey, *Oil and Food as International Sanctions*, 36 INT’L J. 311, 326 (1981).

exercise of food power by an exporting country, where it withholds the export of a certain type of foodstuff (e.g., the partial embargo the U.S. placed on grain exports to the Soviet Union following the invasion of Afghanistan),²⁵² in the case of Israel and Gaza, the coercive power is far stronger due to Israel's control of the passage of most goods into and out of Gaza, and Gaza's limited capacity for producing all of its required food. The extent of this coercion was illustrated by Israeli Army officials, who decided in weekly meetings whether certain foodstuffs, such as bananas or apples, are essential and should be allowed into Gaza, and others, such as apricots or grapes, should not.²⁵³ The Gaza context thus brings to light the limits of the current discourse on food power and the need to develop an understanding of the term that incorporates such situations into the analysis.

Peter Wallenstein has addressed food power and food as an economic commodity that is used as a weapon. According to Wallenstein, since economic commodities are essential to maintaining life and giving it material form, they can be disastrous to human life if "effectively used" as military weapons; such a use of food is particularly potent in this respect. Economic commodities can also be exploited to effectively achieve other goals of weapons, such as punishing enemies and rewarding friends. "The siege of a city is far less dramatic," posits Wallenstein, "than an attack on it," since economic means in fact may have more long-term and indirect effects.²⁵⁴ Food is not merely an economic commodity, not only because of its essentiality to life, but also because of its significance to human existence: our cultural experiences, our family and communal lives, our pleasures, and our bodies. In line with Wallenstein's theory, we contend that the notion of food power should be redefined. From its traditional limited understanding as "the manipulation of international food

However, Doxey notes that food can be used as a "weapon" also through an embargo on the purchase of exports of primary produce from targets of pressure with the objective of reducing foreign-exchange earnings and producing economic hardship. Food or food products are not selected as objects of embargo based on their intrinsic nature; instead, they are selected due to their importance in the foreign trade of the target. *Id.* at 328. While Israel did not block the export of food in general, or specific foodstuffs from Gaza, it was, as we discuss in the text, the general blockade and economic hardship that it created that impacted food security more than the exclusion of any particular supply-side item.

252. See PAARLBERG, *supra* note 246, at 78–79.

253. Feldman, *supra* note 95, at 133.

254. Peter Wallenstein, *Scarce Goods as Political Weapons: The Case of Food*, 13 J. PEACE RES. 277 (1976). Wallenstein points to four factors that set the structural conditions for applying economic commodities as a means of influence: scarcity, supply concentration, demand dispersion, and action independence. While he articulates and analyzes these factors from the perspective of export restrictions rather than food power used in other contexts such as warfare, they can be applied, *mutatis mutandis*, to situations such as Gaza. On the use of food power as a weapon, see Robert Paarlberg, *Food as an Instrument of Foreign Policy*, 34 FOOD POL'Y & FARM PROGRAMS 25 (1982).

transfers in the effective pursuit of discrete diplomatic goals,”²⁵⁵ it should be expanded to also encompass the manipulation of food transfers as a means of warfare, punishment, and humiliation of civilian populations.

Echoing our approach, the Rome Declaration on World Food Security unequivocally states that “[f]ood should not be used as an instrument for political and economic pressure” and reaffirms “the necessity of refraining from unilateral measures not in accordance with the international law and the Charter of the United Nations and that endanger food security.”²⁵⁶ In Gaza, Israel’s restrictions on the movement of food into the Strip, which were also part of the broader violation of Gazans’ food security, violated food power principles. In fact, the analysis of Israel’s exercise of its food power over Gaza reveals a transformation (rather than cessation) of Israeli control post-disengagement: its food power enabled Israel to make arbitrary determinations about the foodstuffs entering and exiting Gaza and to control the lives and bodies of its residents.²⁵⁷ Thus, the food power analysis points to new forms of post-disengagement control exercised by Israel in Gaza, which are aimed at releasing Israel from its duty to ensure food security there and reducing its obligations to the bare minimum, as asserted by the Israeli government and affirmed by the Turkel Commission and Israel Supreme Court.²⁵⁸ But whether taken from a Foucauldian perspective of the exercise of “bio-power”²⁵⁹ over the population or, following Agamben, as part of the abandonment of the Palestinian population to “bare life,”²⁶⁰ this exercise of food power must be rejected as illegitimate under international law.

255. Robert Paarlberg, *The Failure of Food Power*, 6 POL’Y STUD. J. 537 (1978).

256. Rome Declaration, *supra* note 4. Philip Alston also discussed the use of food sanctions as something frowned upon. He noted that to the duty to cooperate as well as specific provisions in Article 11 of the ICESR support the view that there is a general duty not to use food as an international sanction. Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 9, 45–46 (Philip Alston & Katarina Tomasevski eds., 1984). Alston’s observations preceded the existing, more specific prohibitions on such measures in the General Comment and the FAO documents cited above in this section.

257. For a discussion of the ways in which control over the external borders affords Israel control over the lives of those living inside Gaza, see Bashir, *supra* note 8.

258. In the context of fuel, see HCJ 9132/07 Al-Bassiouni v. Prime Minister (Jan. 30, 2008) (unpublished) (Isr.).

259. MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 135–45 (1990). For an examination from a perspective of the exercise of “bio-power” over the population, see Feldman, *supra* note 95.

260. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1998).

D. Food Sovereignty

The third and final framework we incorporate into the discussion is food sovereignty, which collides with the exercise of food power by others. Indeed, Israel's food policies prevented the residents of Gaza from enjoying their right to food sovereignty.

The notion of food sovereignty emerged in the framework of globalization, when the La Via Campesina alliance proposed it as a policy paradigm that takes as its point of departure the concept of the right to food, but goes one step further by claiming a corollary right to land and a right to produce for rural peoples. The term entered the discourse by way of the 1996 Via Campesina Declaration on Food Sovereignty, which stated that the right to food can only be realized in a system where food sovereignty is guaranteed. It defined food sovereignty as “the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity,” including the right to “produce our own food in our own territory,” and, moreover, declared food sovereignty to be “a precondition to food security.”²⁶¹

261. THE RIGHT TO PRODUCE AND ACCESS TO LAND, VIA CAMPESINA DECLARATION ON FOOD SOVEREIGNTY (Rome, Nov. 11–17, 1996), available at <http://www.connexions.org/CxLibrary/CX8459.htm>. The United Nations Special Rapporteur on the Right to Food noted the development of the strategy of food sovereignty as “an alternative vision that puts food security first.” Special Rapporteur on the Right to Food, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/5 ¶¶ 71–75 (Jan. 10, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/98/PDF/G0810098.pdf?OpenElement> (by Jean Ziegler); Special Rapporteur on the Right to Food, *Report Submitted in Accordance with Commission on Human Rights Resolution 2003/25*, U.N. Doc. E/CN.4/2004/10 ¶¶ 24–34 (Feb. 9, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/107/77/PDF/G0410777.pdf?OpenElement> (by Jean Ziegler). For a discussion of food sovereignty as a condition for the full realization of the right to food by the Special Rapporteur, see Special Rapporteur on the Right to Food, *Final Report: The Transformative Potential of the Right to Food*, U.N. Doc. A/HRC/25/57 (Jan. 24, 2014), available at http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf (by Olivier de Schutter). For a further discussion of food sovereignty, see Grain, *Food Sovereignty: Turning the Global Food System Upside Down*, SEEDING (Apr. 29, 2005), <http://www.grain.org/article/entries/491-food-sovereignty-turning-the-global-food-system-upside-down>. On the idea of food sovereignty and its development, see WAYNE ROBERTS, *THE NONSENSE GUIDE TO WORLD FOOD* 52–58 (2008). For a discussion of the relationship between the right to food, food security, and food sovereignty, see Maggie Ellinger-Locke, *Food Sovereignty Is a Gendered Issue*, 18 BUFF. ENV'T'L L.J. 157, 175–84 (2011). Ellinger-Locke cites Raj Patel, who argues that food sovereignty adds the dimension of control and power lacking in the idea of food security. DIG IN! RAJ PATEL ON FOOD SOVEREIGNTY AND WOMEN RIGHTS, available at http://www.youtube.com/watch?v=cI_F9n_c4yY. On the connection between all three, see James Thuo Gathii, *Food Sovereignty for Poor Countries in the Global Trading System*, 57 LOY. L. REV. 509, 529–36 (2011). See also Hauter, *supra* note 191; Fairbairn, *supra* note 182, at 15–32; Raj Patel, *What Does Food Sovereignty Look Like?*, in *FOOD SOVEREIGNTY: RECONNECTING FOOD*, *supra* note 182, at 19–21, 186–96; WILLIAM SCHANBACHER, *THE POLITICS OF FOOD: THE GLOBAL CONFLICT BETWEEN FOOD SECURITY AND FOOD SOVEREIGNTY* (2010). While Schanbacher views food

A few countries actually recognize a right to food sovereignty at the constitutional level.²⁶²

The notion of food sovereignty has been described as both a reaction to and the intellectual offspring of earlier concepts of the right to food and food security.²⁶³ Madeleine Fairbairn has noted that the idea emerged out of a grassroots movement that rejected the way the concept of “food security” was being framed by the global political elite within the neoliberal paradigm and not as a challenge to it.²⁶⁴ We suggest, however, that the concept of food sovereignty is useful only if we see it as complementing, rather than contradicting, food security and with the potential to constitute, in a revised form, an additional layer of analysis necessary for achieving food security.

While there have been amended and expanded definitions of the notion of food sovereignty,²⁶⁵ it is important to note, for our purposes, that the central claim has been that feeding a nation’s people is a matter of sovereignty: it is about the right of nations and peoples to control their own food systems, including their own markets, production modes, food cultures, and food

security and food sovereignty as a state of antagonism in how they conceive hunger and malnutrition, *id.* at ix, as we discussed previously, we consider the two frameworks to be potentially complementary rather than in conflict. For a genealogy of the term tracing its origins to the 1980s, see Marc Edelman, *Food Sovereignty: Forgotten Genealogies and Future Regulatory Challenges* (Conference Paper No. 72, Yale University Food Sovereignty: A Critical Dialogue, Sept. 14–15, 2013). See also Philip McMichael, *Historicizing Food Sovereignty* (Conference Paper No. 13, Yale University Food Sovereignty: A Critical Dialogue, Sept. 14–15, 2013).

262. See Priscilla Claeys, *From Food Sovereignty to Peasants’ Rights: An Overview of Via Campesina’s Struggle for New Human Rights*, in LA VIA CAMPESINA’S OPEN BOOK: CELEBRATING 20 YEARS OF STRUGGLE AND HOPE 4 (May 15, 2013), available at <http://viacampesina.org/en/index.php/publications-mainmenu-30/1409-la-via-campesina-s-open-book-celebrating-20-years-of-struggle-and-hope>.

263. Fairbairn, *supra* note 182, at 15.

264. *Id.* at 26–31.

265. See MICHAEL WINDFUHR & JENNIE JONSEN, FOOD SOVEREIGNTY: TOWARDS DEMOCRACY IN LOCALIZED FOOD SYSTEMS 11–17 (2005), available at http://www.ukabc.org/foodsovereignty_itdg_fian_print.pdf; Raj Patel, *What Does Food Sovereignty Look Like*, 36 J. PEASANT STUD. 663 (2009). Patel notes that the term is so over-defined that it is hard to know what it means. The Declaration of Nyéléni defined “food sovereignty” as “the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.” Declaration of Nyéléni, adopted by the Forum for Food Sovereignty in Sélingué, Mali, Feb. 27, 2007 [hereinafter Declaration of Nyéléni], available at <http://www.nyeleni.org/spip.php?article290>. For our purposes, this definition may be too narrow as it does not put strong enough emphasis on the freedom from the use of food as a weapon and food power but, at the same, also too broad in stressing ecologically sound and sustainable methods, which, as important as they are, may not be of primary concern in situations such as in Gaza, where the essential condition for food sovereignty is the more basic need to allow the Palestinian population to take control of its food system. However, as discussed in the text, the Declaration did mention a need to fight against occupations and economic blockades—a very relevant notion in the Gaza context.

environments.²⁶⁶ Throughout this Article, we have shown that this right was denied to the residents of Gaza by Israel's restrictions on the import of foodstuffs and access to land for agriculture and water for fishing. This was compounded by other processes, as elaborated in Part II, that diminished Gazans' self-sufficiency and intensified their dependence on imported, primarily Israeli, products.

The idea of food sovereignty was developed based on the notion that if "the next meal" of a country's population depends on the global economy or the goodwill of a superpower not to use food as a weapon or is subject to the unpredictability of, say, shipping, then that country is not secure in the sense of national security or food security. Accordingly, it has been asserted that food sovereignty extends beyond the idea of food security, which does not address where food comes from or how it should be produced.²⁶⁷ While the concept of food sovereignty was developed around the idea that people, rather than corporate monopolies, must make the decisions regarding their food,²⁶⁸ our study of conditions in the Gaza Strip highlights the gap in the current food sovereignty discourse. There is a need to expand this notion to incorporate the understanding that people must have sovereignty over their food decisions, without being subject to the goodwill of any controlling power, not just a super power, that can exercise food power and use food as a weapon. Thus, the Gaza case exposes that the food sovereignty discourse is flawed in its emphasis on the ability to produce food and the premise that this ability is sufficient for attaining food security.²⁶⁹ The story of the Gaza closure illustrates more broadly the risks created when an external power, rather than the relevant population, has control over food. It therefore demonstrates a need to protect food sovereignty, and consider it as encompassing Palestinians' right to control their food without being dependent on charity in the form of humanitarian aid. As the discussion shows, achieving this control cannot be limited to ensuring the ability to grow one's own food.

266. Hannah Wittman, Anette Aurelie Desmarais & Nettie Wiebe, *The Origins and Potential of Food Sovereignty*, in *FOOD SOVEREIGNTY: RECONNECTING FOOD* *supra* note 182, at 1.

267. FRED MAGDOFF & BRIAN TOKAR, *AGRICULTURE AND FOOD IN CRISIS: CONFLICT, RESISTANCE, AND RENEWAL* 191–92 (2010).

268. *Id.* at 212.

269. Kevin Danaher noted in another context that the idea of "food as a human right" does not primarily entail a right to charity hand-outs of food, but rather, implies the right to food-producing resources. Danaher, who addressed food power and whose work predated the food sovereignty movement, was concerned that most of the food-producing resources in the world are controlled by market forces, bought and sold as commodities. He therefore asserted a need to partially de-commodify food-producing resources, by shifting land, credit, and agricultural inputs away from market control, to be governed by guidelines that allow people willing and able to farm to do so. Kevin Danaher, *U.S. Food Power in the 1990s*, 30 *RACE & CLASS* 31, 44 (1989).

It has been argued that food security does not seek to identify where food comes from or the conditions under which it is produced and distributed. The argument is that food security targets are often met with food sources produced in environmentally destructive and exploitative conditions and supported by subsidies and policies that destroy local food producers and benefit agribusiness corporations. Food sovereignty, in contrast, stresses ecologically appropriate production, distribution, and consumption, socio-economic justice, and local food systems in the effort to combat hunger and poverty and guarantee sustainable food security for all. Furthermore, food sovereignty, the argument goes, advocates trade and investment that serve society's collective aspirations. It promotes community control of productive resources, agrarian reform and tenure security for small-scale producers, agro-ecology, biodiversity, local knowledge, the rights of peasants, women, indigenous peoples, and workers, social protection, and climate justice.²⁷⁰ Yet while these are all worthy causes in themselves, our study of Gaza reveals how focusing on issues like local food systems, community control, and agro-ecology may not suffice to ensure the "security" in food security. Rather, the concern with the conditions in which food is produced, as important as it is, must complement, and not supersede, attention to the *availability* of adequate food and *access* to food as a matter of security.

The landmark 2007 Nyeleni Declaration on food sovereignty explicitly noted that the struggle for food sovereignty should include a struggle against, inter alia, occupations and economic blockades,²⁷¹ which is certainly relevant to the context of Gaza. Our study, however, illustrates that a population's right to produce its own food in its own territory, on which the food sovereignty movement places much weight, might not necessarily be the only mode of exercising food sovereignty: in cases like Gaza, it could be more crucial to stress the right to exercise sovereignty regarding the importing of food alongside the growing of food.²⁷² In Gaza, there are restrictions on both the ability to grow

270. *Editorial: Food Sovereignty Now!*, NYELENI NEWSL., Mar. 2013, available at http://www.nyeleni.org/DOWNLOADS/newsletters/Nyeleni_Newsletter_Num_13_EN.pdf.

271. Declaration of Nyéléni, *supra* note 265. A statement by one of the delegations to the conference complements parts of our argument:

Food sovereignty is more than a right; in order to be able to apply policies that allow autonomy in food production it is necessary to have political conditions that exercise autonomy in all the territorial spaces: countries, regions, cities and rural communities. Food sovereignty is only possible if it takes place at the same time as political sovereignty of people.

Nyéléni 2007: Forum for Food Sovereignty 16, available at <http://www.foei.org/en/resources/publications/food-sovereignty/2000-2007/nyeleni-forum-for-food-sovereignty/view>.

272. For a critique of food sovereignty as being unable to address the food needs of nonfarmers because it discards important elements of political economy, see Henry Bernstein, *Food Sovereignty via the "Peasant Way": A Skeptical View* (Conference Paper No. 1, Yale University Food

food and the ability to import food. Both are elements of Israel's denial of sovereignty—food and otherwise—to the people of Gaza in its post-disengagement occupation.

It is in this sense that we propose putting the “sovereignty” back into food sovereignty.²⁷³ As we have explained, the ability to grow one's own food may not be sufficient to guarantee food security, especially, but not solely, when food power of the sort discussed here is exercised. Thus, to the extent that food sovereignty is a “much deeper concept than food security because it proposes not just guaranteed access to food, but democratic control over the food system”²⁷⁴ and relates to self-determination that includes the nutritional dimension,²⁷⁵ it exposes how Israel's exercise of food power prevents the residents of Gaza from enjoying sovereignty. Israel's obstruction of food sovereignty in Gaza undermines its claim that it has relinquished control over Gaza and its residents and no longer bears the obligations of an occupying power. From Israel's point of view, it no longer occupies Gaza, yet Gaza is still not permitted to exercise food sovereignty or any other form of sovereignty, by itself or as part of Palestine as a whole. Thus, the creation of food insecurity and withholding of food sovereignty is yet another layer of Israel's ongoing control of Gaza even after disengagement. Clearly, then, in stark contrast to the Turkel Commission's depiction of the Israeli closure of Gaza as within the framework of armed conflict between Israel and Hamas, this has actually been a persistent and consistent policy that began with the Occupation in 1967 and continues to this day.

Sovereignty: A Critical Dialogue, Sept. 14–15, 2013). Similarly, in our context, it seems that much of the food sovereignty discourse neglects the national politics that our case study brings to the forefront.

273. Edelman notes that the question of who is the sovereign in food sovereignty is of crucial importance but, like the meaning of “sovereignty” in our context, unclear. Edelman, *supra* note 261. For our purposes, we consider the sovereignty of Gazans as a collective to be denied in this regard.

274. MAGDOFF & TOKAR, *supra* note 267, at 212. For a comprehensive discussion of the ideas of “food security” and “food sovereignty” as well as of “food enterprise” and “food justice” and how they relate to each other, see Eric Holt-Gimenez & Annie Shattuck, *Food Crises, Food Regimes and Food Movements: Rumbblings of Reform or Tides of Transformation*, 38 J. PEASANT STUD. 109, 115–31 (2011); Eric Holt-Gimenez, *Food Security, Food Justice or Food Sovereignty?* FOOD FIRST BACKGROUNDER, Winter 2010, available at http://dev.international.uiowa.edu/files/international.uiowa.edu/files/file_uploads/FoodMovementsWinter2010bckgrndr.pdf. For a discussion of the relationship of “food sovereignty” to the ideas of the “right to food” and “food security,” see WINDFUHR & JONSEN, *supra* note 265, at 19–24. See also Annie Shattuck & Eric Holt-Gimenez, *Moving from Food Crisis to Food Sovereignty*, 13 YALE HUM. RTS. & DEV. L.J. 421 (2010); Hans Morten Haugen, *Food Sovereignty—An Appropriate Approach to Ensure the Right to Food?*, 78 NORDIC J. INT'L L. 263 (2009); Jacqueline Mowbray, *The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the problem of World Hunger*, 20 LEIDEN J. INT'L L. 545 (2007).

275. See Peter Halewood, *Trade Liberalization and Obstacles to Food Security: Toward a Sustainable Food Sovereignty*, 43 U. MIAMI INTER-AM. L. REV. 115, 115–16, 134–36 (2011).

CONCLUSION

We have shown that assessing the Gaza closure in terms of the right to food and food security frees us from the “hunger” analysis engaged in by the Turkel Commission, from the minimal “Red Lines” approach, and from the limited proportionality-centered humanitarian analysis. We began by critiquing the Commission’s findings on its own terms and then demonstrated how the legal frameworks it omitted from its analysis could expose a need to hold Israel accountable for its infringement of Gaza’s food security, exercise of food power, and denial of food sovereignty. More broadly, we explained the new forms of post-disengagement control that Israel exercises in Gaza and showed how this transformation was aimed at releasing Israel from any responsibility to ensure food security in Gaza and reducing its obligations to the bare humanitarian minimum. We showed that creating food insecurity was an element of Israel’s ongoing control of the Gaza Strip and its residents even after its disengagement from the territory, and that this mode of control cannot be regarded as legitimate under international law.

Israel’s direct exercise of food power, it was explained, is only one element, amongst others, of power and control that impact food security and the economy in Gaza. The Israeli regulation of the entry of food into the Gaza Strip constitutes an exercise of food power that denies food sovereignty to the Palestinian residents in violation of the international law prohibition on using food as an instrument of political and economic pressure. Yet this is not the major cause of food insecurity in Gaza. Rather, our analysis crucially showed that it has been the closure’s effect on buying power that has had the most detrimental effect on food security, continuing even after the restrictions on the entry of foodstuffs into Gaza were lifted in June 2010, following the aid flotilla incident.

Incorporating the notions of food security, food power, and food sovereignty into the analysis allows us to abandon the restrictive approach that finds no violation of international law when starvation is not created. It also allows us to abandon the cost-efficient, means-ends tests, currently predominant in humanitarian law, that disregard power relations with their focus on proportionality, for determining the legality of actions.²⁷⁶ In contrast to the Turkel Commission’s finding that the naval blockade conforms with the principle of proportionality—to be measured, the Commission noted, mainly in

276. For such criticism, see KENNEDY, *supra* note 102, ch. 8. Kennedy points to the role played by humanitarianism in speaking the same language as the military. See also Aeyal Gross, *The Construction of a Wall Between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 26 LEIDEN J. INT’L L. 393 (2006); Ophir, *The Politics of Catastrophization*, *supra* note 14; AZOULAY & OPHIR, *supra* note 14; WEIZMAN, *supra* note 44.

reference to the prohibition on starving the population—we emphasize food security as part of human security,²⁷⁷ food power as part of power relations, and the denial of food sovereignty as part of the overall denial of sovereignty. This highlights the need, in this case, to put the “sovereignty” back into food sovereignty. The Gaza case clarifies all of these concepts, illustrating how policies can prevent food security using both arbitrary limitations on the entry of food and economic warfare. Our study of the Gaza case shows that the concept of food power, when extracted from the limited framework in which it was originally articulated, remains relevant and is echoed in the evolving human rights norms on the right to food. Finally, by underscoring the limits of the current food sovereignty concept, our analysis points to a new path for seriously tackling food security, especially when *sovereignty* in its most basic sense is being denied.

The impact of the Israeli closure of Gaza should not be measured solely based on which foodstuffs were allowed in or prohibited at any given time, but also from the perspective of buying power. We should, moreover, consider also how the arbitrary nature of the list of restricted foodstuffs reflects the absolutely arbitrary nature of the occupation and the deprivation of sovereignty to Gazans. This is a mechanism that lacks any comprehensible rationale and generates decisions devoid of any clear reasoning.²⁷⁸ The food insecurity in Gaza was not the result of a “natural disaster” but part of a deliberate policy or, to borrow a phrase used by Susan Marks, the outcome of “planned misery.”²⁷⁹ Thinking, in Carolan’s terms, “through food” allows us to see that food security should not only depend on the regulation of foods allowed in; rather, food is interwoven into the bigger story of food security. In order to understand the story of food, we must look beyond food itself—from this story of food, we learn much more than simply about food.

277. On food security as component of human security, see MCDONALD, *supra* note 186, at 27.

278. See Amir Paz-Fuchs’ examination of whether the legal regime applied by Israel in the Occupied Palestinian Territory is a legal system or, in Fuller’s terms, an arbitrary system of power. Based on Fuller’s criteria, Paz-Fuchs points to a few relevant elements, including publication, clarity, and lack of contradictions, which seem to be lacking in the regime in the Territories. The story of the regulation of foodstuffs into Gaza could fit this analysis. Amir Paz-Fuchs, *Ha-Birokratia Shel Hakibush* [The Journey Towards Occupation], 13 MISHPAT VEMIMSHAL [HAIFA UNIV. L.J.] 7 (2011). See also Yael Berda, *THE BUREAUCRACY OF THE OCCUPATION* (2012).

279. Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence

Mike Madden*

ABSTRACT

This Article considers several different theoretical bases for exclusionary rules within domestic criminal justice systems, and many associated countervailing considerations against exclusion, in order to identify a principled basis upon which a model exclusionary rule could be built. The Article then describes various application doctrines that form part of different existing exclusionary rules, and assesses how effectively each of these doctrines can be justified in terms of one or more of the accepted bases for exclusion. Finally, building on the theoretical and comparative study within the first two portions of this Article, it concludes by proposing a principle-based model exclusionary test that could be adopted in almost any domestic jurisdiction, and explains how each of the previously discussed exclusionary doctrines either would or would not integrate into this proposed model exclusionary rule.

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INTRODUCTION

The laws of evidence and criminal procedure in many countries include exclusionary rules for dealing with tainted evidence¹—that is to say, rules allowing courts to exclude evidence that has been obtained in breach of an individual’s statutory or constitutional human rights. These exclusionary rules are often complex,² and are—perhaps justifiably—often criticized in both

1. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 24(2) (U.K.) [hereinafter Canadian Charter] (for a Canadian example of a constitutional exclusionary rule).

2. The three part, multi-factorial analysis that applies to Canadian exclusionary decisions under § 24(2) of the Canadian Charter was recently created by the Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353 (Can.). However, applying the analytical framework is not a simple matter: one study found that courts spend an average of sixteen paragraphs within their reasons

academic³ and popular⁴ discourses. The purpose of this Article is therefore to propose a simple, principle-based exclusionary rule that is flexible enough that it could be adopted by any court that is faced with the task of interpreting or applying a domestic⁵ exclusionary rule. By embracing simplicity, and by building upon a foundation of well-articulated principles, the model exclusionary rule proposed within this Article is intended to respond to current and past criticisms of exclusionary rules.

Through previous study⁶ of the Canadian exclusionary rule,⁷ it has become apparent that the Canadian rule is not solidly grounded in either the text of the Charter of Rights and Freedoms (*Canadian Charter* or *Charter*),⁸ or in easily defensible principles. Further study of foreign exclusionary rules reveals that inconsistencies often exist between the purported rationale for, and the actual application of, a given exclusionary rule.⁹ Certainly, much has been written about the strengths and flaws of various exclusionary rules that are used throughout the world. A typical Canadian law review article on the subject of section 24(2) of the *Charter*, for instance, will often include a series of footnotes that make reference to some of the approximately ten-to-twenty leading articles by criminal law scholars who have framed the debate about how Canada's

explaining how they have applied the Grant framework. See Mike Madden, *Empirical Data on Section 24(2) Under R. v. Grant*, SOC. SCI. RES. NETWORK, 6 tbl.6 (Jan. 23, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1745243. [hereinafter Madden, *Empirical Data*].

3. See, e.g., Akash Toprani, Note, *A Tale of Two Section Twenty-Fours: Towards a Comprehensive Approach to Charter Remedies*, 70 U. TORONTO FAC. L. REV. 141 (2012).

4. See, e.g., Richard Humphreys, *Miscarriage of Justice as Guilty Get Off on a Technicality*, INDEPENDENT (July 28, 2013), <http://www.independent.ie/opinion/analysis/richard-humphreys-miscarriage-of-justice-as-guilty-get-off-on-technicality-29453976.htmls>.

5. Throughout this Article, references to exclusionary rules should be understood to mean only those exclusionary rules that operate within domestic—as opposed to international—criminal justice systems. It is acknowledged that separate considerations relating to different (and much more ambitious) purposes and functions of international criminal proceedings would likely justify the application of a different kind of exclusionary rule at any international criminal court or tribunal. For a much more detailed discussion about how international trials demand a unique exclusionary rule, see Mike Madden, *The Exclusion of Improperly Obtained Evidence at the International Criminal Court: A Principled Approach to Interpreting Article 69(7) of the Rome Statute* 104–18 (April 2014) (unpublished LL.M. Thesis, Dalhousie University's Schulich School of Law), available at <http://dalspace.library.dal.ca/bitstream/handle/10222/50199/Madden-Michael-LLM-Law-April-2014.pdf>.

6. Madden, *Empirical Data*, *supra* note 2; Mike Madden, *Marshalling the Data: An Empirical Analysis of Section 24(2) Case Law in the Wake of R. v. Grant*, 15 Canadian Crim. L. Rev. 229 (2011). [hereinafter Madden, *Marshalling the Data*].

7. Canadian Charter, *supra* note 1; R. v. Grant, [2009] 2 S.C.R. 353 (Can.).

8. Canadian Charter, *supra* note 1.

9. See *infra* Part II for extensive discussion of different foreign exclusionary rules and the theoretical problems associated with many aspects of these rules.

exclusionary rule can and should operate.¹⁰ A typical article might also refer to the current status of exclusionary rules in any number of different countries, including England, New Zealand, the United States, South Africa, and Israel, to name but a few of the most frequently compared jurisdictions.¹¹ One can safely say that Canadian scholars are carefully considering certain aspects of their exclusionary rule, and they are diligently looking beyond their borders in their efforts to suggest how exclusionary jurisprudence could be improved. This situation in the Canadian academic legal environment is reflective of the way that exclusionary rules are thought of and written about elsewhere in the English-speaking world¹²—and there is no shortage of doctrinal commentary on any domestic exclusionary rule.

However, the overwhelming majority of current legal scholarship dealing with exclusionary rules either fails altogether to consider why exclusionary rules exist in the first place, or accepts without question the proffered rationale for a given exclusionary rule that has been supplied by a high court in a particular jurisdiction.¹³ In other words, scholars tend to uncritically accept the status quo when it comes to asking what an exclusionary rule should do, and then proceed to comment upon how a given rule is or is not efficient in achieving the purpose that they have unquestioningly accepted. This type of micro-criticism tends to miss potentially more important issues: what if the rationale that underlies the rule is not sound to begin with, or what if a high court has supplied an incomplete or incorrect answer when it has pronounced upon the rationale for a jurisdiction's rule? As these questions suggest, it is time to critically think about why and how exclusionary rules should operate, in order to derive a more principle-based model exclusionary rule.

This Article will begin in Part I with an attempt to establish a principled basis for exclusionary rules in general. Part II will then comprehensively evaluate different aspects of exclusionary rules that are actually in use throughout the world by assessing how effectively the components of these rules can be justified on the basis of the principles developed in Part I. Finally, Part III

10. See, e.g., Steven Penney, *Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter*, 49 McGill L.J. 105, 107–08 nn.7–8 (2003) (citing ten previous works on § 24(2) of the Canadian Charter in the span of two footnotes).

11. See, e.g., Michael Davies, *Alternative Approaches to the Exclusion of Evidence Under s. 24(2) of the Charter*, 46 Crim. L.Q. 21 (2002) (Can.) (referring to exclusionary doctrines that apply in New Zealand and the United States as a basis for comparison with the Canadian rule).

12. See, e.g., Binyamin Blum, *Doctrines Without Borders: The “New” Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 Stan. L. Rev. 2131 (2008) (describing developments to the Israeli exclusionary rule in the context of similar changes to the law in the United States, Canada, South Africa, and the United Kingdom).

13. See *supra* notes 10–11.

will draw from the preceding parts in order to develop and justify a model exclusionary test that could be used within almost any domestic criminal justice system.

Instead of a complicated exclusionary rule framework that develops on a case-by-case basis in ways that are often internally incoherent, this Article ultimately proposes a relatively simple exclusionary rule that could be much more easily justified on the basis of objective principles. Although academic writing cannot realistically propose how courts should decide exclusionary matters in particular cases, this Article should nonetheless provide a paradigm for thinking about the doctrine of exclusion that would guide courts in determining whether tainted evidence should be admitted or excluded in each case.

I.

THE THEORY OF EXCLUSIONARY RULES

The term “exclusionary rule” is a bit like the lunchmeat spam—virtually everybody is familiar with it, only a few people are sure about its precise contents, and most people can stomach it only occasionally and in small portions.¹⁴

Meaningful discourse about exclusionary rules might begin with an explanation of how we conceive of the function that exclusionary rules should perform within our legal systems. After all, how can one determine whether there should be an exception to an exclusionary rule in cases where police have acted in clear good faith when they inadvertently breached an individual’s rights (i.e., the specific content of an exclusionary rule), if one has not first determined that an exclusionary rule should serve a deterrent function (i.e., the more general principle that underpins exclusionary rules)?¹⁵ Therefore, the goal of Part I will be to look beneath the surface at exclusionary rules, in order to ascertain what these rules can and should reasonably be expected to accomplish. Ultimately, a

14. Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 214 (2012) [hereinafter Milhizer, *Great Myths*].

15. For a similar assertion that the rationale of an exclusionary rule tends to determine the content of the rule, see Christian Halliburton, *Leveling the Playing Field: A New Theory of Exclusion for a Post-Patriot Act America*, 70 MO. L. REV. 519, 521 (2005) (“[T]he decision to pursue deterrence goals rather than provide a remedy for the deprivation of constitutional rights had a profound effect on the subsequent development of the exclusionary rule.”). See also Kelly Perigoe, Comment, *Exclusion of Evidence for Failure to Advise Suspects of the Right to Counsel and to Silence Before Custodial Police Interrogation: Comparing the United States and Canadian Doctrines and the Reasons for Their Difference in Scope*, 14 UCLA J. INT’L L. & FOREIGN AFF. 503, 528 (2009) (“Whether a court bases its exclusionary doctrine on a rationale of maintaining trial fairness or on rationales of deterrence and trustworthiness often dictates whether the evidence will ultimately be admitted.”).

principled basis for the development of a model exclusionary rule will emerge from the analysis contained within this Part.

A. *Understanding Forward-Looking Rationales for Exclusion*

For the purposes of this Article, different bases for the exclusion of tainted evidence will be considered as either forward-looking or backward-looking rationales for exclusion. Forward-looking rationales are not concerned with redressing past wrongs, such as rights breaches that led to the collection of impugned evidence, but instead focus on the impact that exclusion is likely to have on a go-forward basis. Some variants of forward-looking theories suggest that they seek to avoid additional harm to the accused that would result from admitting tainted evidence: “when the government tries to convict a person on the basis of an earlier violation of his [constitutional] rights, does it not seek to inflict a *second and distinct* injury?”¹⁶ There are arguably two main forward-looking rationales: the deterrence rationale and the dissociation rationale.

1. *The Deterrence Rationale*

According to the deterrence rationale, evidence obtained in breach of an individual’s fundamental rights must be excluded from criminal trials in order to deter state officials from similarly breaching the rights of others in the future. Backward-looking justifications for the rule are typically rejected by those who espouse a deterrence-based rule in recognition of the fact that courts cannot unring the bell after someone’s rights have been breached: “[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim,”¹⁷ because the “ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.”¹⁸ Instead, “[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”¹⁹ The deterrent rationale for exclusion is thus violator-centric, in that it is concerned with the effect of exclusion on those who have violated, or who might in the future violate, rights of citizens and suspects in criminal investigations.

16. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 594 (1983).

17. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

18. *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), *abrogated by* *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Teague v. Lane*, 489 U.S. 288 (1989).

19. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

This deterrence theory appears to be premised on three underlying assumptions: first, that police officers and other state agents involved in evidence collection are somewhat informed about the exclusionary rule;²⁰ second, that these individuals care enough about the outcome of exclusionary decisions so as to shape their behavior in ways that respect the rights of those who are ultimately accused of crimes;²¹ and, third, that respect for the rights of *all persons* can be encouraged by a rule that only excludes evidence collected *against those who are accused of crimes and who proceed to a contested criminal trial*.²² The validity of these assumptions has been, at least in the United States, subject to much debate and empirical study.²³ The United States Supreme Court seems now to have accepted that it will be difficult, if not impossible, to conclusively ascertain the validity of deterrent assumptions that underlie the exclusionary rule.²⁴

Even if one cannot empirically verify the efficiency of an exclusionary rule in terms of its deterrent effect, a deterrent-based rule can nonetheless be criticized from a variety of other theoretical perspectives. Numerous scholars have postulated that an exclusionary rule might actually lead to more, or worse, police misconduct than it strives to deter, and have argued that the rule leads to police perjury,²⁵ when officers deliberately misrepresent facts surrounding searches and arrests in order to “construct the appearance of compliance” with constitutional and human rights law, and to avoid exclusionary rulings from trial

20. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 600 (2013) (“The exclusionary rule can only be effective as a deterrent to police if the jurisprudence surrounding the rule is sufficiently clear that it can be understood and followed by those officers.”).

21. See *id.* at 602–04.

22. See *id.* at 604 (criticizing this implied assumption of the deterrence rationale for exclusion: “The exclusionary rule attempts to address whether a conviction is likely to flow from a search, but in fact it does little to address the many police activities that never fall under judicial scrutiny.”).

23. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 8 AM. B. FOUND. RES. J. 611 (1983).

24. See *United States v. Janis*, 428 U.S. 433, 450 n.22 (1976), *superseded by statute*, Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3001(a), 112 Stat. 685, 726–27, *as recognized in* *Thompson v. United States*, 523 F. Supp. 2d 1291, 1294–95 (N.D. Ala. 2007) (“The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied.”).

25. On the problem of police perjury (or the phenomenon of “testilying”) generally, see David M. Tanovich, *Judicial and Prosecutorial Control of Lying by the Police*, 100 CRIM. REP. (6TH SER.) 322 (2013); see also Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

judges.²⁶ Others suggest that the exclusionary rule leads police to abandon the prospect of securing convictions against criminals, while driving them to aggressively police communities in ways that would not withstand constitutional scrutiny at criminal trials: “the exclusionary rule may actively encourage such illegal police activity [leading] to an increase in the use of ‘preventative patrols’—police searches aimed not at arrest and prosecution, but at confiscation of weapons and drugs.”²⁷ Still others suggest that reliance on a deterrence-based exclusionary rule inhibits the development of more effective means of controlling police misconduct.²⁸

Deterrence theory essentially predicts that a simple and desirable goal can be achieved by excluding improperly obtained evidence: police and other state actors involved in the criminal process will respect the constitutional rights of the populace because the operation of the exclusionary rule and its undesirable effects on crime control has deterred them from collecting evidence in breach of such rights. However, as even a cursory review of the literature surrounding deterrence theory reveals, the simple premise of the theory is vulnerable to persuasive criticisms.

Notwithstanding the criticisms of deterrence theory, few would argue that an exclusionary rule will have *no* deterrent effect on law enforcement officers, or that it is incapable of deterring rights violations at least some of the time. Thus, while empirical studies and theoretical analysis might indicate that an exclusionary rule is an inefficient, imperfect, or incomplete tool for deterring rights breaches, it does not follow that the rule cannot deter egregious police misconduct. In other words, there is probably some useful role for deterrence theory to play in any discussion about the function and content of principled exclusionary rules.

26. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 192 (Quid Pro Books 4th ed. 2011) (1966).

27. Jacobi, *supra* note 20, at 610; *see also* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 126 (2003) (“[L]arge portions of police activity relating to the seizing of criminal property do not produce (and may not even have been designed to produce) incriminating evidence, and thus do not result in criminal prosecutions.”).

28. *See* Milhizer, *Great Myths*, *supra* note 14, at 237 (suggesting that the exclusionary rule holds “out the false promise of deterrence while masking the need [to] engage in reform that effectively addresses police misconduct”); *see also* *Stone v. Powell*, 428 U.S. 465, 500 (1976) (Burger, J., concurring) (“[I]t now appears that the continued existence of the rule . . . inhibits the development of rational alternatives. The reason is quite simple: Incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form.”).

2. *The Condonation/Dissociation Rationale*

The condonation rationale for exclusion is predicated on the notion that courts will be seen to condone improper police or investigative behavior if they admit improperly obtained evidence into a criminal proceeding. Eugene Milhizer suggests:

The [theory is] premised on the following syllogism: (1) permitting the reception of evidence at trial indicates not only that the evidence is reliable, probative and relevant, but also it signals that courts encourage or condone the methods used to obtain the evidence; (2) courts should not encourage or condone illegal police conduct; and, therefore, (3) the reception of illegally obtained evidence signals that courts encourage or condone police misconduct.²⁹

Similarly, the dissociation rationale for exclusion articulates a need for courts to distance, or to dissociate, themselves from other state actors who have breached an accused's rights—by excluding tainted evidence from a trial.³⁰ Both concepts embrace the same key ideas, and simply express these ideas in different (positive/negative) terms: on the one hand, judicial condonation of police misconduct is undesirable, so evidence obtained in breach of a defendant's³¹ rights must be excluded in order to avoid the appearance of such judicial condonation. On the other hand, courts must strive to dissociate themselves from unlawful actions by state officials within other branches of government, and excluding improperly obtained evidence is one effective means of achieving dissociation. While the deterrent rationale for exclusion is violator-centric, the condonation and dissociation rationales for exclusion are court-centric: these latter bases for exclusion focus on the impact that exclusion will or could have upon the integrity of the courts.

Condonation theory provides the dominant rationale for the Canadian exclusionary rule. In *R v. Collins*, a majority of the Supreme Court of Canada (SCC) opined that the purpose of the rule is to:

prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.³²

The majority further noted, “the administration of justice would be brought into greater disrepute . . . if this Court did not exclude the evidence and

29. Milhizer, *Great Myths*, *supra* note 14, at 239.

30. *R. v. Collins*, [1987] 1 S.C.R. 265, ¶ 45 (Can.).

31. The terms “accused,” “accused person” and “defendant” will be used interchangeably throughout this Article, although it is acknowledged that most jurisdictions will only use one of these terms in order to refer to individuals who are charged with crimes.

32. [1987] 1 S.C.R. 265, ¶ 31 (Can.).

dissociate itself from the conduct of the police in this case.”³³ The *Collins* decision illustrates the close connection between concepts of dissociation and condonation, and, through its use of the future tense, highlights the forward-looking basis for the Canadian exclusionary rule. The rationale for exclusion that was advanced in *Collins* has been reaffirmed in more recent cases such as *R v. Grant*,³⁴ where a majority of the SCC explicitly noted that the exclusionary analysis is “forward-looking,”³⁵ and explained that exclusion is often necessary because “admission may send the message the justice system condones serious state misconduct.”³⁶

American exclusionary law, while now grounded narrowly and exclusively in deterrence theory, was also initially somewhat concerned with dissociating the judiciary from other state actors who participated in rights breaches. For instance, in *Weeks v. United States*,³⁷ the first United States Supreme Court decision to unanimously recognize a constitutional exclusionary rule, Justice Day explained that “unwarranted practices destructive of rights secured by the Federal Constitution, *should find no sanction* in the judgments of the courts which are charged at all times with the support of the Constitution.”³⁸ Justice Brandeis, writing in dissent in *Olmstead v. United States*,³⁹ subsequently explained why exclusion should have been mandated in that case, using the language of condonation and dissociation:

The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers’ crimes. . . . And if this Court should permit the Government, by means of its officers’ crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. . . . [A]id is denied despite the defendant’s wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.⁴⁰

Although Justice Brandeis’s reasoning as to why the exclusionary rule should operate has not subsequently been adopted by any majority of the United States

33. *Id.* ¶ 45.

34. [2009] 2 S.C.R. 353 (Can.).

35. *Id.* ¶ 71.

36. *Id.*

37. *Weeks v. United States*, 232 U.S. 383 (1914), *overruled by* *Elkins v. United States*, 364 U.S. 206, 212–13 (1960).

38. *Id.* at 392 (emphasis added).

39. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

40. *Id.* at 483–84.

Supreme Court,⁴¹ it nonetheless provides some clear insight into the judicial thought that underpins dissociation and condonation theories of exclusion.

Dissociation and condonation rationales are not predicated on empirical propositions about the effectiveness of the exclusionary rule to the same extent as deterrent rationales, since the benefit of the rule—under dissociation theory—is largely unquantifiable.⁴² Although some studies have been suggested⁴³ and undertaken⁴⁴ in efforts to measure the “repute” of the justice system, and how this reputation is affected by exclusionary decisions, the results of these studies should admittedly be viewed with caution,⁴⁵ and the SCC has expressed reluctance to place any emphasis on empirical data in support of the dissociation rationale.⁴⁶ Instead, the benefits of exclusionary rules that serve dissociative purposes must be explained in more abstract and philosophical terms, but this reality does not necessarily weaken the validity of the condonation/dissociation rationale as a basis for any exclusionary rule.

41. Notwithstanding the majority opinions of the United States Supreme Court on exclusionary rulings over the years that have emphasized the deterrent rationale of the American rule, numerous dissents have attempted to re-inject a measure of dissociation into the rule. See, for instance, the dissenting opinion of Justice Ginsburg (writing for herself and three other judges in a 5-4 decision) in *Herring v. United States*, 555 U.S. 135, 148–57 (2009), for the most recent example of this phenomenon. Justice Ginsburg acknowledges that a “main objective” of the rule is deterrence, *Id.* at 152, but she sees “a more majestic” role for the rule, *Id.* at 151, and suggests that it enables the judiciary to avoid being tainted by partnership in unlawful action, and allows judges to withhold judicial imprimatur or endorsement of tainted evidence. *Id.* at 148–57. There is a strong current of dissociation theory running through Justice Ginsburg’s dissent.

42. See Milhizer, *Great Myths*, *supra* note 14, at 247 (“[I]f the basic and straightforward deterrence claims in support of the exclusionary rule are unverified and unverifiable, as has been established, then Brandeis’s more abstract and expansive claims suffer the same infirmity but to a far greater degree.”).

43. Dale Gibson, *Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms*, 61 CANADIAN B. REV. 377 (1983).

44. Alan W. Bryant et al., *Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms*, 69 CANADIAN B. REV. 1 (1990).

45. *Id.* at 41 (“[T]he results of this study should raise serious questions about the forensic use of most survey evidence on the admissibility of evidence in courts.”).

46. See, e.g., *R. v. Collins*, [1987] 1 S.C.R. 265, ¶ 32 (Can.).

The position is different with respect to obscenity, for example, where the court must assess the level of tolerance of the community, whether or not it is reasonable, and may consider public opinion polls[.] It would be unwise, in my respectful view, to adopt a similar attitude with respect to the *Charter*. Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. . . . The *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority.) (citations omitted).

B. Understanding Backward-Looking Rationales

Rather than concentrating primarily on the effect that rights breaches (and exclusion) will have, prospectively, on the justice system, backward-looking rationales for exclusion attempt to correct for harm that has already been done to individuals as a result of state misconduct. There are two main backward-looking rationales for exclusion: the compensation rationale and the vindication rationale.

1. The Compensation Rationale

Compensation theory acknowledges that any remedy must have value commensurate with the value of the right that has been breached in the first place. The compensation rationale uses exclusion in order to recognize “that rights have value and that if the right is destroyed the wrongdoer should provide alternative value to the rights holder lest the right be valueless.”⁴⁷ As David Paciocco explains:

the only way to set the clock back is to treat the parties as though the constitutional violation never occurred. Exclusion arguably achieves this by depriving the state of its wrongful gain and leaving the accused to face the case he would have faced had the right not been violated.⁴⁸

The compensation rationale for exclusion is clearly accused-centric, as it is focused on the beneficial impact that exclusion should have on an individual whose rights have been breached.

The compensation rationale, while attractive at first glance, suffers from several weaknesses. First, as a matter of logic, excluding improperly obtained evidence does nothing to “compensate” an accused; rather, exclusion merely avoids penalizing an accused through the admission of evidence that would lead to conviction. It would perhaps be more coherent to explain exclusion not as a form of compensation to the accused, but as a form of deprivation to the state, and to recognize that this deprivation is not necessarily the same as compensation to the accused. Second, as with the deterrent rationale, the compensation rationale for exclusion arguably inhibits more robust and effective remedies from developing to compensate for rights breaches by the state. For instance, if exclusion is thought to sufficiently compensate an individual whose rights have been breached, then there is likely no reason for a State to create any kind of additional public damages remedy for rights breaches as a means of compensating the individual for harm suffered. Furthermore, exclusion is an

47. David M. Paciocco, *Section 24(2): Lottery or Law—The Appreciable Limits of Purposive Reasoning*, 58 CRIM. L.Q. 15, 21 (2012).

48. *Id.* at 22.

utterly ineffective form of compensation for persons who suffer constitutional violations but who are not prosecuted because the remedy of exclusion is only available to criminal defendants. Anyone whose rights were breached but who does not end up facing a criminal trial cannot (and would have no need to) access the remedy of exclusion. Nonetheless, assuming that some would see the “windfall”⁴⁹ from which an accused benefits when exclusion takes place as being a valid form of compensation (one that could operate to mitigate the harm occasioned by the government after a rights breach), then compensation theory can probably provide a valid basis for an exclusionary rule.

2. *The Vindication Rationale*

Vindication theory is closely linked to both compensation and dissociation theory. As Paciocco suggests, “[v]indication” refers to ‘affirming constitutional values’ by granting meaningful remedies,”⁵⁰ which is superficially similar to compensation theory’s underlying premise. However, vindication can be distinguished from compensation in that vindication does not necessarily demand a correspondence between the harm suffered as a result of a rights breach and the remedy for the breach, since a meaningful remedy can be a symbolic one that offers no compensation to the accused. Paciocco’s description of vindication theory also resembles dissociation theory, in that he suggests a focus on collective (rather than individual) constitutional values and “not on the victim’s loss.”⁵¹ However, Paciocco correctly notes that condonation/dissociation theory is primarily about courts protecting their own integrity, and he implicitly recognizes the retrospective and individualized aspects of vindication theory when he says, “the vindication rationale is also about promoting the relevant right,”⁵² both for the benefit of the accused whose right was violated, and for the larger public who has an interest in protecting the right more generally. Some aspects of Paciocco’s vindication theory (namely the backward-looking and individualized aspects of it) are more persuasive than others. For instance, one might disagree with him that vindication does not focus on the victim’s loss, since a right cannot, realistically, be vindicated without recognition of the individual harm that was done to the victim, and the victim’s

49. Exclusion is frequently described as a form of windfall to the accused. *See, e.g.*, Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1134 (1996) (“The guiltier you are, the more evidence the police find, the bigger the exclusionary rule windfall; but if the police know you are innocent, and just want to hassle you . . . the exclusionary rule offers exactly zero compensation or deterrence.”).

50. Paciocco, *supra* note 47, at 23.

51. *Id.*

52. *Id.* at 24.

sense that the breach must be avenged in order for her to be satisfied. In this sense, the vindication rationale for exclusion is better conceptualized as one with a dual focus: it is both accused-centric, and more broadly, rights holder-centric. Vindication theory suggests that exclusion is warranted in part to give meaning to a particular right of a particular accused that was violated in a particular case, but it is also warranted in order to give expressive meaning to that right in a larger, more collective sense.

The divisions among various rationales for exclusion are not watertight, and this reality is most apparent in considering the vindication rationale. Depending on how one characterizes the vindication rationale, it may be more forward- or backward-looking in nature, and it may be more individual- or group-centric in nature. Ultimately, however, the rationale is capable of offering somewhat of a valid, if a little abstract, basis for exclusion that is unique from the other bases discussed above.

C. *Countervailing Considerations Against Exclusion*

While all of the above theories are capable of justifying the existence of an exclusionary rule, any discussion about such rules should also include consideration of any relevant factors militating against exclusion. For the purposes of this Article, these factors could be grouped into the following general categories: public safety, proportionality, efficiency, and epistemology.

1. *Public Safety Considerations*

The basic premise of a public safety argument against exclusionary rules, or in favor of significant restrictions on exclusionary rules, is that exclusion allows dangerous criminals to go free, which is detrimental to the public's safety. This argument is currently very strong in both American judicial⁵³ and academic⁵⁴ rhetoric, and can probably help to explain the substantial narrowing of the American exclusionary rule over the last fifty years.

53. See, e.g., the typically expressive dicta of Justice Scalia in *Hudson v. Michigan*, 547 U.S. 586, 595 (2006) ("The cost of entering this [exclusionary rule] lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card."). This language was echoed by Chief Justice Roberts in *Herring v. United States*, 555 U.S. 135, 141 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'").

54. See, e.g., Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 766 (2008) ("The end of reducing police misconduct is unquestionably beneficial. But the means of achieving it—deliberately allowing dangerous criminals to go free and crimes to go unpunished—is unquestionably problematic.").

2. *Proportionality Considerations*

The basic premise of the proportionality argument against exclusion is that exclusion is a disproportionate remedy. A minor or technical breach of one's rights, or a breach made by a police officer acting in good faith, for instance, will be rectified with the "massive"⁵⁵ remedy of exclusion. This result, critics argue, does not accord with our fundamental "notion that judicial sanctions should fit the harm."⁵⁶ Thus, proportionality militates against the existence of, or at least against the broad application of, exclusionary rules.

3. *Efficiency Considerations*

Countervailing considerations based on efficiency suggest that exclusion should be avoided because it is an inefficient remedy: either it does not have its purported effect, or it generates only a marginal amount of the desired effect at great cost.⁵⁷ This line of reasoning is similar to the proportionality considerations discussed above, except that efficiency compares the costs and benefits of the rule across the full spectrum of cases in order to determine its institutional efficiency. Proportionality, in contrast, compares the effect of the rule in a particular case with the harm to an accused's rights in that case, in order to ensure a correspondence between the two individualized circumstances.

4. *Epistemic Considerations*

Apart from any consequentialist criticisms of exclusionary rules—such as the public safety ones mentioned above—a non-consequentialist argument can be made that exclusionary rules impair the truth-seeking function of criminal trials by hiding relevant and reliable evidence from fact-finders.⁵⁸ Thus, while the result of an exclusionary rule is that guilty people will often be acquitted (consequentialist reasoning), an exclusionary rule is also harmful in a more

55. Justice Scalia described the remedy of exclusion as "massive" three times in the course of his roughly fourteen-page opinion in *Hudson v. Michigan*, 547 U.S. 586, 586-600 (2006).

56. Paciocco, *supra* note 47, at 27.

57. See Jacobi, *supra* note 20, for an example of commentary that relies heavily on inefficiency criticisms of the American exclusionary rule.

58. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364-65 (1998):

Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions. Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule. (citations omitted).

abstract (non-consequentialist) way because it creates dissonance within the accepted theory of criminal trials. Trials are first and foremost about establishing the truth in relation to charges against an accused, so a rule that impairs courts in their abilities to establish the truth undermines the legitimacy and coherence of the entire criminal trial process.⁵⁹ According to this reasoning, exclusionary rules should be eliminated or constrained to minimize the dissonance they create within criminal trial theory.

Although some might suggest that the above countervailing considerations support a total elimination of exclusionary remedies,⁶⁰ a more modest view that encompasses consideration of both the laudable objectives of exclusion and the countervailing factors militating against exclusion would recognize that, in particular cases or classes of cases, any one of the above countervailing considerations could be so overwhelmingly strong as to require the admission of tainted evidence in spite of a rights breach that occurred during the collection of the evidence.⁶¹ In other words, the choice between exclusion or admission of tainted evidence as a rule of law is not a binary one: the salutary aspects of an exclusionary remedy can be acknowledged as a general matter, without losing sight of the fact that exclusion often causes harm to the integrity of the justice system. Thus, while an exclusionary rule should, in principle, be justifiable on the basis of one of the accepted rationales for exclusion, exceptions to an exclusionary rule should be equally justifiable in terms of one or more of the countervailing factors discussed above.

D. Selecting a Principled Basis for Exclusionary Rules

With the preceding discussion in mind, it is now possible to select a principled and defensible basis for an exclusionary rule by answering the following questions: (1) which of the rationales for exclusion are laudable?; (2) are any of the rationales wholly unachievable through exclusion?; and, (3) are any of the rationales incompatible with one another? The answers to these questions should reveal the rationale(s) upon which exclusionary rules can and should be developed.

The first question involves a value judgement, but it is likely uncontroversial to suggest that all of deterrence, dissociation, compensation, and

59. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1029 (1974).

60. Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373, 380 (2010).

61. See, e.g., Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1118 (2011) (suggesting that the American exclusionary rule should—and does—“pay its own way” by ensuring that exclusion only results when the deterrent value of the rule “outweighs the costs of potential lost evidence”).

vindication are laudable objectives because they would tend to benefit society as a whole. The second question has not yet been conclusively answered through empirical study, and it is perhaps incapable of ever being answered in a falsifiable way. Nonetheless, exclusion seems capable of achieving some degree of deterrence, dissociation, compensation, and vindication at least some of the time.

The third question is perhaps the most difficult one to answer. At first glance, there does not appear to be any categorical conflict between the different rationales for exclusion, in that, for instance, reliance on a deterrent rationale does not generally preclude one from also relying on a dissociation, compensation, or vindication rationale. That being said, when it comes to the specific content of a given exclusionary rule, it would certainly be possible for a part of the rule to be justifiable on the basis of one rationale, but not another. For instance, consider an exception to the exclusionary rule for good faith mistakes by police: this exception could be justified under a deterrent rationale (since good faith mistakes are essentially “accidents” that cannot be deterred), but the exception would be inconsistent or incompatible with a compensation rationale (since the victim would be denied compensation in the form of exclusion even though her rights were breached). It is important to recall, however, that the central goal of this Article is to craft an exclusionary rule from first principles, rather than to simply determine which principles best describe existing exclusionary rules. Thus, the question is not, “which principles can coexist simultaneously as foundations of an extant exclusionary rule?” but, rather, “which principles can coexist simultaneously in the abstract, and how would these principles then influence the content of a subsequently-created model exclusionary rule?”

When the focus is on principles in the abstract, it becomes apparent that all of the four dominant rationales for exclusion can and should operate together to determine the content of an exclusionary rule. However, in certain cases, notwithstanding the benefits that would flow from exclusion in terms of deterrence, dissociation, compensation or vindication, the costs of exclusion in terms of public safety, efficiency, proportionality, and epistemic coherence of the criminal trial process might nonetheless be so great as to demand the admission of tainted evidence as an exception to a general exclusionary rule.

This conclusion that deterrence, dissociation, compensation, and vindication should *all* help to ground an exclusionary rule, and that certain countervailing considerations could similarly help to ground any individual exception or class of exceptions to an exclusionary rule, is important because it provides one with a theory for developing more principled exclusionary alternatives to those offered within domestic jurisdictions throughout the world.

II.

ASSESSING COMMON ELEMENTS OF EXCLUSIONARY RULES

Having established this principled basis for exclusionary rules, this Article can now productively begin a comparative study of existing domestic exclusionary rules. In this Part, therefore, some of the most common doctrines that form part of national exclusionary rules will be examined in an attempt to determine how well these doctrines can integrate into a model exclusionary rule that is based on the principles identified in Part I of this Article. Specifically, the ensuing comparative study will consider standing and identity requirements of various exclusionary rules, evidence-related factors that commonly influence the application of given exclusionary rules, and factors other than evidence-related ones that tend to have an impact on exclusionary decisions.

A. *Identity and Standing Questions*

In looking at standing and identity aspects of national exclusionary rules, there are essentially two related questions to be addressed. First, how do exclusionary rules treat evidence that is collected by private individuals in a manner inconsistent with human rights standards, as opposed to by state actors? And, second, how do exclusionary rules apply in cases where evidence is collected in breach of the human rights of someone other than the accused person? The first question will be referred to as the “identity” question, since it is really concerned with the identity—as either a State or private actor—of an individual who collects tainted evidence, while the second question will be referred to as the “standing” question, since it essentially asks whether an accused person has standing to challenge a human rights violation against a third party.

1. *The Identity Question*

In Canada, the identity question is perhaps an easy one to answer as a matter of constitutional law: the exclusionary rule is created by section 24 of the *Charter*, and section 32 of the *Charter* stipulates that the instrument only applies to the federal and provincial governments and legislative bodies.⁶² In other words, since the constitutional exclusionary rule is derived from the *Canadian Charter*, and since the *Charter* “is essentially an instrument for checking the

62. See *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229 (Can.) (regarding the application of the Canadian Charter generally); see also *R. v. Buhay*, [2003] 1 S.C.R. 631 (Can.) (regarding the application of the section 24(2) exclusionary rule in particular, to only state actors).

powers of government over the individual,”⁶³ it follows that the exclusionary rule cannot apply to actions by non-governmental actors. The same approach is taken to exclusion in the United States: “[t]he Fourth Amendment gives protection against unlawful searches and seizures . . . [but] its protection applies to governmental action.”⁶⁴ Thus, in the United States, evidence that was unlawfully taken from a defendant’s office by a private person can be admitted into evidence, even though it would be subject to the exclusionary rule if a public official had collected such evidence.⁶⁵ However, in jurisdictions where exclusionary rules are applicable to more than just breaches of constitutional rights (for instance, where an exclusionary rule could also apply to breaches of statutory criminal procedure laws)⁶⁶ or where constitutional rights apply *erga omnes* (rather than just between the State and an individual),⁶⁷ then the identity question can become more complex.

By way of example, Belgium has an exclusionary rule that applies in cases where evidence is gathered illegally, such as in breach of the formal requirements of the *Code of Criminal Procedure*,⁶⁸ but also in cases where the method of collection has undermined the reliability of the evidence, or when use of certain evidence would render a trial unfair.⁶⁹ It should also be noted that Belgian penal law permits a “civil party” to participate in trials where the party’s interests are at stake, and where the party may be entitled to an award of damages as a result of the alleged crime.⁷⁰ Perhaps because of these two factors,⁷¹ Belgian case law between 1923 and 1990 affirmed that the

63. McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229, 261 (Can.).

64. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

65. See generally Burdeau v. McDowell, 256 U.S. 465 (1921); see also Steven Euler, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649, 649–50 (1980) (describing how a private citizen can acquire evidence through theft, burglary, and by drilling into a defendant’s personal safe, all without triggering the American exclusionary rule).

66. As is the case in Belgium, see *infra* note 70 and accompanying text.

67. As is the case in Greece: see *infra* note 75 and accompanying text.

68. CODE D’INSTRUCTION CRIMINELLE [C.I.CR.] (Belg.).

69. See Cour de Cassation [Cass.] [Court of Cassation], Oct. 14, 2003, PAS. 2003, No. 499 (Belg.) (generally called the *Antigone* case, after the name of the police operation that led to the illegally collected evidence in that case; describing the three circumstances that can lead to application of the exclusionary rule), available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20031014-18.

70. See CODE D’INSTRUCTION CRIMINELLE [C.I.CR.] arts. 63, 66, 67 (Belg.). One might conceptualize this type of trial as both a criminal and civil trial implicating the State, the accused, and the victim(s), all rolled into a single process.

71. Civil law systems generally include the “civil party” or victim who seeks damages as a participant in criminal trials. This “civil party” often has rights to tender or call evidence. Perhaps because of this “civil party” who brings his own evidence to the trial, collected outside of the ambit

exclusionary rule applied equally to government and private actors⁷² such that evidence collected by a private actor who did not comply with statutory search and seizure requirements would be inadmissible against an accused person.

Similarly, in Greece, the Supreme Court has held that the statutory exclusionary rule found at section 177(2) of the *Code of Penal Procedure*⁷³ prohibits the admission of a recorded conversation even where the conversation was recorded by a private individual, since it is an offense to make such recordings.⁷⁴ With respect to searches that violate the Greek constitutional right to privacy, the constitutional exclusionary rule also applies to both private and state actors, “since constitutional rights in Greece apply *erga omnes*”—regulating even conduct between private individuals—by virtue of Article 25 of the Greek Constitution.⁷⁵ Furthermore, in both Italy⁷⁶ and Spain,⁷⁷ some evidence collection methods can trigger the application of exclusionary rules even if the evidence is collected by private persons.

The different ways in which the identity question is addressed in domestic legal systems merits consideration. For instance, an exclusionary rule that applies to private actors might not be defensible under the deterrence theory of exclusion since private individuals who illegally collect evidence do not necessarily do so with a view to securing successful prosecutions, so exclusion in one case will likely not deter private individuals from illegally collecting evidence in other cases. However, an exclusionary rule that applies to private actors could easily be justified in terms of compensation and vindication

of state authority, exclusionary rules in civil law jurisdictions tend to apply to private actors as well as to state actors.

72. See Marie-Aude Beernaert & Philip Traest, *Belgium: From Categorical Nullities to a Judicially Created Balancing Test*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 161, 162–66 (Stephen C. Thaman ed., 2013) (describing the evolution of Belgian exclusionary case law from 1923 to the present).

73. POINIKOS KODIKAS [P.K.] [Criminal Code] 5:177(2) (Greece), translated in Dimitrios Giannouloupolos, *The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First*, 11 INT’L J. EVIDENCE & PROOF 181, 191 (2007).

74. See Georgios Triantafyllou, *Greece: From Statutory Nullities to a Categorical Statutory Exclusionary Rule*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 261, 276 (Stephen C. Thaman ed., 2013) (describing the Greek Supreme Court decision 1568/2004 on this point).

75. Giannouloupolos, *supra* note 73, at 196.

76. Wiretaps executed by private persons in Italy are not authorized by law, and would therefore be excluded. See Giulio Illuminati, *Italy: Statutory Nullities and Non-Usability*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 235, 255 (Stephen C. Thaman ed., 2013).

77. See Lorena Bachmaier Winter, *Spain: The Constitutional Court’s Move from Categorical Exclusion to Limited Balancing*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 209, 219 (Stephen C. Thaman ed., 2013) (noting that in Spain, the constitutional right to privacy—which can be enforced through exclusion—grants a person a “space of liberty and privacy against interference from third persons, be it from public authorities, other citizens or private entities”).

theories, and could possibly also be justified in terms of dissociation. In jurisdictions where rights apply *erga omnes*, for instance, exclusion could potentially provide the same level of compensation to an accused person regardless of whether misconduct against the accused flowed from the actions of State or private actors. Likewise, in these jurisdictions, a right could be vindicated through exclusion even in cases where the right was trammelled by the conduct of a private individual rather than a police officer, since the expressive aspect of an exclusionary remedy that gives real meaning to a right remains extant even in these cases. Stated simply, if a "right" is capable (by definition) of being breached by a private actor in a particular jurisdiction, then there is no principled reason under either compensation or vindication theory why an exclusionary rule should not be applicable in cases of rights breaches by private actors in these jurisdictions.

Such an application of an exclusionary rule to private actors is perhaps more difficult to justify on the basis of dissociation theory, even in jurisdictions where rights apply *erga omnes*, since dissociation theory is largely premised on the notion that courts must dissociate themselves from improprieties committed by individuals within other branches of government, but not necessarily by private citizens. One must not forget, however, that dissociation theory is essentially the same as condonation theory, and both theories seek to avoid the perception that courts condone rights breaches. When dissociation and condonation theories are understood in this way, it becomes apparent that any exclusionary rule that is applicable to improper actions of both private and state actors can be justified under dissociation and condonation theories, since courts should no more condone misconduct by individual citizens than by state officials if the courts are to maintain their integrity as guardians of the law.

There may be many good reasons why an exclusionary rule that applies in respect of tainted evidence collected by private individuals would be desirable and justifiable on at least some of the recognized bases for an exclusionary rule, including compensation, vindication, and dissociation bases for exclusion. However, in jurisdictions such as Canada, where, by definition, rights do not apply *erga omnes*, any attempt to justify the application of an exclusionary rule to misconduct by private individuals would be less persuasive, since these non-state actors technically cannot breach rights that are extended by the State to individuals in the first place.

2. *The Standing Question*

In Canada, the standing question has a relatively straightforward answer. As a matter of constitutional law, exclusionary remedies are only available

under section 24(1)-(2) of the *Charter* to “[a]nyone whose rights or freedoms . . . have been infringed or denied.”⁷⁸ Thus, in *R v. Edwards*,⁷⁹ the accused was unsuccessful in seeking exclusion of a cache of drugs that was found by police when they conducted an unreasonable search of his girlfriend’s residence, since it was not the accused’s own—but, rather, his girlfriend’s—*Canadian Charter* right to be free from unreasonable search and seizure that was infringed in that case.⁸⁰

The Canadian position on standing to invoke an exclusionary remedy is mirrored in many other jurisdictions. In Germany, for instance, “a person may only challenge the admissibility of illegally obtained evidence, if the violated rule on evidence gathering protects his or her acknowledged interests and thus forms part of his or her legally protected rights.”⁸¹ In the United States, “a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant’s own constitutional rights,”⁸² even in an egregious case when state agents deliberately exploited the standing requirement by conducting an unlawful search of an innocent third party’s effects in order to collect incriminating evidence against the defendant.⁸³

However, the standing question is not answered in the same way in every jurisdiction. In South Africa, for instance, section 35(5) of its Constitution⁸⁴ has been interpreted by the Supreme Court of Appeal (but not yet by the South African Constitutional Court) as requiring “the exclusion of evidence improperly obtained from any person, not only from an accused,”⁸⁵ in a case where the evidence of a witness who had previously been subjected to police torture as part of the investigation was excluded. Similarly, the California Supreme Court held in 1955 that evidence obtained in violation of the state constitution could not be used in a criminal prosecution even where the defendant was not the victim of the unlawful search or seizure.⁸⁶ This rule remained in place until a constitutional amendment in 1985 brought the State’s

78. Canadian Charter, *supra* note 1, § 24(1).

79. See *R. v. Edwards*, [1996] 1 S.C.R. 128 (Can.).

80. *Id.* ¶¶ 50–57 (Can.); see also *R. v. Belnavis*, [1997] 3 S.C.R. 341 (Can.) (reaching a similar result).

81. Sabine Gless, *Germany: Balancing Truth Against Protected Constitutional Interests*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 113, 122 (Stephen C. Thaman ed., 2013).

82. *United States v. Payner*, 447 U.S. 727, 731 (1980).

83. See *id.* at 731–32.

84. S. AFR. CONST., 1996.

85. *Mthembu v. The State* 2008 (2) SA 407 (A) ¶ 27 (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2008/51.html>.

86. See *People v. Martin*, 45 Cal. 2d 755, 857–58 (Cal. 1955), superseded by constitutional amendment, CAL. CONST. art. I, § 28(d).

exclusionary rule into line with the federal rule that imposed a standing requirement upon defendants.⁸⁷

One South African scholar has suggested that “the rationale of the exclusionary rule should determine the nature of the standing threshold requirement.”⁸⁸ This is a sound proposition. If a given exclusionary rule is to serve a deterrent function, then surely the rule would be more efficient without a strict standing requirement that could shield many (perhaps most) instances of police misconduct from judicial review. Similarly, if an exclusionary rule is based on condonation or dissociation theory, then the rule should be applicable in cases where a third party’s rights have been breached, since courts risk condoning police misconduct when they admit evidence obtained through the breach of a third party’s rights just as much as when they admit evidence obtained through the breach of an accused person’s rights (just as courts benefit from the act of dissociating themselves from this misconduct as much when they exclude evidence obtained through third-party rights breaches as through breaches of an accused’s rights).

Vindication theory offers a more tenuous justification for an exclusionary rule’s application to third-party rights breaches, since the remedy of exclusion is arguably not well suited for vindicating rights of those who are not the subjects of criminal prosecutions. However, if one accepts that vindication only requires a meaningful and expressive remedy, but not a remedy that is particularly beneficial to a given rights holder, then exclusion could be justifiable on vindication grounds, at least to some extent, in the case of third-party rights breaches, since the remedy meaningfully deprives the State of otherwise admissible evidence. In contrast, if an exclusionary rule is primarily grounded in compensation theory, then a strict standing requirement would be entirely consistent with the rule’s rationale, since the accused has suffered no compensable loss when a third party’s rights—as opposed to the accused’s own rights—have been breached.

Recalling from Part I that deterrent, dissociation, compensation and vindication theories are all capable of offering a justifiable basis for an exclusionary rule, and that several or all of these rationales for exclusion could concurrently form the basis of a single exclusionary rule, there is no principled reason why an exclusionary rule cannot and should not be invoked even in cases

87. See Mark E. Cammack, *The United States: The Rise and Fall of the Constitutional Exclusionary Rule*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 3, 15 (Stephen C. Thaman ed., 2013) (discussing the history of California’s exclusionary rule).

88. Dave Ally, *Constitutional Exclusion Under Section 35(5) of the Constitution of the Republic of South Africa, 1996*, 193 (June 15, 2009) (unpublished LL.D. thesis, University of Pretoria), available at <http://repository.up.ac.za/handle/2263/25645>.

where the rights of someone other than the accused are breached. Eliminating a strict standing requirement would assist any exclusionary rule in achieving at least two, and possibly three, of the recognized objectives of exclusionary rules: vindication, deterrence, and dissociation.

The above discussion, while suggesting that several accepted bases for exclusion justify applying exclusionary rules both when a non-state actor is involved in a rights breach (the identity question), and when a third party's rights are breached (the standing question), does not necessarily imply that exclusion should always be the result in such cases. Regardless of what one concludes about the standing and identity questions, all of the countervailing considerations that militate against the operation of exclusionary rules (as discussed above in Part I) continue to exist. Thus, while the discussion in this section strives to demonstrate that exclusionary rules would be more capable of achieving their various objectives of deterrence, dissociation, compensation, and vindication (and would therefore be more defensible on a principled basis) if they could be applied to exclude evidence even in cases where traditional standing and identity requirements have not been met, the existence of countervailing factors suggests that exclusionary rules should only lead to actual exclusion in certain classes of cases—but probably not all cases—involving rights breaches. In other words, acknowledging that an exclusionary remedy should more frequently be available as a matter of principle in many jurisdictions does not necessarily mean that exclusion should result more frequently, since countervailing considerations of efficiency, proportionality, public safety and epistemic concerns must still be weighed to determine whether exclusion is desirable in a particular case or in particular classes of cases. Nonetheless, the absolute unavailability of exclusion as a remedy in many jurisdictions when standing and identity requirements have not been met will tend to weaken the logical coherence that should exist between a given exclusionary rule and the purported rationale for the rule, as the above discussion has attempted to show.

B. Evidence-Related Factors Influencing Exclusion

This section will describe and analyze various evidence-related factors that often influence exclusionary decisions. These factors can broadly be understood as relating to one of the following three questions. First, how central is the evidence to the prosecution's case? Second, was the tainted evidence obtained directly or indirectly as result of a rights breach? And, third, could the State have obtained the evidence without having resorted to a rights breach? For the sake of simplicity, these questions will be referred to as the importance of the evidence question, the derivative evidence question, and the hypothetical clean path question, respectively. Each question will be considered in turn.

1. *The Importance of the Evidence Question*

Should evidence be excluded less often when it is of central importance to the prosecution's case? This, essentially, is the question that the "importance of the evidence" doctrine seeks to answer.

In Canada, the SCC has set down an exclusionary framework that involves consideration of three factors: seriousness of the rights breach, significance of the impact that the breach has on the accused, and, consideration of the public interest in seeing the case adjudicated on its merits.⁸⁹ However, with respect to the third factor, the SCC further observed, "[t]he importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry,"⁹⁰ since:

[t]he admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.⁹¹

In practice, lower courts have mainly read this passage to mean that the third *Grant* factor will be difficult to prove (and exclusion will therefore less likely follow) in cases where the tainted evidence is central to the prosecution's case.⁹²

Australian common law also considered the importance of the evidence in its exclusionary framework. In the leading case on exclusion, *Bunning v. Cross*,⁹³ a majority of the SCC first suggested that some flexibility to admit tainted evidence would be accorded to police in cases where the evidence "is both vital to conviction and is of a perishable or evanescent nature"⁹⁴—perhaps to account for exigent circumstances where there is a danger that an accused will destroy the evidence. However, in the same *Bunning* decision, the majority clarified that they were really most concerned with the centrality of the evidence to the case, rather than the possibility of destruction of the evidence: "[i]f other equally cogent evidence, untainted by any illegality, is available to the

89. *R. v. Grant*, [2009] 2 S.C.R. 353, ¶ 85 (Can.).

90. *Id.* ¶ 83.

91. *Id.*

92. *See, e.g., R. v. Bacon*, 2010 B.C.P.C. 1, ¶¶ 82–86 (Can.) (noting in the decision not to exclude that "the exclusion of the handguns would result in the dismissal of all charges related to the possession of the handguns and prohibited device" and would "gut the prosecution"). For an appellate court's perspective, *see R. v. Martin*, 2010 NBCA 41, ¶¶ 94, 100–01 (Can.) (noting in overturning the trial judge's exclusionary ruling that the impugned wiretap evidence was important to the prosecution's case: "[w]ithout it, the prosecution's case collapsed and society's interest in adjudication on the merits was compromised").

93. (1978) 141 CLR 54 (Austl.).

94. *Id.* ¶ 38.

prosecution at the trial the case for the admission of evidence illegally obtained will be the weaker.”⁹⁵ In other words, exclusion will be palatable under Australian common law only in those cases where it has no impact on the outcome of a case. This common law exclusionary rule continues to apply in several Australian jurisdictions (South Australia, Queensland, Western Australia, and the Northern Territory),⁹⁶ but has now been further codified in section 138 of the *Uniform Evidence Legislation*⁹⁷ applicable throughout New South Wales, Victoria, Norfolk Island, the Australian Capital Territory, and Tasmania.⁹⁸

The importance of the evidence doctrine has less, or even no, role in other jurisdictions. In Israel, for instance, the Supreme Court postponed any move to set down a clear framework for application of the doctrine:

The question of the degree to which the courts in Israel should take into account the importance of the evidence and the seriousness of the offence attributed to the accused within the framework of exercising their discretion under the case law doctrine of inadmissibility does not require a decision in the appellant’s case and we can leave this too to be decided in the future.⁹⁹

In Greece, Article 19(3) of the Constitution provides for an absolute exclusionary rule in cases where an individual’s right to privacy has been breached.¹⁰⁰ What is remarkable about this rule is that it will automatically exclude the kinds of reliable, physical evidence that is generated by searches and seizures in violation of rights to privacy, when this evidence will often be the most central to the prosecution’s case. Thus, in Greece, it seems that the importance of the evidence doctrine has been rejected altogether.

Notwithstanding the various jurisdictions that have found a place for the importance of the evidence doctrine in their legal systems, there remain two theoretical problems with the doctrine that must be identified before moving on. First, the doctrine may create a perverse incentive for police to cease collecting additional evidence once they have breached a suspect’s rights, on the presumption that the tainted evidence is more likely to be excluded if it is accompanied by other incriminating evidence (i.e., where the tainted evidence is less central to the prosecution’s case). Second, it is probably unwise to assess

95. *Id.* ¶ 39.

96. Kenneth J. Arenson, *Rejection of the Fruit of the Poisonous Tree Doctrine in Australia: A Retreat from Progressivism*, 13 U. NOTRE DAME AUSTL. L. REV. 17, 20 (2011).

97. The term “Uniform Evidence Legislation” actually refers to a series of identical *Evidence Acts* that are in force in each of a number of Australian jurisdictions. See, e.g., *Evidence Act 2008* (Vic) s 138 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/consol_act/ea200880/.

98. Arenson, *supra* note 96, at 20.

99. CrimA 5121/98 Issacharov v. Chief Military Prosecutor 61(1) PD 461, ¶ 73 (2006) (Isr.).

100. 2001 SYNTAGMA [SYN.] [CONSTITUTION] 19 (Greece).

the importance of a piece of evidence to the prosecution's case as a preliminary matter, arguably before the full significance of any single piece of evidence can be appreciated (i.e., on a voir dire in a common law trial, or by an examining magistrate in a civil law jurisdiction). As Justice Scalia of the United States Supreme Court observed in relation to these kinds of evidentiary decisions in another context, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."¹⁰¹ In some ways, the importance of the evidence doctrine follows the same flawed reasoning: admitting tainted evidence because it is central to the prosecution's case could essentially amount to admitting evidence when the defendant is obviously guilty.¹⁰²

From a deterrence perspective, the fact that a particular piece of tainted evidence is important or central to the prosecution's case should weigh in favor of *exclusion* rather than *admission* of the evidence, since the deterrent rationale for exclusion assumes that police care about exclusionary outcomes, and since a failed prosecution is more likely in cases where central evidence is excluded. In other words, the deterrent effect of an exclusionary rule will be greater if the rule tends to exclude central or important evidence with more frequency rather than less.

As a matter of principle, the importance of the evidence doctrine should not necessarily have any influence on an exclusionary rule based on vindication, compensation, or dissociation theories. From a court-centric perspective, the degree to which evidence is important to the prosecution's case will neither increase nor decrease the level of judicial condonation of a particular rights breach if the evidence is admitted, since admitting tainted evidence arguably always condones a breach, and excluding it arguably always allows judges to dissociate themselves from a breach, irrespective of the class of evidence that is in issue.

Similarly, from an accused person's objective perspective, or from the public's perspective, the degree of compensation or vindication that an exclusionary decision yields will not depend on the centrality of the evidence that is excluded: exclusion either is, or is not, necessary as a consequence of a rights breach to achieve compensation and vindication goals—but in neither case will the centrality of the evidence have an impact in this calculation. If

101. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

102. For a similar expression of the same thought, see D. Ally, *Determining the Effect (the Social Costs) of Exclusion Under the South African Exclusionary Rule: Should Factual Guilt Tilt the Scales in Favour of the Admission of Unconstitutionally Obtained Evidence?*, 15 POTCHEFSTROOM ELECTRONIC L.J. 477, 498 (2012) ("Such an approach implies that unconstitutionally obtained evidence should be readily admitted in the event that the accused is adjudged to be factually guilty.").

compensation is (at least theoretically) generated through exclusion by restoring the accused to the position he would have been in but for the rights breach, then exclusion achieves this measure of compensation when important, unimportant, and every middling degree of somewhat important evidence is excluded. In terms of vindication theory, the remedy of exclusion is expressive, rather than objectively quantifiable, so vindication is equally achieved through exclusion regardless of the importance of the evidence—one cannot hope for *more* vindication from the exclusion of some evidence than from other evidence.

It is possible that the importance of the evidence doctrine has become part of some exclusionary rules predominantly because certain countervailing factors weighing against exclusion tend to be higher in cases where evidence is central to the prosecution's case. Although some public safety arguments might be made against exclusion when the evidence at issue is important to the prosecution's case, public safety concerns will tend to be driven more by the nature of the offense with which an accused is charged rather than by the quality of the evidence that is subject to exclusion after a rights breach. For example, excluding central evidence in a shoplifting case is unlikely to persuade people that public safety will be compromised whereas excluding evidence in a murder trial might seriously threaten public safety, so public safety arguments against the exclusion of central evidence are perhaps misplaced.

However, epistemic arguments against the exclusion of central evidence could have much more purchase: the truth-seeking function of a criminal trial is compromised very severely when the most truth-assisting, central evidence in a trial is excluded. From a proportionality perspective, one could argue that the remedy of exclusion disproportionately penalizes the State and rewards the accused when central evidence is excluded such that exclusion “effectively guts the prosecution.”¹⁰³ This argument is not entirely convincing, as it suggests that a remedy should only flow to the accused in cases where the State can still convict the accused without the benefit of the excluded evidence (which could deprive the remedy of any ability to effectively compensate the accused and would substantially weaken the remedy's ability to vindicate rights breaches). This kind of results-driven reasoning, while perhaps capable of persuading the populace that exclusion should be avoided, is difficult to support in principle.

As the above discussion suggests, there is scope for debate about what role the importance of the evidence doctrine should play in exclusionary decisions. On the one hand, from a principled perspective, an exclusionary rule based on a deterrent rationale should favor the exclusion of important evidence that is obtained through rights breaches, while exclusionary rules based on other

103. R. v. Grant, [2009] 2 S.C.R. 353, ¶ 83 (Can.).

rationales probably do not need to consider the importance of the evidence doctrine. On the other hand, regardless of the rationale(s) that underpin a particular exclusionary rule, countervailing considerations involving epistemic concerns about exclusion are most powerful in cases involving especially important evidence. Conclusions are not easily drawn about how this doctrine should integrate, if at all, into a principled exclusionary rule.

2. *The Derivative Evidence Question*

The concepts of “derivate evidence”¹⁰⁴ and “fruit of the poisonous tree”¹⁰⁵ are often discussed in the same context.¹⁰⁶ However, for the sake of clarity, this Article will avoid use of the unhelpful metaphor “fruit of the poisonous tree” and will refer only to derivative evidence—evidence that is collected indirectly as a consequence of a rights breach.¹⁰⁷ In any situation where a rights breach takes place, one of three evidentiary possibilities logically exists: first, the breach may not yield any evidence (in which case, the breach could not be remedied through application of an exclusionary rule). Second, the breach could directly yield evidence: cases of unlawful searches wherein evidence is found and immediately seized by police, or wherein police physically assault a suspect until she confesses, come to mind as examples of this second possibility. And third, the breach could lead to either direct evidence or information (as distinct from evidence) that, in turn, causes police to collect incriminating evidence at some other time, or in some other place. The term derivative evidence in this Article means indirect evidence that is collected by way of this third possibility, rather than evidence that is collected directly as a result of a rights breach.¹⁰⁸

104. See *R. v. Stillman*, [1997] 1 S.C.R. 607, ¶¶ 99–101 (Can.) (explaining of the concept of derivative evidence).

105. See *Nix v. Williams*, 467 U.S. 431, 441 (1984) (referring to the “fruit of the poisonous tree”).

106. See KERRI MELLIFONT, *FRUIT OF THE POISONOUS TREE: EVIDENCE DERIVED FROM ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE* (2010) (linking fruit of the poisonous tree and derivative evidence).

107. See, e.g., Mark D. Wiseman, *The Derivative Imperative: An Analysis of Derivative Evidence in Canada*, 39 CRIM. L.Q. 435, 436 (1997) (“While there is no standard definition of the term in the jurisprudence *per se*, courts in Canada frequently use the term to refer to secondary evidence which is obtained from or traced to a primary evidentiary source.”).

108. The term is also used this way in Kerri Anne Mellifont, *The Derivative Imperative: How Should Australian Criminal Trial Courts Treat Evidence Deriving from Illegally or Improperly Obtained Evidence?*, 2 (2007) (unpublished J.S.D. dissertation, Queensland University of Technology School of Law) [hereinafter JSD Thesis], available at http://eprints.qut.edu.au/16388/1/Kerri_Mellifont_Thesis.pdf. There, the author offers the following example of derivative evidence: “[A] murder weapon located during an illegal search is primary evidence; whereas if it was found as a result of an improperly obtained confession, it is derivative

Some jurisdictions explicitly treat derivative evidence in the same way as primary evidence for exclusionary purposes. In Serbia's new *Code of Criminal Procedure*,¹⁰⁹ for instance, tainted evidence that is obtained either directly or indirectly must be excluded.¹¹⁰ This legislative wording appears to represent a deliberate choice on the part of the legislators that will resolve a previously existing controversy among academics and courts in that country about whether derivative evidence ought to be excluded.¹¹¹ A similar rule exists in Slovenia, where courts cannot base findings on directly tainted evidence, nor on evidence that was acquired indirectly through the use of tainted evidence.¹¹² Likewise, in Columbia, evidence that owes its existence to excluded evidence must also be excluded.¹¹³

In other jurisdictions, exclusionary rules categorically do not apply to derivative evidence. In the Netherlands, for instance, the exclusionary rule that is created by section 359(a) of the *Code of Criminal Procedure* authorizes a court to rule that "the results of the investigation obtained through the breach may not contribute to the evidence of the offence charged."¹¹⁴ As Matthias

evidence. A confession obtained as a result of an earlier improperly obtained confession is also derivative evidence." *Id.* at 2.

109. SERB. CODE CRIM. P., (2011), *translated by Criminal Codes*, LEGISLATIONLINE, <http://www.legislationline.org/documents/id/8918> (last visited March 14, 2015). Although the Code was adopted in 2011, it did not enter into force until January 15, 2013. *See id.* art. 608 (Entry into Force and Beginning of Implementation of the Code).

110. *Id.* art. 16 ("Court decisions may not be based on evidence which is, directly or indirectly, in itself or by the manner in which it was obtained, in contravention of the Constitution, this Code, other statute or universally accepted rules of international law and ratified international treaties.").

111. *See generally* Snežana Brkić, *Serbia: Courts Struggle with a New Categorical Statutory Exclusionary Rule*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 309, 314–15 (Stephen C. Thaman ed., 2013).

112. Criminal Procedure Act, art. 18(2) (2006), *translated by Criminal Codes*, LEGISLATIONLINE, available at <http://www.legislationline.org/documents/id16906> (last visited March 15, 2015):

The court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence which was obtained in violation of the provisions of criminal procedure and which under this Act may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence.

113. CÓDIGO DE PROCEDIMIENTO PENAL (Criminal Procedure Code) art. 23 (Colum.), *translated in* Stephen C. Thaman, "Fruits of the Poisonous Tree" in *Comparative Law*, 16 SW. J. INT'L LAW 333, 344 (2010) ("All evidence obtained in violation of fundamental guarantees is null within the full meaning of the law and should thus be excluded from the procedure. Evidence that is the consequence of the excluded evidence, or can only be explained by reason of its existence, receive the same treatment.").

114. Wetboek van Strafvordering (Code of Criminal Procedure) (Neth.), *translated in* Matthias J. Borgers & Lonneke Stevens, *The Netherlands: Statutory Balancing and a Choice of Remedies*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 183, 185 (Stephen C. Thaman ed., 2013).

Borgers and Lonneke Stevens note, this statutory wording and the manner in which it has been judicially interpreted have barred any application of the exclusionary rule to derivative evidence, since “[t]here must be a *direct connection* each time between the breach of procedural rules . . . on the one hand and, on the other, the obtaining of evidence or the harm actually suffered by the accused.”¹¹⁵ The exclusionary rule in Germany also does not extend to derivative evidence,¹¹⁶ nor does it in England, at least with respect to evidence derived from tainted confessions.¹¹⁷

Finally, in many jurisdictions, exclusionary rules apply to derivative evidence, but in more complicated or nuanced ways than to direct evidence. For instance, in the United States, derivative evidence is presumptively inadmissible, but this exclusionary rule is subject to at least three broad exceptions: inevitable discovery, good faith, and attenuation of the breach (i.e., a weakened causative connection between the breach and the derivative evidence).¹¹⁸

Ultimately, there is a large variance in how derivative evidence is treated in domestic laws, partly because there are corresponding differences in the underlying rationales for domestic exclusionary rules. If a rule is based on deterrence, then exclusion of derivative evidence is probably justifiable; without exclusion, police might be inclined to routinely breach suspects’ rights by, for instance, beating confessions from suspects. This is because even if the confession is inadmissible, at least the leads that a confession generates might be sufficient to both solve a case and collect enough incriminating derivative evidence to yield a conviction.¹¹⁹ Stephen Thaman makes this point effectively with the following observation:

115. Borgers & Stevens, *supra* note 114, at 190.

116. Gless, *supra* note 81, at 128 (“The doctrine of ‘fruits of the poisonous tree’ is recognized neither in the case law, nor by a majority of scholars.”). Gless explains the rejection of this doctrine in Germany “by the fact that in Germany evidence is not excluded in order to deter police misconduct, but basically on the ‘clean hands’ rationale.” *Id.* at 129).

117. See Police and Criminal Evidence Act, 1984, c. 60, § 76(4) (Eng.) (stating that the fact that a confession is inadmissible does not “affect the admissibility in evidence . . . of any facts discovered as a result of the confession”).

118. See Stephen C. Thaman, *Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth*, 61 U. TORONTO L.J. 691, 695–96 (2011) [hereinafter Thaman, *Police Lawlessness*].

119. This concern was acknowledged by the Supreme Court of Canada when the Court recently reformulated its application framework for the Canadian exclusionary rule in *R. v. Grant*, [2009] 2 S.C.R. 353, ¶ 128 (Can.) (“The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible.”). However, one might criticize the Court for continuing to reason along such deterrent-based lines, while nonetheless professing that “the concern of this inquiry is not to punish the police or to deter *Charter* breaches.” *Id.* ¶ 73.).

Clearly if the “fruits” of unlawful wiretaps or bugs may be used to convict a person, then there would be no incentive for law enforcement officials to refrain from secretly wiretapping or bugging private places without probable cause or judicial authorization due to the derivative usefulness of this investigative tool.¹²⁰

Deterrence theory requires exclusionary rules that help to shape police conduct toward more lawful, constitutional standards. Such rules will be more effective if all tainted evidence (both direct and derivative) is excluded after a rights breach.

In contrast, if an exclusionary rule is based on a dissociation rationale, then courts might be more willing to admit *derivative* evidence, since they could point to the exclusion of tainted *primary* evidence as their means of distancing themselves from a rights breach (at least in cases where a given rights breach generates both primary and derivative evidence). The same could be said in respect of exclusionary rules that are predicated on compensation and vindication rationales: as long as some evidence that was obtained directly as a result of a rights breach is excluded, then the accused will have been partially compensated, and the relevant right will have been partially vindicated, regardless of the fact that other derivative evidence that flows from the rights breach is admitted against the accused. However, compensation, vindication, and dissociation rationales would all favor the exclusion of tainted derivative evidence more strongly in cases where rights breaches do not immediately generate any primary evidence (only information or leads), but the breaches eventually generate derivative evidence. This would be so because such cases would leave courts in situations where the only ways to vindicate rights, compensate accused persons, and avoid condoning breaches would be through exclusion of the relevant derivative evidence.

None of the recognized countervailing factors discussed above in Part I would have a particularly strong influence on the derivative evidence question. Public safety, efficiency, proportionality, and epistemic problems with exclusion do not change depending on the direct or indirect nature of the evidence in issue.

As the above discussion demonstrates, the exclusion of tainted derivative evidence can be easily justified according to deterrence theory, but less easily justified under dissociation, vindication and compensation theories. The derivative evidence doctrine will tend not to be affected by general countervailing arguments against exclusion.

120. Stephen C. Thaman, “Fruits of the Poisonous Tree” in *Comparative Law*, 16 SW. J. INT’L LAW 333, 380 (2010).

3. *The Hypothetical Clean Path and Inevitable Discovery Doctrines*

The “inevitable discovery” doctrine and the “hypothetical clean path” doctrine are somewhat similar, but the latter doctrine arguably subsumes the former. According to the inevitable discovery doctrine, derivative evidence that is obtained in a manner that breaches a suspect’s rights, but that *would* inevitably have been discovered in a lawful manner, is admissible.¹²¹ According to the hypothetical clean path doctrine, “relevant evidence should not be excluded because of a mere ‘technical fault’, if the evidence *could* otherwise have been discovered by legal means.”¹²² Thus, the inevitable discovery doctrine essentially requires a positive finding (on a balance of probabilities or preponderance of evidence standard)¹²³ that the State would have collected the incriminating evidence irrespective of the rights breach, while the hypothetical clean path doctrine merely requires proof that the evidence could have been collected lawfully.

As noted in the previous section, American law recognizes an exception to the exclusionary rule for cases where the incriminating evidence would have been discovered in any event.¹²⁴ German law tends to follow the hypothetical clean path doctrine, and, “although the ‘hypothetical clean path’-approach has been criticized. . . it is still predominant in case law.”¹²⁵ Canadian law has recognized that the independent discoverability of tainted evidence has some role to play in exclusionary decisions, but it is not a dispositive factor.¹²⁶ In many jurisdictions, such as Greece, any hypothetical scenarios posited by the

121. For the origins of this doctrine in American law, see *Nix v. Williams*, 467 U.S. 431, 447 (1984) (“[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.”).

122. Gless, *supra* note 81, at 123 (emphasis added).

123. *Nix*, 467 U.S. 444, (“If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.”).

124. Thaman, *Police Lawlessness*, *supra* note 118, at 695–96.

125. Gless, *supra* note 81, at 123 (footnote omitted).

126. *R. v. Grant*, [2009] 2 S.C.R. 353, ¶ 122 (Can.) Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. . . . The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused’s underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

R. v. Grant, [2009] 2 S.C.R. 353, ¶ 122 (Can.).

State cannot redeem a rights breach that takes place during an unlawful search.¹²⁷

These doctrines dealing with hypothetical clean paths to otherwise-tainted evidence—regardless of the level of speculation that is involved in findings about whether the evidence could or would have been discovered—are conceptually problematic. Consider, for instance, how the doctrine might be justified from a deterrence-based perspective. On the one hand, the fact that police could have obtained a search warrant but chose not to do so could be viewed as a factor that reduces the level of state misconduct in a given case. After all, the State’s conduct in such cases would not, in all circumstances, have been impermissible (as contrasted with a case wherein police officers conduct a warrantless search when no ground for a warrant existed in the first place).¹²⁸ This line of reasoning appears to be in play in those jurisdictions that recognize a hypothetical clean path doctrine,¹²⁹ and it implies that police cannot be deterred by the exclusion of evidence that could have been admitted through some other means. However, on the other hand, many cases wherein police breach a suspect’s rights in order to collect evidence that could otherwise lawfully have been obtained will cry out for deterrence.¹³⁰ What message is sent to police when courts allow these officials to (at worst) deliberately choose a tainted path over a clean path to evidence, or to (at best) neglect any exploration of other lawful possible sources to the evidence? Many hypothetical clean path decisions to admit evidence will likely provide police with incentives to breach rights rather than serve as deterrents against such breaches.¹³¹

127. Article 19(3) of the *Constitution of Greece* provides for an absolute exclusionary rule. See *supra* note 100 and accompanying text.

128. For a discussion along these lines, see *R. v. Stillman*, [1997] 1 S.C.R. 607, ¶¶. 103–04 (Can.).

129. Such as the United States and Germany. See *supra* notes 124 and 125, respectively.

130. This reality was noted by the Supreme Court of Canada in *R. v. Collins*, [1987] 1 S.C.R. 265, ¶ 38 (Can.):

[T]he availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tend to render the *Charter* violation more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the *Charter*, which is a factor supporting the exclusion of the evidence.”

131. This is the conclusion that is reached in Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221, 1238 (1987) (“The inevitable discovery rule already is overbroad. Applying it to primary evidence completely undermines the deterrent effect of the exclusionary rule.”).

The same flaws with the hypothetical clean path doctrine make it difficult to justify from dissociation, vindication, and compensation perspectives. If a rights breach is no less culpable simply because another line of investigation could have generated the same evidence without a rights breach (setting aside the question of whether such a rights breach is *more* culpable), then courts must still dissociate themselves from these culpable rights breaches by excluding evidence, even where a hypothetical clean path to the evidence existed. Similarly, vindication theory suggests that exclusion is appropriate even in hypothetical clean path cases, since the culpability of the breach and the need to vindicate the affected right remain the same regardless of what other paths police might have chosen to obtain the evidence. Finally, from an accused-centric compensation perspective, it would be difficult to justify the denial of compensation (through exclusion) to an accused person whose rights were breached by state agents who had other investigative options that would not have involved rights breaches, while offering compensation to other accused persons whose rights are violated by police because no other investigative options existed. If a rights breach demands compensation, then extraneous factors such as what other courses of action the police might have pursued should not cause compensation to be withheld from an accused.

Again, as with derivative evidence, recognized countervailing factors against exclusion do not carry more or less weight in the context of the hypothetical clean path doctrine. Public safety concerns remain the same regardless of the path that is chosen to obtain a particular piece of evidence, just as epistemic, proportionality, and efficiency concerns would all remain the same.

On the whole, one is left wondering why the hypothetical clean path doctrine has found its way into so many exclusionary rules.¹³² The doctrine cannot easily be explained on the basis of commonly accepted exclusionary principles.

C. Factors (other than Evidence-Related Ones) Influencing Exclusion

In addition to evidence-related factors that often weigh in exclusionary decisions, a number of additional factors that are not so clearly related to the impugned evidence have also become part of many exclusionary rules throughout the world. This section will examine two of these factors: the good faith factor and the seriousness of the offense factor.

132. See *supra* notes 124–126 and accompanying text.

1. *The Good Faith Factor*

Since at least 1984, American exclusionary case law has consistently held that evidence should not be excluded if it was obtained by police officers who acted in good faith under authority of a search warrant that was subsequently found by a court to be deficient or invalid.¹³³ This good faith exception to the exclusionary rule is justified within American jurisprudence, as is the exclusionary rule itself, in the language of deterrence: when a police officer acts on the authority of an apparently valid warrant, “there is no police illegality and thus nothing to deter. Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations,”¹³⁴ so the exclusionary rule will not apply in such cases.

In New Zealand¹³⁵ and Canada,¹³⁶ the good faith of a state official who improperly obtains evidence is merely one factor among many that is considered by judges in exclusionary decisions. Similarly, in Israel, a court must “examine whether the law enforcement authorities made use of the improper investigation methods intentionally and deliberately or in good faith,”¹³⁷ but, as in Canada and New Zealand,¹³⁸ the presence or absence of good faith is not dispositive of matter: “the fact that the authority acted in good faith does not necessarily prevent the evidence being excluded when this is required in order to protect the right of the accused to a fair criminal trial.”¹³⁹

In Scotland, case law seems inconsistent in how it treats the good faith doctrine: “acting under an illegal warrant (or without a warrant at all) has been excused in some cases, but exceeding the terms of a warrant has been held—despite the police officers’ good faith—to be inexcusable in others.”¹⁴⁰ No judicial test in Scotland has established that good faith should be considered in making exclusionary decisions, but a “leading text on the Scots law of

133. *See generally* United States v. Leon, 468 U.S. 897 (1984).

134. *Id.* at 920–21.

135. *See* Evidence Act 2006, § 30(3)(a)–(h) (N.Z.) (stating that where seriousness of the intrusion upon a right and impropriety done in bad faith are two of the listed factors, a court “may, among other matters” consider in deciding whether to exclude evidence).

136. *See* R. v. Grant, [2009] 2 S.C.R. 353, ¶ 75 (Can.) (indicating that good faith reduces the need for judicial dissociation through exclusion of evidence).

137. Issacharov v. Chief Military Prosecutor, Criminal Appeal 5121/98 [2006], ¶ 70 (Isr.).

138. *See supra* notes 135–136 and accompanying text.

139. *Id.*

140. Findlay Stark & Fiona Leverick, *Scotland: A Plea for Consistency*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 69, 77–78 (Stephen C. Thaman ed., 2013).

evidence”¹⁴¹ lists “good faith of those who obtained the evidence”¹⁴² as a factor that must be considered by the courts.

In Belgium, the good faith doctrine appears to be more relevant to police disciplinary hearings than to the actual criminal trial of an accused person who was the victim of a rights breach:

the intentional nature of the illegality committed by the authorities can certainly play an important and even decisive role in any potential disciplinary or criminal proceedings against the officials involved, but it is not clear that this fact should also play a role in the decision of the criminal courts whether or not to accept the evidence in question in the original criminal proceedings.¹⁴³

However, as the above passage demonstrates, Belgian courts may actually be looking at bad faith by the police (intentional illegality) more than good faith, and this is not unique to Belgium. In Taiwan, for instance, section 158-4 of the *Code of Criminal Procedure*¹⁴⁴ -which creates the Taiwanese exclusionary rule¹⁴⁵-has been interpreted by the Supreme Court as requiring courts to consider “the good or bad faith of the officer when violating the law” as one of eight factors that might influence the exclusionary decision.¹⁴⁶

The good faith doctrine is complicated in many jurisdictions by somewhat loose and ambiguous language among scholars and judges when referring to the conduct of police, as Steve Coughlan has observed in a Canadian context.¹⁴⁷ What exactly does “good faith” mean? Is it merely the absence of bad faith, or is it behavior that is “so exculpatory of [police] motives as to override any other considerations about seriousness [of the rights breach]”?¹⁴⁸ With respect to Israeli case law, Binyamin Blum has similarly noted that, between the obvious

141. *Id.* at 72. Stark and Leverick, however, suggest that this authority is somewhat misleading, in that good faith is probably only a factor that *may* be considered by courts, rather than one that *must* be considered.

142. *Id.*

143. Beernaert & Traest, *supra* note 72, at 168.

144. 刑事訴訟法 [The Code of Criminal Procedure] §158-4 (February 6, 2003) (Taiwan), translated by LAWBank, <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp> (last visited May 20, 2015). (“The admissibility of the evidence, obtained in violation of the procedure prescribed by the law by an official in execution of criminal procedure, shall be determined by balancing the protection of human rights and the preservation of public interests, unless otherwise provided by law.”).

145. *Id.*

146. Jaw-Perng Wang, *Taiwan: The Codification of a Judicially-Made Discretionary Exclusionary Rule*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 355, 356–57 (Stephen C. Thaman ed., 2013).

147. See generally Steve Coughlan, *Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology*, 15 CANADIAN CRIM. L. REV. 195 (2011).

148. *Id.* at 199.

extremes of “intentionally and knowingly violating the law on the one hand, and doing so in good faith on the other,” lie a range of police behaviors that courts are less quick to characterize.¹⁴⁹

In response to this definitional problem, Coughlan proposes a three-category approach to the good faith doctrine: a label of “bad faith” should be reserved for cases wherein police deliberately or knowingly breach fundamental rights;¹⁵⁰ a label of “good faith” should be reserved for cases wherein police reasonably believe that they are complying with the law (such as when police follow a valid law that is subsequently struck down upon judicial review);¹⁵¹ and, a neutral assessment that neither good nor bad faith is present should apply to all other cases (such as cases where police act in an environment of legal uncertainty, where they subjectively believe they are complying with the law, but cannot objectively justify their beliefs, or where police are unreasonable or negligent in their efforts to ascertain and comply with the law).¹⁵² Coughlan proposes that true bad faith should always lead to exclusion, true good faith should virtually always rule out exclusion, and, for the vast majority of cases, neutral conduct that cannot clearly be identified as either good or bad faith should have significantly less impact on exclusionary decisions.¹⁵³

Clearly there are many different ways to incorporate the good faith doctrine into an exclusionary rule. An exception that forecloses application of an exclusionary rule whenever the police act in good faith is defensible in terms of deterrence. Since one probably can never deter true accidents,¹⁵⁴ it would be futile to apply an exclusionary remedy as a means of deterring something that cannot be deterred. Similarly, dissociation and condonation theories will seldom demand that exclusion be available as a remedy in cases of good faith rights breaches, since the courts do not necessarily need to dissociate themselves from mere accidental (non-blameworthy) misconduct on the part of other state actors.

The same good faith doctrine, however, would be problematic if elements of vindication or compensation theory also formed part of the underpinning of an exclusionary rule: an accused person whose rights are breached by an officer

149. Binyamin Blum, “Exclude Evidence, You Exclude Justice”? A Critical Evaluation of Israel’s Exclusionary Rule After *Issacharov*, 16 SW. J. INT’L LAW 385, 419 (2010).

150. Coughlan, *supra* note 147, at 204–05.

151. *Id.* at 207.

152. *Id.* at 204–05.

153. *Id.* at 199–200.

154. The argument that deterrence of undesirable outcomes that are caused in the absence of moral fault and in the context of non-“useless” activities will be difficult or near impossible to achieve is effectively made in Guido Calabresi, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs*, 78 HARV. L. REV. 713, 718–20 (1965).

acting in good faith is arguably no less deserving of compensation than one whose rights are breached by an officer acting in neutral or bad faith, since the accused persons have essentially suffered the same harm in all cases, regardless of the police officers' knowledge or motives in perpetuating rights breaches. Similarly, vindication theory suggests that, if rights are truly to have meaning, then they must be vindicated whenever they are breached (even by officers acting in good faith) rather than just when they are most deliberately or flagrantly breached.¹⁵⁵

As the above discussion demonstrates, and keeping in mind that vindication and compensation theory could justifiably form part of the basis of any exclusionary rule, there is no principled reason why exclusion should automatically be unavailable to an accused person just because that person's rights have been breached by a state official who acted in good faith. While certain countervailing factors might militate in favor of admission of tainted evidence in cases of good faith rights breaches, a calculation that weighs the benefits of exclusion (in terms of vindication and compensation) against the harms of exclusion (in terms of public safety, efficiency, epistemic, and particularly proportionality concerns) should be undertaken on a case by case basis if an exclusionary rule is to remain defensible as a matter of principle. Blanket exceptions to an exclusionary rule for good faith mistakes by police will tend to undermine the logical coherence of a rule.

2. *Seriousness of the Offense as an Exclusionary Factor*

The central debate regarding seriousness of the offense as an exclusionary factor is whether exclusionary remedies should be more or less available to those charged with serious offenses, or, expressed in other terms, whether the social costs and benefits of excluding evidence in a serious offense case are appreciably different from those in a less serious offense case.¹⁵⁶

In some countries, the seriousness of the offense with which an accused is charged is explicitly considered as a factor weighing against application of an exclusionary rule. This is the case in New Zealand, for instance, where section 30(3)(d) of the *Evidence Act, 2006*, lists "the seriousness of the offence with which the defendant is charged" as one factor to be considered among others,¹⁵⁷

155. See *supra* notes 49–51 and accompanying text.

156. For an introduction to some of the issues and data involved in this debate, see Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. OF CRIM. L. 341, 351–53 (2012).

157. Evidence Act 2006, *supra* note 135, § 30(3)(d).

and where case law has established that this factor militates in favor of admission of improperly obtained evidence.¹⁵⁸

In other jurisdictions, the applicability of the seriousness of the offense doctrine is less clear. In Canada, for instance, the SCC initially made the following observation in *R. v. Grant*:¹⁵⁹

[W]hile the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. [...] While the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.¹⁶⁰

These comments seem to suggest that the seriousness of the offense will be a neutral factor, since it weighs simultaneously in favor of both admission and exclusion. However, in the SCC's subsequent *R. v. Côté* decision wherein the SCC reiterated that seriousness of the offense can "cut both ways,"¹⁶¹ the Court perhaps hinted at how it actually views this factor by saying that the seriousness of the offense "will not always weigh in favour of admission."¹⁶² These words suggest that in proceedings on charges for relatively serious offenses, tainted evidence will tend to, but will not necessarily, be admitted.¹⁶³ Ultimately, however, the SCC upheld the trial judge's decision to exclude evidence in spite of the seriousness of the charge in *Côté*, and restored the acquittal that was entered at trial.¹⁶⁴ Thus, the SCC's thinking on seriousness of the offense remains ambiguous.

In Taiwan, similar dissonance between the theory and practice of exclusion is apparent. Section 158-4 of the *Code of Criminal Procedure*¹⁶⁵ has been

158. See *R v Williams* 3 N.Z.L.R. 207 (2007), ¶¶ 245–51 (N.Z.), for an excellent summary by the Court of Appeal on how the legislated exclusionary rule is to be applied in New Zealand. Note that the more recent Supreme Court decision, *Hamed v R* 2 N.Z.L.R. 305 (2012) (N.Z.), may have displaced the earlier Court of Appeal framework for applying the exclusionary rule with a vague, unguided discretionary approach to exclusion. Whether the *Hamed* decision will complement or replace the *Williams* framework in future cases remains to be seen. For an insightful case comment on the *Hamed* decision, see Scott Optican, *Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's Approach to S. 30 of the Evidence Act 2006*, 2012 N.Z. L. REV. 605 (2012).

159. *R. v. Grant*, [2009] 2 S.C.R. 353 (Can.).

160. *Id.* ¶ 84.

161. *R. v. Côté*, [2011] S.C.J. 46, ¶ 53 (Can.).

162. *Id.*

163. In practice, this hypothesis seems to be borne out by the statistics. See, e.g., Madden, *Marshalling the Data*, *supra* note 6, at 245 tbl.6 (noting that guns—presumably a form of evidence associated with more serious charges—tend to be admitted much more often than other forms of physical evidence).

164. [2011] S.C.J. No. 46, ¶¶ 89–90 (Can.).

165. Taiwan Code of Criminal Procedure, *supra* note 144.

interpreted by the Taiwanese Supreme Court as requiring courts to consider “the gravity of the charged offence and the harm it caused” as one of eight factors in a balancing calculus.¹⁶⁶ However, one commentator has observed that, “in practice, courts tend not to exclude evidence in cases involving very serious offences, such as murder or rape. Guns are also unlikely to be excluded by many courts.”¹⁶⁷ This observation suggests that, while seriousness of the charge is purportedly just one among many co-equal factors, it may actually be the driving factor in Taiwanese exclusionary decisions.

There are persuasive reasons both for and against using a sliding scale of exclusion depending on the seriousness of the offense, perhaps best explained by commentators from Belgium:

On the one hand, it is understandable that the extreme seriousness of an offence committed by the accused could go against excluding an illegally obtained piece of evidence where the act in question only involved a “minor” illegality. But on the other hand, we could just as easily argue that a guilty verdict involving a particularly serious offence will typically bring with it a very heavy punishment and it is therefore particularly important that the verdict be the result of a procedure conducted in conformity with existing law. There exists a paradox in saying that the rule governing admissibility of evidence in cases involving a serious offence should be more flexible than those which apply in the trial of less serious offences with lesser punishments.¹⁶⁸

In order to ascertain how this paradox can best be addressed through a principled exclusionary rule, one must consider both the bases for exclusion and the countervailing considerations identified in Part I.

Consideration of the seriousness of an offense is not particularly useful if a given exclusionary rule is grounded in either vindication or compensation theory. Since these rationales for exclusion are mostly accused-centric,¹⁶⁹ the necessity of excluding evidence in the case of a particular rights breach (considered objectively from the accused’s perspective) will be the same regardless of the offense with which the accused is charged. Similarly, the need for courts to dissociate themselves from rights breaches by actors within other branches of government will tend to be the same regardless of the offense with which an accused is charged: admitting evidence that was collected through a given rights breach would logically lead to exactly the same degree of judicial condonation in both a prosecution for shoplifting and a prosecution for aggravated sexual assault, because condonation theory is concerned only with

166. Wang, *supra* note 146, at 356–57.

167. *Id.* at 357.

168. Beernaert & Traest, *supra* note 72, at 168.

169. *Supra* notes 47–52 and accompanying text.

the relationship between the courts and the police, rather than with any actions of the accused.¹⁷⁰

The only rationale for exclusion that might require consideration of the seriousness of the offense doctrine is the deterrence rationale. As discussed in Part I, the deterrence rationale is based in part on the assumption that police and other state agents involved in the criminal process care enough about exclusionary outcomes as to shape their conduct in ways that are less likely to result in rights breaches and the exclusion of tainted evidence.¹⁷¹ If it is accepted that police dislike outcomes involving exclusion and failed prosecutions, then one could reasonably hypothesize that the level of police concern and interest in exclusionary outcomes is proportional to the seriousness of the offense—that is, police are not very concerned about exclusionary decisions in minor cases, but are quite concerned in major cases. If this hypothesis is correct, then the seriousness of the offense doctrine is highly relevant to a deterrence-based exclusionary rule. Courts will be able to achieve a greater degree of deterrence when they exclude tainted evidence in serious offense cases as compared to minor offense cases, as exclusionary rulings will shape police conduct away from rights breaches both more efficiently and effectively.

As the above discussion demonstrates, the seriousness of the offense doctrine is probably irrelevant to exclusionary rules that are grounded in compensation, vindication, or dissociation theory. However, when the impact of the doctrine on a deterrence-based exclusionary rule is considered, it appears that exclusion should result more frequently in cases involving serious offenses. This conclusion is somewhat surprising, given that several of the exclusionary rules surveyed in this section (including rules from New Zealand,¹⁷² Taiwan,¹⁷³ and perhaps Canada¹⁷⁴) would all favor admission—not exclusion—of tainted evidence in cases where the underlying offense is serious.

The dissonance between theory and reality in the context of the seriousness of the offense doctrine might be due to the fact that countervailing factors militating against exclusion, such as public safety and proportionality concerns, are significantly more powerful in cases involving serious offenses. Public safety is at much greater risk when an individual charged with a serious offense escapes prosecution on a technicality than when a petty criminal is set free. The consequences of exclusion are also tilted disproportionately in favor of an

170. *Supra* notes 28–32 and accompanying text.

171. *Supra* notes 23–27 and accompanying text.

172. *Supra* note 158 and accompanying text.

173. *Supra* notes 165–167 and accompanying text.

174. *Supra* notes 159–164 and accompanying text.

accused person and against society when the accused who is charged with a very serious offense avoids a trial on the merits after successfully having tainted evidence excluded.

Thus, while seriousness of the offense might be a relevant consideration in many jurisdictions, the way in which the doctrine has been integrated into existing exclusionary rules has either been ill-considered, or ill-explained. When deterrence theory suggests that exclusion is more important in serious offense cases, but domestic legislation and jurisprudence favors admission of tainted evidence in serious offense cases, some explanation as to the cause of the dissonance is arguably required. If courts deem that tainted evidence must be admitted in these cases due to proportionality and public safety considerations, then their decisions, and the overall coherence of their exclusionary rules, would be strengthened by a straightforward explanation of this reality. In the absence of any such explanation, many exclusionary rules continue to exist on bases that are weak and unprincipled.

III.

A DETAILED PROPOSAL FOR A MODEL EXCLUSIONARY RULE

The final Part of this Article will propose a model exclusionary rule, and explain how it should be interpreted and applied. The goal in this Part is to discuss the different principles and doctrines that could form part of an exclusionary rule in order to explain how these doctrines should or should not be incorporated into a model rule.

As Part I demonstrated, any exclusionary rule should attempt to balance policy objectives against societal costs. Simply stated, if the preceding argument within this Article is accepted then an exclusionary rule should lead to exclusion whenever exclusion will advance objectives of deterrence, dissociation, vindication or compensation, and the gains that exclusion will bring in one or more of these areas is larger than any social costs of exclusion in terms of public safety, efficiency, proportionality, or epistemic sacrifices or risks. A model rule should not use a bright-line approach to categorically exclude evidence when certain criteria are met, but then admit evidence when other criteria are met, since this type of rule would not allow for the kind of case-by-case weighting of factors in favor of and against exclusion that a nuanced and principled exclusionary rule demands.

To say that a model exclusionary test must be flexible, and must always balance the benefits of exclusion in terms of deterrence, dissociation, compensation and vindication against the harms of exclusion in terms of public safety, efficiency, proportionality, and epistemic losses, is not to say that the test cannot include guidance to litigants and judges about how certain doctrines or

classes of cases will generally need to fit within the rule. It will therefore be helpful to review how some of the frequently encountered exclusionary doctrines discussed in Part II might factor into a model exclusionary rule.

The identity doctrine often operates to bar exclusion as a remedy in cases where rights are breached or disrespected by private actors instead of state agents.¹⁷⁵ The doctrine can, to a certain extent, be justified if an exclusionary rule only seeks to deter future rights breaches, but the doctrine would undermine any exclusionary rule that seeks to achieve dissociation, vindication, or compensation. Furthermore, none of the countervailing factors against exclusion depend on the identity of the individual who collects the evidence: no matter who collects tainted evidence, the calculation of benefits and harms of exclusion will not significantly depend on the identity of the transgressor. Thus, the overall balance of considerations indicates that the identity doctrine should form no part of a model exclusionary rule.

The standing doctrine often dictates that exclusion will not be available as a remedy except in cases where the accused's own rights are breached, rather than when a third party's rights are breached.¹⁷⁶ The deterrent effect of a rule will be stronger if the rule applies to the full range of police and state interactions with the population, not only to those interactions involving a small set of accused persons. Similarly, the need for courts to dissociate themselves from misconduct by evidence collectors is just as strong in the case of a third-party rights breach as in the case of a rights breach against the accused. Finally, although a third party receives no direct compensation from evidence being excluded, it is still possible for their rights to be vindicated when a State or society is deprived of evidence as a result of the rights breach, since this kind of exclusion expresses a measure of the importance of the right, and of the sacrifices that society is willing to accept in order to give meaning to fundamental rights. Thus, the collective of rationales for exclusion all suggest that a strict standing requirement should not form part of a model exclusionary rule. Furthermore, as with the identity requirement, no countervailing rationale against exclusion operates more persuasively in cases of third-party rights breaches than in cases where the accused's own rights are breached. Thus, the abandonment of any strict standing requirement within a model exclusionary rule would be salutary.

The importance of the evidence doctrine is equally difficult to incorporate into a principled exclusionary rule. This doctrine suggests that evidence should be excluded less frequently when it has special importance or centrality to the prosecution's case.¹⁷⁷ However, applying the doctrine cannot help to advance

175. *Supra* notes 62–67 and accompanying text.

176. *Supra* notes 78–83 and accompanying text.

177. *Supra* notes 89–96 and accompanying text.

any dissociation, vindication or compensation goals of exclusion, and likely hinders the deterrent goal by admitting tainted evidence in a way that encourages future breaches by evidence collectors. No compelling public safety or efficiency arguments can be made against exclusion simply because of the importance of the evidence. However, there is room to argue that exclusion of central evidence would destroy the epistemic purpose of a trial, and that it would be a disproportionate remedy. Based on the fact that the doctrine cannot be justified on the basis of a known rationale for exclusion, the centrality of the evidence doctrine should not often form part of a model exclusionary rule. Nonetheless, in extreme cases, it is *possible* that the harm of excluding very important evidence in terms of epistemic or proportionality concerns would outweigh the benefits of exclusion. It is therefore conceivable that the centrality of the evidence doctrine would occasionally play a relevant role in exclusionary calculations.

The derivative evidence question asks whether an exclusionary rule should operate to exclude both evidence that was collected directly in connection with a rights breach, and evidence collected indirectly, but still deriving from, a rights breach.¹⁷⁸ The deterrent rationale for exclusion suggests that derivative evidence should be subject to an exclusionary rule, but other rationales for exclusion offer less clear answers: so long as some direct evidence is excluded, then a measure of dissociation, vindication and compensation will be achieved in respect of a rights breach, even if derivative evidence is admitted. Depending on the case, it might also be necessary to exclude derivative evidence if the exclusion of only directly tainted evidence is insufficient to achieve the objectives of an exclusionary rule, but this may not follow if countervailing factors against exclusion in a given case are strong. Thus, a principle-based exclusionary rule would extend the rule's reach to derivative evidence as a general matter, but would apply the same basic balancing test that is proposed in this Part to determine whether exclusion is required on the facts of a particular case.

The hypothetical clean path doctrine provides that tainted evidence can be admitted if police could, hypothetically, have obtained the same evidence by some other means that would not have led to a rights breach.¹⁷⁹ If one accepts that a rights breach is even more egregious when the breach was likely unnecessary in order to obtain the evidence, then the hypothetical clean path doctrine would undermine all of the recognized rationales for exclusion. Furthermore, no countervailing argument against exclusion is any more persuasive in cases where a hypothetical clean path to the tainted evidence

178. See generally JSD Thesis, *supra* note 108.

179. *Supra* notes 121–129 and accompanying text.

existed. Consequently, the hypothetical clean path doctrine should not form part of a model exclusionary rule.

The good faith doctrine often operates to allow tainted evidence to be admitted in cases where a right was breached in good faith by the state.¹⁸⁰ This doctrine is justifiable on the basis of deterrence and dissociation theories, in that good faith mistakes and accidents by police cannot easily be deterred, since they were unintentional from the start, and they do not always necessitate judicial dissociation. However, the doctrine is problematic from vindication and compensation perspectives, since it leaves rights breaches to stand without compensation to the accused, and without meaningful reassertion of the importance of the right. In this sense, a good faith exception to an exclusionary rule would frustrate some objectives of exclusion (vindication and compensation), while other objectives would be impossible to promote through exclusion of evidence obtained through good faith rights breaches. Thus, without yet considering the impact of countervailing factors in a good faith rights breach scenario, the good faith exception could be justifiable in cases where vindication and compensation for a rights breach have already been achieved or could otherwise be achieved through some other means, such as a domestic tort or public damages remedy. Exclusion would nonetheless be necessary in cases where it is the only way to vindicate a right and compensate the accused. In terms of countervailing factors, proportionality concerns would favor a good faith exception within a model exclusionary rule, since the harm of a good faith rights breach—while perhaps substantial to an accused—is somewhat reduced from a societal perspective, and therefore may call for a less drastic remedy than exclusion in many trials. As this discussion demonstrates, the good faith exception should sometimes play a role in balancing the benefits and harms of exclusion as part of a model exclusionary rule.

The seriousness of the offense doctrine suggests that evidence should be excluded less frequently in cases where the accused is charged with a particularly serious offense.¹⁸¹ However, when this doctrine is examined from a principled perspective, it is apparent that it cannot be justified on dissociation, vindication, or compensation grounds. On deterrent grounds, it generates an outcome (admission of tainted evidence) that likely undermines rather than strengthens the deterrent effect of the basic rule. While a few persuasive public safety and proportionality arguments could be advanced against exclusion in cases of serious offenses, the overall dissonance within exclusionary theory that this doctrine would create suggests that the seriousness of the offense doctrine should not form part of a model exclusionary rule.

180. *Supra* note 133 and accompanying text.

181. *Supra* notes 156–159 and accompanying text.

In summary, an application of the basic exclusionary test that is proposed within this Article to different classes of cases or exclusionary doctrines reveals that some accepted doctrines should clearly form part of a model exclusionary rule, some should clearly not form part of the rule, and some doctrines should contextually influence the outcome of exclusionary decisions in certain types of cases, but not others.

CONCLUSION

The forgoing examination of the rationales for exclusion, the countervailing arguments against exclusion, and the most common exclusionary doctrines from around the world shed light on how a more sophisticated approach to the exclusion of tainted evidence could develop. By understanding the theory upon which this Article is grounded, one can also see how many exclusionary rules fail to achieve their stated or implied purposes, and how a model exclusionary rule could avoid the same pitfalls by adhering to the principles set forth in this Article.

The basic test proposed within this Article is that evidence obtained through a rights breach should be excluded whenever exclusion will advance objectives of deterrence, dissociation, vindication or compensation, and the gains that exclusion will bring in one or more of these areas are larger than any social costs of exclusion in terms of public safety, efficiency, proportionality, or epistemic sacrifices or risks. This test can be applied to any known or new class of evidence, and any aspect of an exclusionary doctrine borrowed from another jurisdiction, because it is simple and based on easily understood principles of exclusion. Over time, it should lead to predictable and logical results, and it lends itself well to judicial justifications for exclusionary decisions. In short, the test proposed within this Article offers courts a solution to common problems of exclusionary uncertainty and lack of principle by offering judges a model rule upon which they can base future development of their own exclusionary rules.

The World Bank Group's Human Rights Obligations

Under the United Nations Guiding Principles on Business and Human Rights

Meghan Natenson*

ABSTRACT

The United Nations Human Rights Council unanimously adopted the *Guiding Principles on Business and Human Rights* (the Guiding Principles) on June 16, 2011. The Guiding Principles set forth three general principles: (1) States have a duty to protect against human rights abuses; (2) business enterprises must respect human rights; and (3) both States and business enterprises have an obligation to establish access to effective remedy for those harmed by businesses. Although the Guiding Principles are broad, applying “to all States and to all business enterprises,” the State and business enterprise binary makes it difficult to apply to the World Bank Group, an international financial institution with characteristics of both a State and a business enterprise. As such, the World Bank Group's human rights obligations under the Guiding Principles are unsettled. This paper argues that, despite its State-like features, the World Bank Group should be considered a business enterprise.

Under the Guiding Principles, the World Bank Group is obligated to establish sufficient access to effective non-judicial remedies for those harmed by the projects that it funds. The World Bank Group currently offers two mechanisms—the Inspection Panel, covering the World Bank Group's public sector lending, and the Compliance Advisor Ombudsman (CAO), covering its private sector lending. This paper evaluates both of these mechanisms under the effectiveness criteria established in Guiding Principle 31. It concludes that, although there are significant aspects of the mechanisms that do not meet the standards of Guiding Principle 31, these mechanisms provide access to an

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important, and in some instances the only, remedy to people harmed by one of the world's largest international financial institutions.

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INTRODUCTION

The United Nations *Guiding Principles on Business and Human Rights* (the Guiding Principles), the leading structure for understanding business-related human rights responsibilities, divides human rights obligations between States and business enterprises. International financial institutions, such as the World Bank Group, are not easily categorized as either a State or a business enterprise. Although categorization is important in identifying the human rights obligations of the World Bank Group, its status is still unsettled. But regardless of whether the World Bank Group is a State or a business enterprise, it has the duty to provide access to an effective remedy under the Guiding Principles. This Note examines whether the World Bank Group should be recognized as a State or a business enterprise and evaluates the effectiveness of its two accountability mechanisms.

Section I provides an overview of the World Bank Group's mandate and a description of each institution that makes up the World Bank Group. It also includes an analysis of the scope and scale of the potential human rights impacts of projects funded by the World Bank Group.

Section II analyzes whether the World Bank Group should be considered a State or a business enterprise for the purpose of determining its human rights responsibilities under the Guiding Principles. Section II.A details the "Protect, Respect, and Remedy" Framework and the structure of the Guiding Principles. Section II.B details important characteristics of the World Bank Group and concludes that, despite some State-like features, it should be considered a business enterprise. As such, the World Bank Group has a duty to respect human rights and to provide access to non-judicial mechanisms that can effectively remedy human rights abuses caused by the projects it funds.

Section III evaluates whether the World Bank Group's two independent accountability mechanisms—the Inspection Panel and the Compliance Advisor Ombudsman (CAO)—meet the effectiveness criteria laid out in Guiding Principle 31, which is applicable to both States and business enterprises. This Section finds that these two mechanisms include several features that comply with the effectiveness criteria, and highlights key areas where the mechanisms fail to meet certain criteria. It concludes that, despite many areas that need improvement, the independent accountability mechanisms offer important non-judicial remedies for those harmed by the World Bank Group. These mechanisms are an important, and sometimes the only, means for communities to access any type of remedy for harms caused by World Bank Group-funded projects.

I.

THE WORLD BANK GROUP AND ITS HUMAN RIGHTS IMPACTS

A. *Overview of the World Bank Group*

The World Bank Group is a large international financial institution created to promote international development. It has two goals: (1) to end extreme poverty by decreasing the “percentage of people living on less than \$1.25 per day to no more than [three] percent by 2030,” and (2) to promote shared prosperity by fostering “the welfare and income growth of the bottom [forty] percent of the population in every developing country.”¹ It works to achieve these goals through its five organizations: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).²

The World Bank Group lends to States and business enterprises. IBRD and IDA make up the World Bank Group’s public-sector lending arm and are collectively known as the World Bank.³ IBRD funds development projects in “middle-income countries and creditworthy poorer countries” through loans, guarantees, risk management products, and analytical and advisory services.⁴ IDA provides loans and guarantees to the poorest countries “for programs that boost economic growth, reduce inequalities, and improve people’s living conditions.”⁵

The World Bank Group’s private sector lending arm consists of IFC and MIGA. IFC focuses solely on developing countries, lending to companies and financial institutions, and it has five strategic priorities: (1) “[s]trengthening the focus on frontier markets”; (2) “[a]ddressing climate change and environmental and social sustainability”; (3) “[a]ddressing constraints to private sector growth”; (4) “[d]eveloping local financial markets”; and (5) “[b]uilding long-term client relationships in emerging markets.”⁶ MIGA aims to promote foreign direct investment into developing countries by offering risk insurance, or

1. WORLD BANK, *THE WORLD BANK GROUP A TO Z* xxiii-xxiv (2005), available at <https://openknowledge.worldbank.org/handle/10986/20192>.

2. *About*, WORLD BANK GROUP, <http://www.worldbank.org/en/about> (last visited Apr. 7, 2015).

3. *Id.*

4. WORLD BANK, *THE WORLD BANK GROUP A TO Z*, *supra* note 1, at 86.

5. *Id.* at 86–87.

6. *Id.* at 87.

guarantees, and credit enhancement for investments in those countries.⁷ It covers risks from currency inconvertibility and international transfer restrictions; expropriation losses when governments reduce or remove ownership or control over the investment; and losses resulting from war, terrorism, civil disturbance, breach of contract, and failure of a State or State-owned enterprise to fulfill its financial obligations.⁸

B. The World Bank Group's Human Rights Impacts

The World Bank Group states that it pursues its twin goals of poverty alleviation and the promotion of shared prosperity “in an environmentally, socially, and economically sustainable manner to ensure that development gains do not harm the welfare of current and future generations.”⁹ But the World Bank Group has frequently been criticized for human rights violations and a lack of accountability.¹⁰

Business enterprises can impact almost any internationally recognized human right.¹¹ The business enterprise's particular industry,¹² as well as its “size, sector, operational context, ownership, and structure,”¹³ will influence the scope and scale of its potential human rights violations. In terms of size, the World Bank Group is one of the largest international financial institutions in the world—between July 1, 2013, and June 30, 2014, it provided \$65.6 billion in “loans, grants, equity investments, and guarantees to partner countries and private businesses.”¹⁴ It plans to increase its average annual financing capacity to more than \$70 billion over the next ten years.¹⁵ The World Bank Group's sheer size alone demonstrates its potential to cause large human rights impacts, both positive and negative.

7. *Id.* at 107.

8. *Id.* at 108.

9. *Id.* at xxv.

10. Siobhán McInerney-Lankford, *International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW, DANIEL D. BRADLOW & DAVID B. HUNTER 239, 240 (2010).

11. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Bus. and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Human Rights Council, princ. 18 cmt., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

12. *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

13. *Guiding Principles*, *supra* note 11, at princ. 14.

14. WORLD BANK, ANNUAL REPORT 2014 5 (2014), available at <http://www.worldbank.org/en/about/annual-report>; see also WORLD BANK, THE WORLD BANK GROUP A TO Z, *supra* note 1, at xxvii (reporting that, for fiscal year 2014, IBRD committed over \$18.6 billion; IDA committed over \$22.2 billion; IFC committed over \$17.2 billion; MIGA's gross issuance totaled over \$3.1 million; and Recipient Executed Trust Funds committed over \$4.3 billion).

15. WORLD BANK, ANNUAL REPORT 2014, *supra* note 14, at 13.

The World Bank Group funds projects in a wide variety of sectors: education; agriculture, fishing, and forestry; water, sanitation, and flood protection; transportation; energy and mining; finance; health and other social services; industry and trade; information and communications; and public administration, law, and justice.¹⁶ Many of these sectors, particularly those involving energy and mining projects, require large-scale infrastructure development.¹⁷ Such projects frequently involve environmental harm and long-lasting human rights abuses, such as forced evictions and displacement.¹⁸

Yet, funding infrastructure development projects “represents the World Bank’s largest business line, which at \$19 billion, comprised forty-seven percent of the total assistance to client countries in fiscal year 2014.”¹⁹ As of February 28, 2014, over half of the World Bank’s active projects—including “high and substantial safeguard risk projects”—lacked assigned technical specialists to create appropriate safeguards.²⁰ Given the wide breadth of industries that it invests in, its emphasis on infrastructure development projects, and lack of

16. *Id.* at 32.

17. Amnesty Int’l, *Amnesty International’s Written Statement for the 24th Session of the Human Rights Council (9 to 27 September 2013)*, AI index IOR 41/020/2013 (Sept. 16, 2013).

18. *Id.*; see also Press Release, World Bank, World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems, World Bank Press Release 2015/332/ECR (Mar. 4, 2015) (World Bank Group President Jim Yong Kim stating, “We took a hard look at ourselves on [involuntary] resettlement and what we found caused me deep concern.”).

19. This funding amount only accounts for the lending practices of the IBRD and IDA, which collectively make up the World Bank. It does not account for the activities of the IFC or MIGA, the remaining institutions of the World Bank Group. See WORLD BANK, ANNUAL REPORT 2014, *supra* note 14, at 15.

20. INTERNAL AUDITING DEP’T, WORLD BANK GRP., ADVISORY REVIEW OF THE BANK’S SAFEGUARD RISK MANAGEMENT 2, 30 (June 16, 2014) (draft report), available at <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/3/317401425505124162/iad-draft-report-advisory-review-safeguards-risk-management.pdf> (noting that 1,206 out of 2,355 active projects did not have assigned specialists, including 173 agriculture and rural development projects, 135 energy and mining projects, forty-three transport projects, and thirty-five water projects).

safeguard specialists,²¹ the World Bank Group has the potential to violate “virtually the entire spectrum of internationally recognized human rights.”²²

The risk for significant human rights violations in World Bank Group-sponsored projects is heightened by the projects' operational contexts. The World Bank Group often invests in countries and projects that are unable to access private sector capital.²³ In fact, the IFC's Articles of Agreement prevent it from lending to business enterprises that could have reasonably obtained private sector capital.²⁴ IDA is also prohibited from providing funding where private sector capital is available.²⁵ Similarly, IBRD's Articles of Agreement encourage it to make loans when private sector capital is not reasonably available.²⁶ These countries and industries often lack access to private sector capital because “they present political, social, and environmental challenges that exceed the risk tolerance of private-sector financiers.”²⁷ For instance, corruption is frequently present in these contexts.²⁸ The World Bank Group must manage

21. Although the World Bank announced an action plan on March 4, 2015, to combat this lack of specialists, among many other issues, members of civil society are highly critical of the plan. See Press Release, Accountability Counsel, World Bank Admits Stunning Failures in Resettlement Policy, Proposed Remedy Insufficient, (Mar. 5, 2015) (Natalie Fields, Executive Director of Accountability Counsel, stated that the World Bank's “proposed solutions are utterly inadequate to make up for the vast harm caused by its cavalier accounting of land and livelihoods lost.”); Ben Hallman, *World Bank Admits It Ignored Its Own Rules Designed to Protect the Poor*, HUFFINGTON POST, Mar. 5, 2015, http://www.huffingtonpost.com/2015/03/05/world-bank-resettlement_n_6810208.html (Ted Downing, the president of the International Network on Displacement and Resettlement, stated that the World Bank's press release and action plan were meant “to distract people” from larger issues.).

22. *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

23. Submission to the U.N. Special Representative to the Sec'y Gen. on Human Rights and Transnat'l Corps. and other Bus. Enters., Bank Information Center, *The Roles and Responsibilities of International Financial Institutions with Respect to Human Rights and Their Relevance to the Private-Sector* 3 (Feb. 2007) (by Steven Herz), available at <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Bank-Information-Ctr-submission-to-Ruggie-Feb-2007.pdf> [hereinafter Herz, *Roles and Responsibilities*].

24. Articles of Agreement of the International Finance Corporation, art. III, § 3(i), May 25, 1955, T.I.A.S. No. 3620, *amended* June 27, 2012 [hereinafter IFC Articles of Agreement] (“the Corporation shall not undertake any financing for which in its opinion sufficient private capital could be obtained on reasonable terms”); see also Herz, *Roles and Responsibilities*, *supra* note 23, at 3–4.

25. Articles of Agreement of the International Development Association, art. V, § 1(c), Jan. 26, 1960, 11 U.S.T. 2284 [hereinafter IDA Articles of Agreement] (“The Association shall not provide financing if in its opinion such financing is available from private sources on terms which are reasonable for the recipient or could be provided by a loan of the type made by the Bank.”).

26. Articles of Agreement of the International Bank for Reconstruction and Development, art. I(ii), Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, *amended* Dec. 16, 1965, T.I.A.S. No. 5929 [hereinafter IBRD Articles of Agreement] (“The purposes of the Bank are: (ii) . . . when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.”).

27. Herz, *Roles and Responsibilities*, *supra* note 23, at 4.

28. DANIEL PERLMAN & ANANYA ROY, *THE PRACTICE OF INTERNATIONAL HEALTH: A CASE-BASED ORIENTATION* 168 (2009).

these risks, “seeking to reconcile its [AAA] bond ratings with the enterprise of making loans to countries ‘where one cannot drink the water.’”²⁹

The World Bank Group has “not recognized [its] historical role in promoting corruption by lending large quantities of money to unrepresentative governments that have used the money for personal wealth or to maintain power through war and repression.”³⁰ The World Bank Group’s “substantial skill in maintaining strict financial policies and performing well in purely financial terms has allowed it to act as an intermediary through which the resources of the world’s most conservative investors can be channeled to developing countries for what, under other circumstances, would be considered distinctly risky ventures.”³¹ Thus, the World Bank Group often, if not always, invests in countries and industries that are likely to negatively impact human rights.

In short, the World Bank Group’s institutions are “linchpin financiers and catalysts for ‘high risk-high reward’ development projects, particularly in countries with weak, corrupt, or authoritarian governance.”³² Because of this high-risk operational context, the large size of the World Bank Group, and the wide variety of industries in which it invests, the World Bank Group’s potential human rights impacts are enormous in both scope and scale.³³

II.

HUMAN RIGHTS RESPONSIBILITIES OF THE WORLD BANK GROUP

The World Bank Group maintains a “quasi-sovereign” character, resulting from a combination of business-like and State-like features.³⁴ However, John Ruggie’s “Protect, Respect, and Remedy” Framework and the Guiding Principles divide human rights obligations between States and business enterprises.³⁵ Thus, the determination of whether the World Bank Group is a State or a business enterprise under the Guiding Principles greatly affects its responsibilities toward human rights.

Neither the Framework nor the Guiding Principles explicitly state whether international financial institutions, such as the World Bank Group, are

29. ANANYA ROY, *POVERTY CAPITAL: MICROFINANCE AND THE MAKING OF DEVELOPMENT* 55 (2010).

30. PERLMAN & ROY, *supra* note 28, at 168.

31. MICHELLE MILLER-ADAMS, *THE WORLD BANK: NEW AGENDAS IN A CHANGING WORLD* 25 (1999).

32. Herz, *Roles and Responsibilities*, *supra* note 23, at 4.

33. McInerney-Lankford, *supra* note 10, at 244.

34. See ROY, *supra* note 29, at 55 (using “quasi-sovereign” in the context of capital markets).

35. See *Guiding Principles*, *supra* note 11, at 3.

considered States or business enterprises. Nor are these institutions assigned their own human rights obligations. Consequently, it is necessary to look to the characteristics of the World Bank Group to determine its status under the Guiding Principles. Key characteristics in this determination are the World Bank Group's: (1) ownership and control by States; (2) enjoyment of immunity equal to, or greater than, sovereign immunity; (3) lack of territorial sovereignty; (4) mandate not to engage in political activities; and (5) profit-seeking behavior. Although some of these attributes are State-like, the majority demonstrate that the World Bank Group is more like a business enterprise.

A. *The "Protect, Respect, and Remedy" Framework and the Guiding Principles on Business and Human Rights*

In July 2005, John Ruggie was appointed Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises.³⁶ In this capacity, he developed the "Protect, Respect, and Remedy" Framework for addressing businesses' impacts on human rights, which the United Nations Human Rights Council adopted on April 7, 2008.³⁷ The Framework identified "the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences" as the "root cause" of business-related human rights violations.³⁸

The "Protect, Respect, and Remedy" Framework sets up three principles. First, "States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction."³⁹ Second, businesses have a responsibility to "respect human rights," meaning "do no harm."⁴⁰ Third, both States and businesses have an obligation to provide access to effective remedy.⁴¹ States must provide both judicial and non-judicial mechanisms under this third prong, while business enterprises must only provide non-judicial mechanisms.⁴²

The Framework does not directly address the responsibilities of the World Bank Group, or even international financial institutions in general. However, it recommends that "States, companies, and *the institutions supporting*

36. See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development—Protect, Respect and Remedy: A Framework for Business and Human Rights*, Human Rights Council, 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *Framework*].

37. *Id.*

38. *Id.* ¶ 3.

39. *Id.* ¶ 18.

40. *Id.* ¶¶ 23–24.

41. *Id.* ¶¶ 26, 82.

42. *Id.* ¶ 82.

investments, and those designing arbitration procedures should work towards developing better means to balance investor interest and the needs of host States to discharge their human rights obligations.”⁴³ This recommendation sets up a role for the World Bank Group, as an institution that supports investments, to address the gap between human rights responsibilities of States and profit-seeking interests of investors. But it does not provide specific ways for the World Bank Group to fulfill this role.

On June 16, 2011, the Human Rights Council unanimously endorsed the Guiding Principles,⁴⁴ reaffirming the Framework’s three general principles as: “(a) States’ existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; [and] (c) [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.”⁴⁵ The Guiding Principles “apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”⁴⁶

Under the Guiding Principles, States and business enterprises, at a minimum, must respect all of the human rights reflected in the International Bill of Human Rights and in the International Labour Organization’s *Declaration on Fundamental Principles and Rights at Work*.⁴⁷ However, under certain operational contexts, there may be a need to respect additional rights, such as “the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them.”⁴⁸

The Guiding Principles do not expressly mention international financial institutions, but they do address international organizations on several occasions.⁴⁹ For instance, under Guiding Principle 4, States have an additional

43. *Id.* ¶ 38 (emphasis added).

44. *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights*, UN NEWS CENTRE (June 16, 2011), http://www.un.org/apps/news/story.asp?NewsID=38742#.VHLUV5PF_iI; see also Rpt. of the Working Group on the Issue of Human Rights and Trans’nl Corps. and Other Bus. Enters., 3, Human Rights Council, Rep. on its 26th Sess., U.N. Doc. A/HRC/26/25 (May 5, 2014) [hereinafter HRC Working Group Report].

45. *Framework*, *supra* note 36, at 6.

46. *Id.*

47. *Guiding Principles*, *supra* note 11, at princ. 12.

48. *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

49. Peter T. Muchlinski, *International Finance and Investment and Human Rights*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS LAW 263, 274 (Scott Sheeran & Sir Nigel Rodley eds.,

responsibility to protect against human rights abuses caused by “business enterprises that are owned or controlled by the State, or that receive substantial support from State agencies”⁵⁰ The Commentary finds that “agencies” under this principle can be “linked formally or informally to the State,” including development agencies and development finance institutions.⁵¹ Although the World Bank Group itself does not have any responsibilities under this principle, its member States do. But the World Bank Group is controlled by 188 States, not just one. Thus, the policy rationale for imposing additional responsibility on member States for the World Bank Group's adverse human rights impacts may be weaker than in the case of a regional or national development bank.⁵²

In addition, Guiding Principle 10 recognizes the specific duties of member States of business-related multilateral institutions. Member States have an obligation to ensure that these institutions do not prevent States from fulfilling their duty to protect human rights or prohibit business enterprises from respecting human rights.⁵³ It also requires States to encourage multilateral institutions to (1) promote respect for human rights, and (2) if requested, “help States meet their duty to protect against human rights abuses by business enterprises.”⁵⁴ Therefore, the World Bank Group, as a multilateral institution, may have a duty to help protect human rights, but only if requested by a member State.

Despite the few instances where they acknowledge international organizations, the Guiding Principles “[f]all short of a fuller understanding of the responsibilities of investors and financial institutions.”⁵⁵ The Guiding Principles do “not frame the relationship between investors and the companies [or governments] they invest in as one of complicity.”⁵⁶ Also, “‘financiers’ responsibilities are not discussed in the same breath with value chain responsibility.”⁵⁷

Although the Guiding Principles do not explicitly provide for responsibilities of international institutions, the United Nations Working Group may provide more insight as to why international financial institutions fall under

2014).

50. *Guiding Principles*, *supra* note 11, at princ. 4.

51. *Guiding Principles*, *supra* note 11, at princ. 4 cmt.

52. *Id.* (“[T]he closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.”).

53. *Guiding Principles*, *supra* note 11, at princ. 10(a).

54. *Guiding Principles*, *supra* note 11, at princ. 10(b).

55. Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Process*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION* 32 (Radu Mares ed., 2012).

56. *Id.* at 33.

57. *Id.*

the Guiding Principles. The Human Rights Council established the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group) in June 2011 to promote “the dissemination and effective and comprehensive implementation of all three pillars of the Guiding Principles.”⁵⁸ In particular, in an April 28, 2014 report addendum, the Working Group communicates the importance of international financial institutions and business working together to ensure sufficient access to non-judicial grievance mechanisms.⁵⁹ It highlights that international financial institutions can increase the capacity of borrowers to resolve human rights abuses early on and prevent further harm.⁶⁰ The Working Group’s focus on international financial institutions’ role in providing access to effective remedy implies that such institutions do have responsibilities under the Guiding Principles.

Overall, the Guiding Principles can be read as having implied responsibilities for international financial institutions, including the World Bank Group, under both State and business duties. Although international financial institutions are thought to have a role under the Guiding Principles, the human rights obligations of these institutions are unsettled.⁶¹

B. Important Characteristics of the World Bank Group in Determining Whether It Should Be Considered a State or a Business Enterprise

The World Bank Group is not easily characterized as a State or a business enterprise for the purposes of understanding its human rights obligations under the Guiding Principles. It has features of both a State and a business enterprise. Similar to a State, the World Bank Group is owned by States and enjoys immunity equal to (or greater than) that of sovereign immunity. But, like a business enterprise, it does not have territorial sovereignty, it has a mandate to refrain from engaging in political affairs, and it is profit-seeking. In fact, some of the World Bank Group’s business-like qualities make it incapable of fulfilling

58. HRC Working Group Report, *supra* note 44, at 3, ¶ 3.

59. Rep. of the Working Grp. on the Issue of Human Rights and Transn’l Corps. and Other Bus. Enters., Addendum, Rep. from an Expert Workshop entitled “Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience” Held in Toronto in 2013, ¶ 18, Human Rights Council, 26th Sess., U.N. Doc. A/HRC/26/25/Add.3 (April 28, 2014) [hereinafter HRC Working Group Report Addendum 3] (“For example, international financial institutions are increasing the capacity of borrowers to resolve issues at the project level before they escalate into larger conflicts or cause more harm.”); *id.* ¶ 20(e) (international financial institutions can incentivize “business enterprises to establish or participate in non-judicial grievance mechanisms” by conditioning their borrowers’ access to credit on such participation).

60. *Id.*

61. McInerney-Lankford, *supra* note 10, at 239.

certain duties assigned to States under the Guiding Principles. Thus, the World Bank Group should be viewed as a business enterprise for the purposes of the Guiding Principles.

1. *The World Bank Group is Owned and Controlled by States*

All of the World Bank Group institutions are made up of and governed by States: IBRD has 188 member States, IDA has 172, IFC has 184, MIGA has 179, and ICSID has 150.⁶² The member States determine each institution's policies.⁶³ These States bring to the World Bank Group "their existing external human rights obligations, compliance with which must be retained as they go about their mandated activities."⁶⁴ Among these human rights obligations is the duty of member States to protect human rights.⁶⁵ As a result, the "[S]tate duty to protect is a key element in the developing debate over the human rights responsibilities of [international financial institutions]," including the World Bank Group.⁶⁶

Because most of the World Bank Group's member States have accepted their duty to protect human rights listed in the International Bill of Human Rights,⁶⁷ the World Bank Group is "implicated in the [S]tate's duty to protect human rights and in the oversight of business enterprises in the exercise of their responsibility to respect when they are involved in [World Bank Group] projects and policy delivery."⁶⁸ That the World Bank Group is made up of States, each retaining their responsibility to protect, weighs in favor of considering the World Bank Group as a State under the Guiding Principles, with the corresponding duty to protect, respect, and fulfill human rights.

62. *Member Countries*, WORLD BANK GROUP, <http://www.worldbank.org/en/about/leadership/members> (last viewed Apr. 2, 2015).

63. MARGOT E. SALOMON, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW* 106 (2007).

64. *Id.*

65. See *Guiding Principles*, *supra* note 11, at princ. 10 ("States, when acting as members of multilateral institutions that deal with business-related issues, should: (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising . . .").

66. Muchlinski, *supra* note 49, at 265.

67. The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR). See *Guiding Principles*, *supra* note 11, at princ. 12 cmt.

68. Muchlinski, *supra* note 49, at 265.

2. *The World Bank Group Has Immunity Equal to Sovereign Immunity*

Another State-like quality enjoyed by the World Bank Group is immunity from liability similar to sovereign immunity. This immunity is built into the Articles of Agreement for each of the World Bank Group institutions, as well as the laws of the United States.

Under the Articles of Agreement for IBRD, IDA, and IFC, as well as MIGA's Convention, these institutions have immunities and privileges in the territories of all of their member States.⁶⁹ The institutions each have similar provisions stating that, among other privileges and immunities:

- No member State shall be liable for the obligations of IDA or IFC.⁷⁰
- Actions brought against IBRD, IDA, IFC, or MIGA may only be brought in a "court of competent jurisdiction in the territories of a member" in which the Bank, Association, Corporation, or Agency "has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."⁷¹
- A member State or "a person acting for or deriving claims from members" cannot bring an action against IBRD, IDA, IFC, or MIGA.⁷²
- The property and assets of IBRD, IDA, IFC, and MIGA are "immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action."⁷³
- The property and assets of IBRD, IDA, IFC, and MIGA "shall be free from restrictions, regulations, controls, and moratoria of any nature."⁷⁴
- "All governors, executive directors, alternates, officers, and employees" of the IBRD, IDA, IFC, and MIGA are "immune from legal process with respect to acts performed by them in their official capacity," except when the institution waives this immunity.⁷⁵

69. See IBRD Articles of Agreement, *supra* note 26, art. VII; IDA Articles of Agreement, *supra* note 25, art. VIII; IFC Articles of Agreement, *supra* note 24, art. VI; Convention Establishing the Multilateral Investment Guarantee Agency, ch. VII, Oct. 11, 1985, T.I.A.S. No. 12,089 [hereinafter MIGA Convention].

70. See IDA Articles of Agreement, *supra* note 25, art. II, § 3; IFC Articles of Agreement, *supra* note 24, art. II, § 4.

71. IBRD Articles of Agreement, *supra* note 26, art. VII, § 3; IDA Articles of Agreement, *supra* note 25, art. VIII, § 3; see also IFC Articles of Agreement, *supra* note 24, art. VI, § 3; MIGA Convention, *supra* note 69, ch. VII, art. 44.

72. *Id.*

73. IBRD Articles of Agreement, *supra* note 26, art. VII, § 4; IDA Articles of Agreement, *supra* note 25, art. VIII, § 4; see also IFC Articles of Agreement, *supra* note 24, art. VI, § 4; MIGA Convention, *supra* note 69, ch. VII, art. 45(a).

74. IBRD Articles of Agreement, *supra* note 26, art. VII, § 6; IDA Articles of Agreement, *supra* note 25, art. VIII, § 6; see also IFC Articles of Agreement, *supra* note 24, art. VI, § 6; MIGA Convention, *supra* note 69, ch. VII, art. 48(i).

75. IBRD Articles of Agreement, *supra* note 26, art. VII, § 8(i); IDA Articles of Agreement, *supra* note 25, art. VIII, § 8(i); see also IFC Articles of Agreement, *supra* note 24, art. VI, § 8(i); MIGA Convention, *supra* note 69, ch. VII, art. 45(b).

Although States have the primary responsibility to protect human rights under both international law and the Guiding Principles, the Articles of Agreement of the IBRD, IDA, IFC, and MIGA's Convention prevent their member States from bringing an action against the institutions.⁷⁶ Further, unless the World Bank Group waives immunity, all of its employees, officers, and directors are immune from any court proceeding in a member State's territory. Consequently, these provisions may inhibit States from fulfilling their duties to protect and remedy human rights violations when the World Bank group is an actor in the violations.

The strong immunities and privileges provided for in the IBRD, IDA, and IFC's Articles of Agreement, and in MIGA's Convention are complemented by the institutions' immunity in U.S. courts. This immunity is derived from the International Organizations Immunities Act of 1945 (IOIA).⁷⁷ An "international organization" is defined as an "organization that is created by an international agreement and has a membership consisting entirely or principally of states."⁷⁸ The IOIA designates all five World Bank Group institutions as international organizations.⁷⁹ As an international organization, the World Bank Group, as well as its property and assets, "shall enjoy the status, immunities, exemptions, and privileges" including "the same immunity from suit and every form of judicial process as enjoyed by foreign governments, except to the extent that [it] may expressly waive [its] immunity."⁸⁰

In 1945, when the IOIA was enacted, foreign governments enjoyed "absolute immunity," meaning that they could not be sued in U.S. courts.⁸¹ Since then, the United States and the international community have identified exceptions to absolute immunity for foreign sovereigns.⁸² For instance, the U.S.

76. When a disagreement develops between the IBRD, IDA, IFC, or MIGA and a country that has ceased to be a member or a member during the permanent suspension of the institution, the disagreement is submitted to arbitration. Thus, under normal circumstances, a member State cannot bring a claim against the World Bank Group. See IBRD Articles of Agreement, *supra* note 26, art. IX(c); IDA Articles of Agreement, *supra* note 25, art. X(c); IFC Articles of Agreement, *supra* note 24, art. VIII(c); MIGA Convention, *supra* note 69, ch. IX, arts. 57–58.

77. See International Organizations Immunities Act of 1945, 22 U.S.C. §§ 288–288I (2012); see also Aaron I. Young, *Deconstructing International Organization Immunity*, 44 GEO. J. INT'L L. 311, 313 (2012).

78. Young, *supra* note 77, at 313 n.6 (citing to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 221 (1987)).

79. 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 41.24 exh. 1 (2012) (listing the following as international organizations that have been designated by Executive Order pursuant to treaties or under the IOIA: IBRD in 1946; IFC in 1965; ICSID in 1977; IDA in 1977; and MIGA in 1988).

80. 22 U.S.C. § 288a(b).

81. Young, *supra* note 77, at 314.

82. *Id.*

Foreign Sovereign Immunities Act (FSIA) provides an exception to foreign sovereign immunity for actions in connection with “commercial activities.”⁸³

Yet despite the FSIA, U.S. courts usually grant absolute immunity to international organizations covered by the IOIA.⁸⁴ For example, in *Atkinson v. Inter-American Development Bank*,⁸⁵ the D.C. Circuit interpreted the IOIA to provide international organizations with “virtually absolute” immunity.⁸⁶ In *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*, the D.C. Circuit found that “[b]ecause the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the [FSIA].”⁸⁷

But there is a circuit split.⁸⁸ In *OSS Nokalva, Inc. v. European Space Agency*, the Third Circuit held that the IOIA incorporates the FSIA’s immunity exceptions.⁸⁹ In November 2014, the D.C. Circuit reaffirmed *Atkinson* and expressly declined to adopt the Third Circuit’s *OSS Noklava, Inc.* decision to restrict international organizations’ immunity under the IOIA.⁹⁰ Notwithstanding the circuit split, U.S. courts generally recognize that “an international organization is entitled to such immunity from the jurisdiction of a member state as is necessary to fulfill its organizational purposes” and continue to grant absolute immunity.⁹¹ Thus, the World Bank Group’s immunities and privileges “effectively exceed[]” those of foreign governments.⁹²

The IOIA further protects the World Bank Group by stating that its property and assets, “wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from

83. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (2012) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”).

84. Young, *supra* note 77, at 314.

85. 156 F.3d 1335 (D.C. Cir. 1998).

86. Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT’L L. REV. 471, 493 (2008) [hereinafter Herz, *International Organizations*].

87. 264 Fed. App’x. 13, 15 (D.C. Cir. 2008).

88. Young, *supra* note 77, at 321.

89. 617 F.3d 756, 765 (3d Cir. 2010).

90. *Nyambal v. Int’l Monetary Fund*, 722 F.3d 277, 281 (D.C. Cir. 2014).

91. Herz, *International Organizations*, *supra* note 86, at 517 (citing to *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983)).

92. Young, *supra* note 77, at 314.

confiscation. The archives of [the World Bank Group] shall be inviolable.”⁹³ In addition, member States’ representatives and the World Bank Group’s officers and employees have immunity for “acts performed by them in their official capacity and falling within their functions as such representatives, officers or employees.”⁹⁴

The U.S. Congress or President “can reduce the privileges and immunities of the entities that have been designated public international organizations covered by the IOIA.”⁹⁵ But even if the World Bank Group were to lack immunity under the IOIA, it still has access to a wide range of U.S. common law defenses: “common-law immunity, *forum non conveniens*, comity, and the Act of State doctrine.”⁹⁶ Thus, litigation against the World Bank Group is unlikely to succeed in the United States because of the World Bank Institutions’ Articles of Agreement, immunity under the IOIA, and the practices of most U.S. courts.⁹⁷ Consequently, the World Bank Group retains immunity, a State-like quality, which makes it difficult for its member States to hold it accountable for any human rights abuses that it may cause.

3. *The World Bank Group Does Not Have Territorial Sovereignty*

Although owned by States, the World Bank does not have all the characteristics of a State. In particular, the World Bank Group “only has territorial jurisdiction over a limited physical area recognized as the ‘headquarters seat’ under its agreement with its host state,” the United States.⁹⁸ All of its activities and the projects that it funds take place “either in the territory of the host state or in the territories of other states under an agreement on the purpose, scope, and duration of their operations.”⁹⁹ The World Bank Group therefore also lacks general police powers and jurisdiction over any population.

Because the World Bank Group lacks territorial sovereignty, it does not have the ability to meet some of the responsibilities of a State under the Guiding Principles. For instance, under Guiding Principle 2, States should “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”¹⁰⁰ Although the member States of the World Bank Group can fulfill this

93. International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(c) (2012).

94. *Id.* § 288d(b).

95. Young, *supra* note 77, at 351.

96. *Id.*

97. Muchlinski, *supra* note 49, at 275.

98. Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT’L L. 177, 193–94 (2005).

99. *Id.* at 194.

100. *Guiding Principles*, *supra* note 11, at princ. 2.

requirement, the World Bank Group itself cannot do so because it does not have a territory or jurisdiction over an area where business enterprises reside.

Additionally, the World Bank Group's lack of territorial sovereignty makes it incapable of following Guiding Principles 1, 3, 5, 7(d), 25, and 26. All of these Guiding Principles include a need to enact and uphold laws to protect human rights.¹⁰¹ Without a territory, jurisdiction over a population, or police powers, the World Bank Group has no authority to create legislation to protect human rights from violations by businesses. In addition, the World Bank Group cannot create any judicial mechanisms to enforce its policies. Thus, its lack of sovereign territory makes the World Bank incapable of fulfilling all of a State's human rights duties under the Guiding Principles. This inability weighs in favor of characterizing the World Bank Group as a business enterprise.

4. *The World Bank Group Has a Mandate to Refrain from Engaging in Political Affairs*

The World Bank Group forbids "strictly political activities"¹⁰²—each of its institutions has a mandate prohibiting any political activity, as well.¹⁰³

101. See *Guiding Principles*, *supra* note 11, at princ. 1 ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."); *id.* at princ. 3 ("In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights . . ."); *id.* at princ. 5 cmt. ("[E]nabling legislation should clarify the State's expectations that these enterprises respect human rights."); *id.* at princ. 7 ("Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: . . . (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses."); *id.* at princ. 25 ("As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."); *id.* at princ. 26 ("States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to denial of access to remedy.").

102. Ana Palacio, *The Way Forward: Human Rights and the World Bank*, THE WORLD BANK (Oct. 27, 2006), <http://go.worldbank.org/RR8FOU4RG0>.

103. See IBRD Articles of Agreement, *supra* note 26, art. IV, § 10; IDA Articles of Agreement, *supra* note 25, art. V, § 6; IFC Articles of Agreement, *supra* note 24, art. III, § 9; MIGA Convention, *supra* note 69, ch. V, art. 34.

Specifically, IBRD, IDA, and IFC's Articles of Agreement contain provisions stating:

The [Bank, Association, or Corporation] and its officers shall not interfere in the political affairs of any member; nor shall it be influenced in its decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to its decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.¹⁰⁴

MIGA's Convention contains a similar provision, but permits MIGA's staff to "take into account all circumstances surrounding an investment,"¹⁰⁵ rather than only economic considerations.

But protection of and respect for human rights includes "unavoidable political content."¹⁰⁶ As a consequence, Ana Palacio, former Senior Vice President and General Counsel of the World Bank Group, stated:

Political human rights in particular have traditionally been considered to lie beyond the permitted range of considerations under the Articles of Agreement, which bar decisions based on political considerations or political systems, as well as interference in domestic political affairs of its members. The World Bank's role is a facilitative one, in helping our members realize their human rights obligations. In this sense, human rights would not be the basis for an increase in Bank conditionalities, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business.¹⁰⁷

Despite recognizing the political dimensions of human rights, Palacio went on to conclude that the World Bank Group's consideration of human rights is "permissive," but not mandatory.¹⁰⁸

Embracing this ability to consider human rights, the IFC created a *Guide to Human Rights Impact Assessment and Management (HRIAM)*. The Guide to HRIAM is designed to enable "companies to identify, understand, and evaluate actual or potential human rights impacts of a project at each stage of development and operations."¹⁰⁹ The Guide to HRIAM considers all the human rights in the International Bill of Human Rights.¹¹⁰ But unlike the Guiding

104. See IBRD Articles of Agreement, *supra* note 26, art. IV, § 10; IDA Articles of Agreement, *supra* note 25, art. V, § 6; IFC Articles of Agreement, *supra* note 24, art. III, § 9.

105. See MIGA Convention, *supra* note 69, ch. V, art. 34 ("The Agency, its President and staff shall not interfere in the political affairs of any member. Without prejudice to the right of the Agency to take into account all the circumstances surrounding an investment, they shall not be influenced in their decisions by the political character of the member or members concerned.").

106. Palacio, *supra* note 102.

107. *Id.*

108. *Id.*

109. *Guide to Human Rights Impact Assessment and Management (HRIAM)*, INT'L FIN. CORP., http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/.

110. See *Guide to Human Rights Impact Assessment and Management: What Are Human Rights?* INT'L FIN. CORP., http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/What+are+Human+Rights/.

Principles, it does not consider the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.¹¹¹ In addition to the Guide to HRIAM, the IFC has Performance Standards that state, "[b]usiness should respect human rights."¹¹² The Performance Standards, however, also stop short of covering all human rights and always require specific human rights due diligence.

Despite the IFC's advances in considering human rights, the other World Bank Group institutions have not expressly acknowledged any human rights responsibilities.¹¹³ No World Bank Group institution has implemented a "comprehensive human rights policy."¹¹⁴ Instead, the World Bank Group asserts that it is not an "enforcer of human rights" and "its policies, programs, and projects have never been explicitly or deliberately aimed towards the realization of human rights."¹¹⁵ The World Bank Group interprets its mandate to avoid engagement in political affairs in order to prevent it from having an explicit responsibility for human rights, a duty it considers to be left to States.

5. *The World Bank Group is Profit-Seeking*

Despite its twin goals of poverty alleviation and the promotion of shared prosperity, the World Bank Group may be considered "nearly entirely 'commercial' in nature."¹¹⁶ Although the World Bank Group claims that it is "not profit maximizing," it acknowledges that "strong financial performance is important" to achieving its development goals.¹¹⁷ And the World Bank Group "has been overwhelmingly profitable, recording healthy profits every year since 1947 with profits exceeding \$1 billion per year [since 1995], hitting close to \$2 billion in recent years."¹¹⁸ As with many businesses, bondholders benefit from the interest payout on these high revenues.¹¹⁹

111. See *Guiding Principles*, *supra* note 11, at princ. 12.

112. INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 1, 3 (Jan. 1, 2012), *available at* http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

113. See, e.g., *FAQs: Human Rights*, WORLD BANK GROUP (June 2012), <http://go.worldbank.org/72L95K8TN0>.

114. Herz, *Roles and Responsibilities*, *supra* note 23, at 5.

115. *Id.*

116. Young, *supra* note 77, at 339.

117. WORLD BANK TREASURY, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT THE WORLD BANK 2, *available at* <http://treasury.worldbank.org/cmd/pdf/WorldBankFacts.pdf>.

118. ROY, *supra* note 29, at 55.

119. *Id.*

The World Bank Group's high revenues demonstrate that "the Bank is a bank," and favors acknowledging it as a business enterprise under the Guiding Principles.¹²⁰ In 2002, the World Bank Operations Evaluation Department found that "[d]espite the Bank's poverty reduction mission, a country's level of poverty gets relatively minor explicit consideration in budget allocations."¹²¹ Financial performance "trumps all other measures of performance."¹²² This is demonstrated through the IFC, IBRD, and IDA's Articles of Agreement, which require the institutions to only take economic considerations into account,¹²³ combined with these institutions' lack of comprehensive human rights policies.¹²⁴ In this way, the World Bank Group "say[s]—loudly, if implicitly—that [human rights] are not as important" as profits.¹²⁵ This profit-seeking, if not profit-maximizing, behavior favors a finding that the World Bank Group is a business.

C. Despite Some State-Like Qualities, the World Bank Group Functions as a Business Enterprise Under the Guiding Principles

In addition to the Guiding Principles and the characteristics of the World Bank Group, the Working Group on the issue of human rights and transnational corporations and other business enterprises provides additional insight into the responsibilities of international financial institutions.¹²⁶ In its May 5, 2014 report, the Working Group lists international financial institutions as a type of institution that can "play a significant role in requiring, or encouraging, States and business enterprises to implement the Guiding Principles."¹²⁷ This statement seems to set international financial institutions outside the Guiding Principles' two categories: State or business enterprise. But the addendum to this report recognizes the close link between business enterprises and international financial institutions needed to enforce the third pillar, access to remedy.¹²⁸ This addendum increases support for the finding that the World Bank Group is more like a business enterprise than a State.

Because the Guiding Principles do not offer a third category outlining responsibilities for international financial institutions, the World Bank Group's

120. *Id.* at 80.

121. CATHERINE GWIN, WORLD BANK OPERATIONS EVALUATION DEP'T, IDA'S PARTNERSHIP FOR POVERTY REDUCTION: AN INDEPENDENT EVALUATION OF FISCAL YEARS 1994–2000 68 (2002).

122. ROY, *supra* note 29, at 81.

123. *See* IBRD Articles of Agreement, *supra* note 26, art. IV, § 10; IDA Articles of Agreement, *supra* note 25, art. V, § 6; IFC Articles of Agreement, *supra* note 24, art. III, § 9.

124. Herz, *Roles and Responsibilities*, *supra* note 23, at 5.

125. *Id.* at 7.

126. *See generally* HRC Working Group Report, *supra* note 44.

127. *Id.* at 4.

128. HRC Working Group Report Addendum 3, *supra* note 59, at ¶ 18; *see also supra* Part II.A.

characteristics should be used to determine its status. Although it has some State-like qualities, including immunity and control by States, its lack of territorial sovereignty, political affairs prohibition, and emphasis on economics and profits cause the World Bank Group to look more like a business and prevent it from fulfilling several obligations of States. Due to these business-like characteristics, the World Bank Group should be considered a business under the Guiding Principles.

III.

DO THE WORLD BANK GROUP'S INDEPENDENT ACCOUNTABILITY MECHANISMS PROVIDE SUFFICIENT ACCESS TO REMEDY?

Regardless of its designation as a State or business enterprise, the World Bank Group has an obligation to provide access to effective remedy under the Guiding Principles. To address grievances of communities harmed by World Bank Group-financed projects, there are two non-judicial mechanisms: the Inspection Panel and the Compliance Advisor Ombudsman (CAO). Because the World Bank Group enjoys immunity equal to that of a sovereign State, judicial mechanisms provide insufficient access to remedy for individuals or communities harmed by projects that it finances. Consequently, it is important to evaluate the adequacy of the Inspection Panel and the CAO in providing access to remedy.

A. *The World Bank Group's Duty to Provide Access to Effective Remedy*

Under the Guiding Principles' third pillar, both States and business enterprises have a responsibility to provide access to effective non-judicial grievance mechanisms. Guiding Principle 29 requires business enterprises to create "effective operational-level grievance mechanism[s] for individuals and communities who may be adversely impacted" by their projects.¹²⁹ The operational-level grievance mechanisms must perform two functions. The first is to identify adverse human rights impacts by "providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted."¹³⁰ The second function is to create a method to address and remediate identified adverse impacts "early and directly by the business enterprise."¹³¹

129. *Guiding Principles*, *supra* note 11, at princ. 29.

130. *Guiding Principles*, *supra* note 11, at princ. 29 cmt.

131. *Id.*

The World Bank Group offers two independent accountability mechanisms (IAMs)—the Inspection Panel, for its public sector lending arm, and the CAO for its private sector lending arm. IAMs are distinct from operational-level grievance mechanisms. Unlike the Inspection Panel and the CAO, administered by the World Bank Group, operational-level grievance mechanisms are administered by the business enterprise implementing a project.¹³² Thus, in the context of World Bank Group projects, the borrower implements the project. Although the Inspection Panel and the CAO achieve the first function of an operational-level grievance mechanism, they fail the second function because they only provide remedies directly from the World Bank Group, not the borrower.

Even though the IAMs cannot be categorized as operational-level grievance mechanisms, the World Bank Group must provide them regardless of the presence of any operational-level grievance mechanisms already in place.¹³³ Additionally, Guiding Principle 31 provides a list of seven effectiveness criteria that are applicable to all non-judicial grievance mechanisms, not just operational-level grievance mechanisms.¹³⁴ Thus, it is appropriate to review the Inspection Panel and the CAO under Guiding Principle 31.

B. Overview of the Inspection Panel and CAO Processes

The Inspection Panel, created by the IBRD and IDA Boards of Executive Directors in 1993, reviews complaints from communities harmed by projects funded by IBRD and IDA.¹³⁵ The Inspection Panel has only one function: conducting compliance reviews.¹³⁶ The CAO, established in 1999, addresses complaints from individuals or communities harmed by IFC and MIGA projects.¹³⁷ The CAO offers three services: dispute resolution, compliance review, and advisory work.¹³⁸

Through their compliance review functions, the Inspection Panel and the CAO can conduct an investigation into the World Bank Group's compliance with its operating policies and procedures.¹³⁹ When the Inspection Panel

132. *Id.*

133. *Id.* (noting that operational-level grievance mechanisms “cannot substitute for” mechanisms with broader stakeholder involvement).

134. *Guiding Principles*, *supra* note 11, at princ. 31.

135. INSPECTION PANEL, THE WORLD BANK, ANNUAL REPORT JULY 1, 2013–JUNE 30, 2014 14 (2014), available at <http://ewebapps.worldbank.org/apps/ip/IPPublications/AnnualReport2013-2014f.pdf?Mobile=1>.

136. *Id.* at 12.

137. COMPLIANCE ADVISOR OMBUDSMAN, CAO 2013 ANNUAL REPORT 8 (2013), available at http://www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf.

138. *Id.* at 8, 10.

139. See INSPECTION PANEL, THE WORLD BANK, OPERATING PROCEDURES ¶ 1 (Apr. 2014), available at

receives a complaint from project-affected individuals, it must review the complaint and make a decision whether to register it within fifteen days of its receipt.¹⁴⁰ Once the complaint is registered, the Inspection Panel notifies the complainants, the World Bank Board, the World Bank Group President, and the borrower.¹⁴¹ World Bank management must respond within twenty-one business days, stating its view on whether the complaint raises issues attributable to World Bank management's actions and providing evidence of its compliance or plans to comply with the World Bank's operational policies and procedures.¹⁴²

The Inspection Panel then has twenty-one business days to submit to the Board a "Report and Recommendation" detailing its independent recommendation on whether to investigate the complaint, typically after a field visit to confirm the complaint's eligibility.¹⁴³ To be an eligible complaint, the Inspection Panel requires that: (1) there are at least two individuals who were or likely will be affected by a World Bank-financed project; (2) the harm or potential harm is allegedly caused by a violation of the World Bank's operational policies and procedures; (3) the complainants took steps to notify World Bank management of their concerns and management responded inadequately; (4) the matter is unrelated to procurement; (5) the disbursement of the loan is less than ninety-five percent by the date of the complaint's receipt; and (6) the Inspection Panel has not previously made a recommendation on the matter.¹⁴⁴

The Board must then authorize a recommended investigation, usually within ten business days.¹⁴⁵ With Board approval, the Inspection Panel will conduct an investigation and issue an "Investigation Report" of its findings to the Board.¹⁴⁶ Within six weeks, World Bank management will submit to the Board its "Management Report and Recommendation in Response to the Inspection Panel Investigation Report" (MRR), typically including proposed

<http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf> [hereinafter *INSPECTION PANEL OPERATING PROCEDURES*]; COMPLIANCE ADVISOR OMBUDSMAN, CAO OPERATIONAL GUIDELINES §§ 1.2, 4.3 (2013), available at <http://www.cao-ombudsman.org/howwework/2012OperationalGuidelinesUpdate.htm> [hereinafter *CAO OPERATIONAL GUIDELINES*].

140. *INSPECTION PANEL OPERATING PROCEDURES*, *supra* note 139, ¶¶ 22–26.

141. *Id.* ¶ 28.

142. *Id.* ¶¶ 29, 33–34.

143. *Id.* ¶¶ 36–37, 40.

144. *Id.* ¶ 39.

145. *Id.* ¶ 49 n.8.

146. *Id.* ¶¶ 52–53, 63–65.

remedial actions.¹⁴⁷ Finally, the Board considers the Investigation Report and MRR to decide whether to approve World Bank management's proposed action plan.¹⁴⁸

When the CAO receives a complaint, the CAO will screen it for eligibility within fifteen days of acknowledging its receipt.¹⁴⁹ A complaint is eligible if: (1) it is related to a project that the IFC or MIGA "is participating in, or is actively considering"; (2) it raises issues related to the environmental or social impacts of the project covered by IFC and MIGA operating policies; and (3) the complainant is, or may be, affected by the issues raised in the complaint.¹⁵⁰ If a complaint is eligible, the CAO conducts an assessment within 120 days of the eligibility determination to identify all stakeholders and determine whether the parties want to engage in dispute resolution, compliance review, or both.¹⁵¹ If the parties do not agree to engage in dispute resolution or dispute resolution is unsuccessful, the complaint goes to compliance review.¹⁵²

The CAO begins its compliance review with an appraisal process to determine whether the projects listed in the complaint "raise substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA."¹⁵³ To make this determination, the CAO looks to whether (1) there is evidence of "potentially significant adverse" impacts; (2) there are "indications that a policy or other appraisal criteria" may not have been followed; and (3) there is evidence that an IFC or MIGA provision "failed to provide an adequate level of protection."¹⁵⁴ The CAO then provides its results in an Appraisal Report to the IFC or MIGA, the World Bank Group President, and the Board.¹⁵⁵ If the issues raised meet the appraisal criteria, the CAO will conduct a compliance investigation and issue a draft Investigation Report to IFC or MIGA management.¹⁵⁶ After receiving comments from the IFC or MIGA on the draft, the CAO will finalize the Investigation Report and the IFC or MIGA will submit a response.¹⁵⁷ The President then considers both the Investigation Report and the IFC or MIGA response to determine whether to provide clearance.¹⁵⁸ If the IFC or MIGA is

147. *Id.* ¶¶ 67–68.

148. *Id.* ¶ 71.

149. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.2; *see generally id.* at 11 fig. 2.

150. *Id.* § 2.2.1.

151. *Id.* § 2.3.

152. *Id.*

153. *Id.* § 4.2.1.

154. *Id.*

155. *Id.* § 4.2.2.

156. *Id.* §§ 4.4.1, 4.4.5.

157. *Id.* § 4.4.5.

158. *Id.*

found to be out of compliance, the CAO will monitor the project until the IFC or MIGA addresses its compliance issues.¹⁵⁹

In addition to compliance review, the CAO has dispute resolution and advisory roles. It can provide dispute resolution if both the project-affected individuals and the World Bank Group client implementing the project agree to engage in the process.¹⁶⁰ The dispute resolution process can involve the facilitation of information sharing, negotiation of fact-finding approaches that are agreeable to both parties, encouragement of dialogue, and mediation by a neutral third party.¹⁶¹ Based on its experience through its dispute resolution and compliance processes, the CAO can give advice on IFC and MIGA's environmental and social policies, the CAO's systemic concerns, but not about specific IFC or MIGA projects.¹⁶² The CAO Vice President, World Bank Group President, and IFC or MIGA senior management can initiate the advisory work.¹⁶³

*C. Evaluation of the Inspection Panel and CAO
under Guiding Principle 31*

To provide sufficient access to remedy, the Inspection Panel and the CAO should meet all seven of the effectiveness criteria listed in Guiding Principle 31: they must be (1) legitimate; (2) accessible; (3) predictable; (4) equitable; (5) transparent; (6) rights-compatible; and (7) a source of continuous learning.¹⁶⁴ Despite containing several characteristics of an effective mechanism, both the Inspection Panel and the CAO fall short of meeting Guiding Principle 31's effectiveness criteria.

1. Legitimacy

Guiding Principle 31 defines a legitimate grievance mechanism as one that "enabl[es] trust from the stakeholder groups for whose use they are intended, and [is] accountable for the fair conduct of grievance processes."¹⁶⁵ To achieve

159. *Id.* § 4.4.6.

160. *Id.* § 3.1.

161. *Id.* § 3.2.1

162. *Id.* § 5.1.2.

163. *Id.* § 5.2.1.

164. Guiding Principle 31(h) lists an eighth effectiveness criterion that only applies to operational-level grievance mechanisms. The Inspection Panel and the CAO are considered independent accountability mechanisms, distinct from operational-level grievance mechanisms, and therefore, the eighth criterion does not apply. *See Guiding Principles, supra* note 11, at princ. 31.

165. *Guiding Principles, supra* note 11, at princ. 31(a); *see also id.* at princ. 31 cmt.

this trust, the Inspection Panel and the CAO must ensure that the stakeholders “cannot interfere with its fair conduct.”¹⁶⁶

The Inspection Panel and CAO's stated independence from the World Bank Group helps foster some of this trust. The Inspection Panel's Operating Procedures explain that it is independent from World Bank management and its work is performed impartially.¹⁶⁷ Similarly, the CAO's Operational Guidelines describe the CAO as independent and impartial, recognizing that trust by project-impacted individuals is essential to the operation of the mechanism.¹⁶⁸

The mechanisms' structures also help foster their independence. The Inspection Panel consists of three members of different nationalities from World Bank member countries.¹⁶⁹ Inspection Panel members are appointed for five-year terms that are non-renewable, after which the person cannot be employed by the World Bank Group.¹⁷⁰ The CAO promotes its independence by ensuring that the CAO Vice President recruits CAO staff; prohibiting certain CAO staff from working for the IFC or MIGA for two years after their work for the CAO; prohibiting the CAO Vice President from World Bank Group employment for life; and limiting direct access to the CAO office to only CAO staff.¹⁷¹

However, several external stakeholders believe that the Inspection Panel is not “sufficiently independent.”¹⁷² The Inspection Panel reports directly to the IBRD and IDA Board of Directors.¹⁷³ The Board also appoints the Inspection Panel members and has the authority to reject the Inspection Panel's recommendations for a compliance investigation, as well as any proposed action plans.¹⁷⁴ Thus, the Inspection Panel is dependent on the Board of Directors to function effectively.¹⁷⁵

Additionally, a former Inspection Panel member, Richard Bissell, stated that the “independence of the Panel is only partial at best . . . [T]he Board has not restrained Management from commenting on eligibility [of a complaint] (a matter reserved to the Panel . . .) and has not prevented recurrent and last-

166. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

167. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 5(b).

168. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.3.

169. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 7; *see also* Richard E. Bissell & Suresh Nanwani, *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, 6 MANCHESTER J. INT'L ECON. L. 2, 11 (2009).

170. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 7.

171. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.3.

172. Suzuki & Nanwani, *supra* note 98, at 207.

173. Bissell & Nanwani, *supra* note 169, at 11.

174. *Id.*; *see also* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 49, 70.

175. Yvonne Wong & Benoit Mayer, *The World Bank's Inspection Panel: A Tool for Accountability?*, in 6 THE WORLD BANK LEGAL REVIEW: IMPROVING DELIVERY IN DEVELOPMENT: THE ROLE OF VOICE, SOCIAL CONTRACT, AND ACCOUNTABILITY 495, 510 (Jan Wouters et al. eds., 2015), available at <https://openknowledge.worldbank.org/handle/10986/21553>.

minute introduction of ‘action plans’ that interfere with the Panel’s work.”¹⁷⁶ For example, the Inspection Panel allows IBRD and IDA management to propose “remedial ‘action plans’” before the Inspection Panel has conducted its compliance investigation.¹⁷⁷ This can lead the Inspection Panel to delay its recommendation of an investigation to allow management to implement these plans.¹⁷⁸ This delay is unnecessary because an Inspection Panel investigation does not prohibit management from implementing remedial measures in response to complainants’ concerns.¹⁷⁹

The Inspection Panel’s independence further decreased after the introduction of the Pilot Program in April 2014.¹⁸⁰ Under this program, IBRD and IDA management can develop measures to address harms alleged in cases “amenable to early resolution.”¹⁸¹ In these cases, the Inspection Panel must delay its decision on whether to even register the complaint.¹⁸² As a result, those that file an eligible complaint may never have their claim investigated. This reliance on World Bank management to implement remedial measures without an Inspection Panel investigation may break the trust of the mechanism’s stakeholders, particularly communities that hope to use the mechanism and civil society.

Additionally, civil society organizations have raised concerns that the World Bank Group management tends “to refute, deny or otherwise fail to act on critical findings” of the Inspection Panel and the CAO.¹⁸³ After the Inspection Panel submits its Investigation Report, IBRD and IDA management are required to submit a “Management Report and Recommendation” (MRR) setting out proposed actions to remedy identified instances of noncompliance.¹⁸⁴ Similarly, after the CAO submits its Investigation Report, IFC or MIGA management submit a response.¹⁸⁵ However, rather than proposing remedies, World Bank Group management frequently uses these responses to contest the

176. Suzuki & Nanwani, *supra* note 98, at 207.

177. *Id.*; see also INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 33–35.

178. Wong & Mayer, *supra* note 175, at 506.

179. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 60.

180. See generally INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, annex I.

181. *Id.* ¶¶ 3–4.

182. *Id.* ¶ 5.

183. Letter from Accountability Counsel et al. to Dr. Jim Yong Kim, President of World Bank Group, Learning from Failure: Management Action Plans Needed in Response to Inspection Panel and CAO Investigations 1 (Nov. 12, 2013), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2014/01/CSO-ltr-learning-from-failure-12-Nov-2013.pdf> [hereinafter Nov. 2013 Civil Society Letter].

184. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 67–68.

185. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 4.4.5.

findings of the Investigation Reports. This undermines the Inspection Panels and CAO's legitimacy.¹⁸⁶

2. *Accessibility*

Under the Guiding Principles, a grievance mechanism must be accessible, meaning that it is “known to all [intended] stakeholder groups . . . and [provides] adequate assistance for those who may face particular barriers to access.”¹⁸⁷ Both the Inspection Panel and the CAO are accessible to many who are impacted by World Bank Group-funded projects because neither requires a harm to occur before a complaint can be brought—a complaint can even be filed at the project proposal stage.¹⁸⁸ This is squarely in line with Guiding Principle 29, which requires that non-judicial grievance mechanisms “specifically aim to identify any legitimate concerns of those who may be adversely impacted” and cannot demand that a complaint first rise to the level of a human rights abuse.¹⁸⁹ The ability to bring a complaint before any harm has occurred also helps the IAMs provide a means for those affected by projects to “raise concerns when they believe they are being or will be adversely impacted.”¹⁹⁰

However, the Inspection Panel and the CAO have significant barriers to access. Complainants have a limited time to file with both mechanisms. For the Inspection Panel, a complaint must be filed before the IBRD or IDA disburses ninety-five percent of its promised financing.¹⁹¹ The CAO requires a complaint to pertain to a project that the IFC or MIGA is “participating in, or is actively considering.”¹⁹² But the negative impacts of a World Bank Group-funded project may not be known until after a project has been completed, the IBRD or IDA has disbursed ninety-five percent of its financing, or the IFC loan has been repaid. Thus, individuals and communities harmed by a project after certain financing thresholds have passed are unable to utilize these grievance mechanisms.

In addition, the Inspection Panel requires that, prior to a complaint being filed, complainants raise their issue with World Bank management, and

186. Nov. 2013 Civil Society Letter, *supra* note 183, at 1–2.

187. *Guiding Principles*, *supra* note 11, at princ. 31(b).

188. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 12(b) (noting that a request for inspection should include a “description of how the Bank-financed project or proposed project as far as it may be known to the Requesters, stating how, in their view, the harm suffered or likely to be suffered by them is linked to the project activities . . .”); CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.2.1 (“CAO will deem the complaint eligible if: . . . (3) The complainant is, or may be, affected by the environmental and/or social impacts raised in the complaint.”).

189. *Guiding Principles*, *supra* note 11, at princ. 29.

190. *Guiding Principles*, *supra* note 11, at princ. 29 cmt.

191. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 11.

192. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.2.1.

management responds unsatisfactorily.¹⁹³ However, under Guiding Principle 29, these grievance mechanisms should “not require that those bringing a complaint first access other means of recourse.”¹⁹⁴ The Inspection Panel requirement that complainants first bring their concerns to World Bank management violates this Guiding Principle and can impede accessibility. In contrast, the CAO does not contain any similar requirement and is, therefore, more accessible.¹⁹⁵

An additional accessibility barrier to the Inspection Panel, but not to the CAO, is its limit on who can file a complaint. The CAO allows “[a]ny individual or group of individuals that believes it is affected or potentially affected, by the environmental and/or social impacts of an IFC/MIGA project [to] lodge a complaint with the CAO.”¹⁹⁶ However, the Inspection Panel requires “two or more people with common interests and concerns who claim that they have been or are likely to be adversely affected by a Bank-financed project to submit a complaint.”¹⁹⁷ Unlike the CAO, the Inspection Panel is not accessible to a single individual claiming harm by a World Bank-financed project.

The implementation of the Inspection Panel’s Pilot Program presents another potential obstacle to accessibility.¹⁹⁸ Proceeding under the Pilot Program is voluntary, and complainants have the right “at any time to indicate that they are not satisfied and would like the Panel to register their Request” for inspection.¹⁹⁹ However, in the Pilot Program’s first case, this right was not respected: two out of the three complainants “expressed their deep dissatisfaction with the Pilot Program and therefore submitted a request for registration,” but the Inspection Panel closed their case, rather than register the complaint.²⁰⁰

193. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 12(d) (“A Request should describe steps taken or efforts made to bring the issue to the attention of Bank staff (if possible, with dates, people contacted, and copies of the correspondence with the Bank), and a statement explaining why, in the Requesters’ view, the Bank’s response was inadequate.”); *id.* ¶ 39 (Criterion (C)) (“The Request asserts that its subject matter has been brought to the attention of Management and that, in the Requesters’ view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank’s policies and procedures.”).

194. *Guiding Principles*, *supra* note 11, at princ. 29.

195. See generally CAO OPERATIONAL GUIDELINES, *supra* note 139.

196. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.1.2.

197. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 10(a).

198. Letter from Natalie Bridgeman Fields et al. to Dr. Jim Yong Kim, President of the World Bank Group, and Eimi Watanabe, Inspection Panel Chair 2 (Aug. 27, 2014), *available at* <http://www.accountabilitycounsel.org/wp-content/uploads/2014/08/8.27.14-Letter-to-President-and-Panel-re-Pilot.pdf> [hereinafter Aug. 2014 Civil Society Letter].

199. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, annex I, ¶ 5(b).

200. Aug. 2014 Civil Society Letter, *supra* note 198, at 2.

Lastly, the Inspection Panel and the CAO are underutilized, as neither mechanism is known to all relevant stakeholders.²⁰¹ Both civil society actors and individuals affected by World Bank Group-financed projects may not be aware of the available mechanisms.²⁰² It may not be obvious to those affected that a project has World Bank Group financing because a borrowing State or borrowing business enterprise typically implements the project.²⁰³ Furthermore, impacted individuals may not know enough about the World Bank Group's operational policies and procedures to know when there is noncompliance, and that they may therefore be eligible to bring a complaint.²⁰⁴ Compounding this problem is the lack of availability of World Bank Group policies and information about the mechanisms in many local languages.²⁰⁵ Although both the Inspection Panel and the CAO engage in outreach, the mechanisms remain largely unknown.²⁰⁶

3. Predictability

Guiding Principle 31 requires that an effective grievance mechanism be predictable by providing “a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.”²⁰⁷ It should make information about its procedures publically available, and should respect timeframes for each stage while allowing for flexibility.²⁰⁸ In alignment with Guiding Principle 31, the Inspection Panel and the CAO state that they aim to be predictable.²⁰⁹ They also provide timelines for their complaint processes.²¹⁰

201. Wong & Mayer, *supra* note 175, at 507.

202. *Id.*

203. *Id.*

204. Although Inspection Panel complainants do not have to specify what policy or procedure they believe the IBRD or IDA to be violating, for complainants “to make the decision to utilize the Panel at all, they need to have a broad understanding of the Bank’s operational policies and procedures, technical documents that remain relatively unknown outside the specialist community.” *See id.* at 508.

205. The Inspection Panel website is only available in English, but it does provide translations into twelve languages of an eight-page brochure about the Inspection Panel. The CAO website is available in sixteen languages. *See id.* In contrast, the CAO website is available in sixteen languages and its 2013 Operational Guidelines are available in seven. *See generally* COMPLIANCE ADVISOR OMBUDSMAN (CAO), www.cao-ombudsman.org (last visited April 2, 2015).

206. *See* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 76–77; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.6.

207. *Guiding Principles*, *supra* note 11, at princ. 31(c).

208. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

209. *See* INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, at 4 (stating that the Operating Procedures “aim to make the process user-friendly, transparent, predictable and up-to-date.”); CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.3 (“CAO strives to be an independent, transparent, credible, accessible, and equitable mechanism that provides a predictable process”).

210. The Inspection Panel’s timeline was just added during its most recent update to its

The CAO also monitors the implementation of agreements reached by the parties through its dispute resolution function and publicly discloses the outcomes on its website.²¹¹ This monitoring function provides increased predictability that agreements will be executed. However, the CAO's monitoring function after a compliance investigation does not always make the outcome predictable because the CAO will only monitor the situation "until actions taken by IFC/MIGA assure the CAO that IFC/MIGA is addressing the noncompliance."²¹² It does not have to monitor until the noncompliance issue has been fixed. Thus, outcomes from the CAO's compliance mechanism will be less predictable than its dispute resolution function.

The Inspection Panel, on the other hand, has no general monitoring authority. It can, but is not required to, submit a report to the Board on the adequacy of World Bank management's consultations with complainants during the development of action plans.²¹³ The Inspection Panel also has a quasi-monitoring role when World Bank management includes "a proposal to submit to the Board periodic progress reports on the implementation of the remedial efforts and/or plan of action."²¹⁴ If World Bank management does submit progress reports, the Inspection Panel is required to make them available on its website and provide them to the complainants.²¹⁵ However, the Inspection Panel never has authority to monitor the implementation of any action plans, making its outcomes less predictable than CAO outcomes.

The Inspection Panel provides no guarantee that all eligible complaints will be investigated, further decreasing predictability. Its operating procedures state that the Inspection Panel "may decide *not* to recommend an investigation even if it confirms that the technical eligibility criteria for an investigation are met,"²¹⁶ based on a variety of considerations.²¹⁷ As of June 2014, there were twelve

Operating Procedures in April 2014. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 26, 29, 33, 36, 38, 53(b), 64 & n.8; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 2.4; see also Letter from Natalie Fields et al. to Eimi Watanabe, Inspection Panel Chair, Civil Society Comments on Inspection Panel Draft Operating Procedures 4 (Jan. 15, 2014), available at <http://www.accountabilitycounsel.org/wp-content/uploads/2014/02/Joint-CSO-letter-on-Inspection-Panel-OPs.pdf> [hereinafter Jan. 2014 Civil Society Letter].

211. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 3.2.3.

212. *Id.* § 4.4.6.

213. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 70.

214. *Id.* ¶ 69.

215. *Id.* ¶ 74.

216. *Id.* ¶ 41 (emphasis added).

217. *Id.* ¶ 43 ("In making its recommendation, the Panel takes into account the following: (a) Whether there is a plausible causal link between the harm alleged in the Request and the Project. (b) Whether the alleged harm and possible non-compliance by the Bank with its operational policies and procedures may be of a serious character. (c) Whether Management, in the Panel's view, has dealt

complaints for which the Inspection Panel acknowledged that all eligibility criteria were met, yet the Inspection Panel did not recommend an investigation.²¹⁸ The process requires “the Panel to guess about findings that should only be made through a full investigation,” and the Inspection Panel will likely “not have sufficient evidence to make [these] judgments” before an investigation.²¹⁹

4. *Equitability*

An effective grievance mechanism must also be equitable, meaning that it must “seek[] to ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process on fair, informed, and respectful terms.”²²⁰ Affected individuals often have less information and fewer expert resources than the World Bank Group.²²¹ Closing this information gap is necessary in order to have an effective mechanism.²²²

Both the Inspection Panel and the CAO contain provisions to ensure that complainants receive copies of the Investigation Reports and responses from World Bank Group management translated into a locally understood language.²²³ However, the information imbalance is partially maintained during the Inspection Panel's site visit to determine whether a complaint is technically eligible. During this visit, the Inspection Panel team meets with the complainants and “briefs them orally about relevant information in the Management Response.”²²⁴ The Inspection Panel does not have to provide the complainants with a written version of the Management Response, thus risking the possibility that complainants will not have all needed information.

5. *Transparency*

The Guiding Principles also require that a grievance mechanism be transparent by “keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build

appropriately with the issues raised in the Request and demonstrated clearly that it has followed the required policies and procedures. (d) Whether Management has provided a statement of specific remedial actions, and whether, in the judgment of the Panel and taking into account the view of the Requesters, the proposed remedial actions may adequately address the matters raised by the Request.”).

218. Wong & Mayer, *supra* note 175, at 505.

219. Jan. 2014 Civil Society Letter, *supra* note 210, at 4.

220. *Guiding Principles*, *supra* note 11, at princ. 31(d).

221. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

222. *Id.*

223. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶¶ 72–73; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.6.

224. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 38.

confidence in its effectiveness and meet any public interest at stake.”²²⁵ Both the Inspection Panel and the CAO aim to be transparent. The Inspection Panel “promotes transparency in Bank operations through publication of its reports.”²²⁶ Similarly, the CAO “makes every effort to ensure transparency and maximum disclosure of its reports, findings, and outcomes. This includes reports and findings from its dispute resolution processes, compliance investigations, and advisory work, as well as CAO Annual Reports.”²²⁷

The Inspection Panel and CAO also implement important limits on transparency in order to protect the interests of complainants. Both mechanisms allow for complaints to be kept confidential when requested by complainants.²²⁸ Thus, the Inspection Panel’s Operating Procedures and the CAO’s Operational Guidelines strike a good balance between ensuring transparency and protecting complainants’ interests.

6. *Rights-Compatibility*

Guiding Principle 31 states that effective grievance mechanisms should also be rights-compatible, meaning that they ensure “that outcomes and remedies accord with internationally recognized human rights.”²²⁹ Even if a mechanism does not frame grievances in terms of human rights, “care should be taken to ensure that they are in line with internationally recognized human rights.”²³⁰

Neither the Inspection Panel nor the CAO is fully rights-compatible. To file a complaint with either mechanism, the complainants must be experiencing harm, or believe they will be harmed, as a result of the World Bank Group’s violation of its own internal operational policies and procedures.²³¹ However, while the Guiding Principles recognize human rights as consisting of the International Bill of Human Rights and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work,²³² the World Bank

225. *Guiding Principles*, *supra* note 11, at princ. 31(e).

226. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 5(g).

227. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.4.

228. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 18; CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.4.

229. *Guiding Principles*, *supra* note 11, at princ. 31(f).

230. *Guiding Principles*, *supra* note 11, at princ. 31 cmt.

231. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 12(c); see also CAO OPERATIONAL GUIDELINES, *supra* note 139, § 1.1 (providing a grievance mechanism to redress negative “impacts related to business and human rights in the context of the IFC policy and Performance Standards on Environmental and Social Sustainability.”).

232. *Guiding Principles*, *supra* note 11, at princ. 12.

Group's internal policies and procedures consider fewer rights. Thus, these mechanisms cannot address all human rights violations and are not fully human rights-compatible.

7. *Source of Continuous Learning*

Lastly, an effective grievance mechanism is one that is a source of continuous learning, "drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms."²³³ Both the operating procedures and guidelines of both the Inspection Panel and the CAO allow the mechanisms to promote institutional learning in certain circumstances. The Inspection Panel details "systemic issues and reflections discerned from its work to the Board, Management, and the public via its Annual Report and other publications."²³⁴ But it may only present its observations during meetings with the Board and Management "when requested."²³⁵ Similarly, the CAO's advisory role can be initiated in three situations: (1) "[a]t the discretion of the CAO Vice President regarding lessons learned from CAO's Dispute Resolution and Compliance roles"; (2) "[a]t the discretion of the CAO Vice President to the World Bank Group President on systemic and critical issues relating to CAO's casework"; and (3) by a "request from the President or IFC/MIGA senior management."²³⁶

The Pilot Program denies the Inspection Panel the opportunity to improve World Bank projects through the promotion of lessons learned.²³⁷ During the only two cases handled through the Pilot Program, as of March 31, 2015, the Inspection Panel acknowledged evidence of safeguard violations, but did not launch an investigation.²³⁸ Complainants must voluntarily opt into the Pilot Program, and they retain the right to indicate at any time that they are dissatisfied and would like their complaint to be registered.²³⁹ But within three months of receipt of the complaint through the Pilot Program, the Inspection Panel reviews the case and, based on the complainants' satisfaction at that point, decides whether to register the complaint.²⁴⁰ As a result, those filing a complaint who become dissatisfied with the progress through the Pilot Program

233. *Guiding Principles*, *supra* note 11, at princ. 31(g).

234. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, ¶ 79.

235. *Id.*

236. CAO OPERATIONAL GUIDELINES, *supra* note 139, § 5.2.1.

237. Aug. 2014 Civil Society Letter, *supra* note 198, at 1.

238. *See id.*; Memorandum from the Inspection Panel to the Executive Directors of the International Bank for Reconstruction and Development, Request for Inspection – Paraguay: Sustainable Agriculture and Rural Development Project (P088799), Notice of Non-Registration and Panel's Observations of the Second Pilot to Support Early Solutions (Mar. 11, 2015) (available on World Bank website, IPN Request RQ 14/04).

239. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 139, annex I, ¶¶ 4, 5(b).

240. *Id.* ¶ 8.

after the three months may never have their claim investigated because the Inspection Panel will have already issued a Notice of Non-Registration. By relying on World Bank management to handle cases through the Pilot Program and deciding not to register a complaint so quickly, the Inspection Panel misses an opportunity to investigate and present to the Board “the cause and extent of the Bank’s policy violations and to learn lessons to improve future projects.”²⁴¹

Overall, based on Guiding Principle 31’s seven effectiveness criteria, both the Inspection Panel and the CAO have several characteristics of an effective mechanism: they are accessible to communities before a harm has occurred, they strike a good balance between promoting transparency and respecting complainants’ confidentiality, and they have the potential to promote institutional learning. The CAO has additional characteristics of an adequate mechanism: it does not require complainants to pursue any other redress mechanisms first, and it allows for complaints by individuals, rather than only communities. But both mechanisms are also lacking in several areas. Neither mechanism is fully rights-compatible or has perfect legitimacy. Both mechanisms may only promote institutional learning in limited circumstances. In addition, the Inspection Panel meets fewer criteria than the CAO, namely predictability, accessibility, and equitability.

Although they do not to meet some of the Guiding Principles’ effectiveness criteria, the Inspection Panel and the CAO still play an important role in ensuring access to remedy. Without these mechanisms, many project-affected communities may have no access to any form of remedy. The existence of the Inspection Panel and the CAO may also pressure World Bank Group management to take steps to ensure that the internal policies and procedures are followed, preventing some future harms.²⁴² Thus, the Inspection Panel and the CAO are essential mechanisms to provide access to effective remedy for those facing harm from World Bank Group-sponsored projects.

CONCLUSION

Under the Guiding Principles, the responsibilities of the World Bank Group are unclear. The World Bank Group maintains State-like qualities, such as ownership by States and immunity equal to that of sovereign immunity. However, it is also characterized by several business-like qualities—including a lack of sovereign territory, a prohibition on engaging in political affairs, and profit-seeking behavior—that prohibit it from fulfilling many of the duties that

241. *Id.*

242. Wong & Mayer, *supra* note 175, at 516–517.

the Guiding Principles imposes on States. Thus, the World Bank Group should be considered a business enterprise.

Under the Guiding Principles, the World Bank Group has a duty to provide access to effective non-judicial remedies. It offers two accountability mechanisms: (1) the Inspection Panel, covering the IBRD and IDA, and (2) the Compliance Advisor Ombudsman (CAO), covering the IFC and MIGA. Evaluated under the seven characteristics of an effective mechanism in Guiding Principle 31, both mechanisms have several features demonstrating effectiveness. For instance, the Inspection Panel and the CAO are accessible to communities before harm has occurred, they promote transparency while protecting complainants' need for confidentiality in certain cases, and they can foster institutional learning in some circumstances. In addition, the CAO allows an individual to file a complaint, does not require contact with World Bank Group management prior to filing a complaint, and has a strong monitoring function.

But both mechanisms need to improve in a number of areas. In particular, the Inspection Panel and the CAO should establish greater independence from World Bank Group management and ensure equitable access to information for complainants. They should also investigate all eligible complaints and expand timelines for filing complaints. Lastly, they should promote greater stakeholder awareness of the mechanisms. However, despite some failures, the Inspection Panel and the CAO provide a crucial method to hold the World Bank Group accountable for the human rights violations of the projects it funds.

Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies

Sam Szoke-Burke*

ABSTRACT

This Article focuses on the right to truth and its interaction with the duty to bring perpetrators to justice following a period of gross violations of international human rights law and serious violations of international humanitarian law. It explores how truth-finding and criminal justice programs interact, and how States can most comprehensively satisfy their obligations with regard to the right to truth and the duty to bring perpetrators to justice, given the raft of practical limitations that a State may face in periods of political transition. The Article argues that even when a State is able to carry out prosecutions, it is likely obliged to look for additional strategies, including truth commissions, to more comprehensively fulfill its international human rights obligations. Additionally, where an exhaustive suite of prosecutions is not feasible in the short term, truth commissions and other transitional justice mechanisms can be employed to commence the fulfillment of the right to truth, though these should be implemented with a view to proceeding to thorough criminal justice processes as soon as the State's political context permits.

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INTRODUCTION

Following a period of gross and systematic violations of human rights and serious breaches of international humanitarian law, a government must not only respond to political pressures but also comply with international law. The field of transitional justice was developed by practitioners, policy makers, and

academics to guide government responses in order to achieve broad notions of justice while maintaining peace and stability.¹ Apart from the continuing obligation to protect individuals within its jurisdiction from human rights violations,² a State must provide reparations to victims of past human rights violations,³ and may be required to bring perpetrators to justice.⁴ A State must also ensure the fulfillment of the right to the truth, which obliges governments to investigate and reveal all available information regarding past human rights violations. The interaction of these obligations ensures that transitional justice policies are best suited to the maintenance of peace and the restoration of the dignity of victims, rather than merely forming policies that are politically expedient for the government. The impact of international human rights law on transitional justice policies is thus a ripe area for exploration. The norms and jurisprudence of international criminal and humanitarian law, both of which are relevant to periods immediately following conflict or grave human rights abuses, are also considered in this Article when determining the scope of the right to truth and the duty to bring perpetrators to justice.

This Article builds on jurisprudence and commentary from the last decade to conclude that the right to truth, often viewed as a soft (*lex ferenda*) obligation, has now crystallized into a legally binding (*lex lata*) norm. The Article considers the interaction of the right to truth with the duty to bring perpetrators to justice. Prosecutions are commonly regarded as the primary means of addressing both of

1. . See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003) (defining transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”).

2. . See International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, S. TREATY DOC. 95-20, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”).

3. . Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; ICCPR, *supra* note 2, art. 2(3); International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), S. TREATY DOC. 95-18, 660 U.N.T.S. 195, 212 (all of which require States to provide “remedies” for violations of human rights); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85, 113 (requiring “redress” and “compensation”); Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989) (requiring “measures to promote physical and psychological recovery and social reintegration of a child victim”); Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 18 June 1977 art. 91, Jun. 8, 1977, 1125 U.N.T.S. 3 (requiring “compensation”); Rome Statute of the International Criminal Court art. 75, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (requiring “reparations . . . including restitution, compensation and rehabilitation”).

4. . See Part III: The Duty to Bring Perpetrators To Justice, *infra*.

these obligations.⁵ However, this Article argues that even when a State is able to carry out a comprehensive suite of prosecutions, it will usually be obliged to look for additional strategies to more comprehensively fulfill its international obligations. In this regard, the value of truth commissions in satisfying truth-finding obligations and the duty to bring perpetrators to justice is explored in detail.

The Article considers how the right to truth and the duty to bring perpetrators to justice can both be most fulsomely satisfied, given the raft of practical limitations that a State in transition may face. These factors include a government's institutional or financial capacities,⁶ the extent of the past violations,⁷ whether perpetrators remain embedded in State institutions,⁸ and the stability of the current political environment.⁹ Properly incorporating these factors into the design of a country's transitional justice program will assist States in determining the most productive division of labor between their obligations regarding truth and justice and in choosing among the various

5. . *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 150 (Sep. 26, 2006) (holding that “the ‘historical truth’ included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings”); *El-Masri v. The Former Yugoslav Republic of Maced.*, Judgment, App. No. 39630/09, Eur. Ct. H.R. ¶¶ 191–93 (Dec. 13, 2012); *Contreras v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 170 (Aug. 31, 2011); Human Rights Council Res. 9/11, ¶ 4, Sept. 18, 2008, U.N. Doc. A/HRC/9/L.12; *see also* Juan Méndez and Francisco Bariffi, *Truth, Right to, International Protection*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, Jan. 2011, ¶ 13 (stating that “[a]s regards the duty of the State to prosecute grave human rights violations, the adequate fulfillment of this obligation by the State could be the most complete and satisfactory method of obtaining both truth and justice, by means of transparent criminal trials conducted with full guarantees of due process”).

6. . *See, e.g.*, Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, in *LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* 55, 60–64 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) (“a combination of the scale and nature of past crimes, the absence of evidence, and a dysfunctional criminal justice system may mean that a state is simply unable to punish”).

7. . *Id.*

8. . *Id.* 54, (arguing that where security forces are “under the control of, or loyal to, the previous regime” and are “so powerful that any attempt to prosecute them or their allies could lead to . . . a refusal to allow transition to democracy [or] a return to military rule” this may be a legitimate reason why a successor government may not be able to prosecute past abuses).

9. . *See, e.g.*, Omar Drammeh, *Rethinking Transitional Justice: The Simultaneous Existence of the Truth & Reconciliation Commission (TRC) and the Special Court for Sierra Leone*, Paper delivered to MAKING INSTITUTIONS WORK FOR THE POOR, ANNUAL CONFERENCE FOR THE NORWEGIAN ASSOCIATION FOR DEVELOPMENT RESEARCH, Bergen, Nov. 5–7, 2007, 7 (describing the factors affecting the Special Court of Sierra Leone’s approach to prosecutions, and observing that “[t]he extent and form of such prosecutions is generally viewed as being determined by local political context at the time of transition”).

mechanisms that can be employed to satisfy them. This should lead to a transitional justice program with various integrated, and possibly sequenced,¹⁰ mechanisms. The Article concludes that truth commissions should often be employed to play a fruitful, efficient, and complementary role in fulfilling the right to truth.¹¹ To do so, truth commissions must be implemented pursuant to a long-term strategy that clearly delineates how they interact with criminal prosecutions and other transitional justice processes.

This Article is divided into seven parts. It first considers how governments in times of transition must design policies that address the practical and political challenges they face while also complying with international human rights law. In Part II, the Article argues that the right to truth has crystallized into a hard norm, with which governments are bound to comply, and sets out the content of that right. State obligations to bring perpetrators to justice are considered under Part III, followed by a discussion on how the right to truth and the duty to bring perpetrators to justice interact in Part IV. Part V considers the capacity of prosecutions and of truth commissions to fulfill these obligations and addresses potential challenges. In Part VI, the Article navigates various practical factors that impact a State's ability to comply with its obligations. Part VII discusses the potential benefits of sequencing different transitional justice mechanisms. The Article concludes that while prosecutions will generally have a strong role to play, States will often be bound to implement some additional truth-finding processes to adequately fulfill the right to truth.

I.

DECISION-MAKING IN TIMES OF TRANSITION

Various pressures will influence government policies when transitioning from a period of gross and systematic human rights violations. Periods of prolonged armed conflict often significantly deplete a government's coffers, creating financial restrictions. Ruined infrastructure or a governmental apparatus staffed by bureaucrats loyal to the former regime may limit the new government's capacity to effectively implement new policies. The government may also find its citizens divided and traumatized, leading to popular reprisals or cycles of violence.¹² A State's police force or military may have been complicit

10. . See Part VII, *infra*.

11. . Lydiah K. Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*, 3 SUR – INT'L. J. HUM. RTS. 70, 79 (2006). Truth Commissions can also contribute to processes of reparations, recommend institutional reform, and provide a platform of dialogue between victims and perpetrators, which can contribute to societal healing and reconciliation. However, such functions are outside the scope of this Article.

12. . See, e.g., ERICA JAMES, DEMOCRATIC INSECURITIES: VIOLENCE, TRAUMA, AND

or actively involved in the past abuses and may pose a threat to the maintenance of a peaceful society. An effective government must be able to respond to and work within such constraints in determining its roadmap for the future.

Significant legal constraints also exist. In particular, international human rights law imposes duties on the State to bring perpetrators to justice (while according due process to all persons facing prosecution),¹³ to provide reparations to victims,¹⁴ and to uncover the truth.¹⁵ These obligations create a normative framework to guide governmental action, setting out “the right thing to do” in a way that cannot be ignored regardless of what a government’s political concerns may demand. They also apply important pressures on governments¹⁶ to ensure that responses to atrocity serve two important goals: the restoration of dignity for the victims of human rights violations¹⁷ and the non-recurrence of those violations.¹⁸

While international human rights law creates normative pressures on governmental responses to atrocity, this must not lead to responses that are unbalanced or that fulfill one particular obligation to the detriment of another.¹⁹ The question should not be whether to bring a perpetrator to justice or whether to uncover and record the truth, but how justice can be done and what process of truth-finding can be embarked upon given the countervailing pressures.²⁰ Thus,

INTERVENTION IN HAITI 12–13 (2010).

13. . See Part III, *infra*.

14. . The duty to provide reparations to victims is outside the scope of this Article, and will not be considered in detail.

15. . See Part II, *infra*.

16. . This Article focuses on obligations on national governments. Accordingly, efforts by international bodies at truth-finding or prosecutions will not be considered in detail.

17. . Navanethem Pillay, Address by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights at the UN Approach to Transitional Justice (Dec. 2, 2009), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9663&LangID=e#sthash.BEFkcbxr.dpuf> (“[T]ransitional justice . . . seeks to restore and protect the dignity of individuals as bearers of fundamental human rights and freedoms.”).

18. . United Nations, *Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice*, (Mar. 2010), 4, http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf (highlighting that transitional justice processes should “ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and *guarantees of non-recurrence of violations*, in accordance with international law” (emphasis added)).

19. . Eduardo González Cueva, *Seeking Options for the Right to Truth in Nepal*, ICTJ BRIEFING (Nov. 2012) at 2, <http://ictj.org/sites/default/files/ICTJ-Briefing-Paper-Nepal-Ordinance-Dec-2012-ENG.pdf>; Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 256 (1997).

20. . Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 43 (2002) (stating that “prosecution and forgetting are not the only options available in the context of transitional justice”).

a State cannot rely on its inability to prosecute more than a handful of accused individuals as an excuse for not considering other complementary truth-finding mechanisms. This Article considers the interaction of truth-finding and justice processes in more detail in Part IV, before then exploring the various processes available to assist with truth-finding and bringing perpetrators to justice in Part V.

II.

THE RIGHT TO TRUTH

A. *Content*

The right to truth began as a general and somewhat flexible doctrine in the 1980s, but regional human rights courts have more precisely articulated and more strictly enforced the right in recent years.²¹ It was first enunciated not as an individual right, but by the corresponding State obligation to investigate.²² In *Velasquez-Rodriguez*, the Inter-American Court of Human Rights spoke of a State's obligation to "carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible,"²³ and to inform "the relatives of the fate of the victims and, if they have been killed, the location of their remains."²⁴

The right to truth has been held to belong not only to victims and their families,²⁵ but also to victims of similar crimes and to society as a whole.²⁶ In addition to holdings by the European Court of Human Rights Grand Chamber, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights, references to the right of the general public to

21. . Paul van Zyl, *supra* note 6, at 53, 60–64.

22. . Méndez, *supra* note 19, at 261.

23. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

24. . *Id.* ¶ 181.

25. . See, e.g., Comm'n on Human Rights Res. 2005/66, U.N. Doc. E/CN.4/RES/2005/66, at 2 (Apr. 20, 2005) ("[s]tressing the imperative for society as a whole to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families, within the framework of each State's domestic legal system, to know the truth regarding such violations").

26. . El-Masri v. The Former Yugoslav Republic of Maced., Judgment, App. No. 39630/09, Eur. Ct. H.R., ¶ 191 (Dec. 13, 2012); Lenahan (Gonzales) v. United States of America, Merits, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 193 (July 21, 2011); Moiwana Village v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 204 (June 15, 2005); Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 274 (Nov. 25, 2003).

truth have been made by the Human Rights Council²⁷ and the General Assembly,²⁸ as well as by expert studies and reports.²⁹

The types of “truth” that a State is now bound by international law³⁰ to genuinely attempt³¹ to reveal fall within two categories. First, a government must endeavor to uncover the truth about each particular incident, including the human rights violations suffered, the identity of the victim, the identity and responsibility of the perpetrator and, for disappearances, the victim’s whereabouts.³² This Article refers to such truths as “incident-specific truths.” Second, victims and the general public are also entitled to the “full and complete truth”³³ about the systemic or structural causes and circumstances of the events in question and any patterns of abuse.³⁴ This second category of truths is referred to herein as “structural truths.” The structural truths that a truth commission might articulate include the predominant societal factors that led to ethnic violence, such as when Kenya’s Truth, Justice and Reconciliation Commission found that “historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya.”³⁵ Truth commissions might also explain how government policies at the time of the

27. . Human Rights Council Dec. 2/105, at 1 (Nov. 27, 2006); H.R.C. Res. 9/11, *supra* note 5, at 2–3; Human Rights Council Res. 21/7, ¶ 3, U.N. Doc. A/HRC/RES/21/7 (Oct. 10, 2012).

28. . Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 24, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

29. . Comm’n on Human Rights, Study on the Right to the Truth, ¶ 58, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter *Study on the Right to Truth*]; Comm’n on Human Rights, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005), Principles 1, 2, 19 and 31.

30. . The right to truth has a diverse range of sources, which are discussed in Part II (C) (“Sources: Treaties and Interrelated Rights”) and Part. II(D). (“Sources: State Practice and Customary International Law”), *infra*.

31. . Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174–81 (July 29, 1988) (holding that “[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result”); *see also* Méndez, *supra* note 19, at 264.

32. . Méndez & Bariffi, *supra* note 5, ¶ 6; González Cueva, *supra* note 19, at 2.

33. . *Study on the Right to the Truth*, *supra* note 29, ¶ 59; *see also* H.R.C. Res. 21/7, *supra* note 27, at 3 (acknowledging the right “to know the truth regarding such violations, to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations and the circumstances under which they occurred”).

34. . Valle Jaramillo v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 102 (Nov. 27, 2008); *see also* Méndez and Bariffi, *supra* note 5, ¶ 5; *Study on the Right to the Truth*, *supra* note 29, ¶ 59; Report of the Independent Expert to Update the Set of Principles to Combat Impunity, *supra* note 29, Principle 2.

35. . TRUTH, JUSTICE, AND RECONCILIATION COMM’N, REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION, VOL. IV, at 8 (May 2013).

violations ensured rights violations remained “unpunished and . . . impossible to redress,” as was found by Argentina’s National Commission on the Disappearance of Persons (CONADEP).³⁶ They may also identify demographic tendencies of victims, such as Peru’s Truth and Reconciliation Commission’s conclusion that those experiencing poverty and social exclusion, and those speaking indigenous languages, were considerably more likely to be victims.³⁷ Juan Méndez, former President of the Inter-American Commission on Human Rights and the current United Nations Special Rapporteur on Torture, notes that investigation and revealing the truth should also involve the hearing of the victims’ voices, which should include a “process whereby victims or their family members are invited to be heard by a State entity, or at least by a representative of the society in which they live.”³⁸ International courts and instruments have yet to expressly include this notion of hearing from victims or their family members within the right to truth, although by necessity truth-finding will often be reliant on the accounts of those who suffered the abuse.

The right to truth also has a temporal element. The United Nations Human Rights Committee has determined that there is a general obligation to investigate allegations of violations “*promptly*, thoroughly and effectively through independent and impartial bodies.”³⁹ For this reason, a truth commission may be an especially apposite mechanism to employ in circumstances where other means of obtaining the truth, such as prosecutions, may take considerable time to conduct. How the timing of different mechanisms affects a State’s ability to fulfill its international obligations is further considered in Part VII.

The focus of the obligation to fulfill the right to truth is the means employed by a State, rather than the extent of the truth actually found.⁴⁰ Regardless, the duty requires the State to carry out a serious and thorough investigation, rather than one which is “a mere formality preordained to be

36. . NATIONAL COMM’N ON THE DISAPPEARANCE OF PERSONS, NUNCA MÁS (NEVER AGAIN): REPORT OF CONADEP, at Part I. G (1984).

37. . TRUTH AND RECONCILIATION COMM’N OF PERU FINAL REPORT, VOL. VIII, “GENERAL CONCLUSIONS”, at 316–717 (YEAR).

38. . Juan Méndez, *The Right to Truth*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 265 (Christopher C. Joyner and M. Cherif Bassiouni, Eds., 1998).

39. . Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 15 (2004) (emphasis added).

40. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174–81, (July 29, 1988). (holding that “[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result”); see also Méndez, *supra* note 19, at 264.

ineffective.”⁴¹ The Human Rights Council and the General Assembly have also articulated the right to truth as requiring States to preserve archives and other evidence⁴² and to use, where practicable and appropriate, forensic technologies in their investigations.⁴³

B. *Status as Lex Lata*

The right to truth has emerged as a legally binding (*lex lata*) norm of international law.⁴⁴ It has been the subject of significant extra-judicial development by scholars and independent experts⁴⁵ and is regularly applied in many authoritative interpretations of binding norms and international instruments.⁴⁶ The Inter-American Court of Human Rights first articulated the right to truth in the context of enforced disappearance, holding that “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁴⁷

More recently, the Grand Chamber of the European Court of Human Rights in *El Masri* considered the right to truth of a man who was detained and later

41. . Velásquez Rodríguez, *supra* note 23, ¶ 177.

42. . H.R.C. Res. 9/11, *supra* note 5; H.R.C. Res. 21/7, *supra* note 27, at 3. *See also* G.A. Res. 68/165, ¶ 10, U.N. Doc. A/RES/68/165 (Dec. 18, 2013) (encouraging states to “establish a national archival policy that ensures that all archives pertaining to human rights are preserved and protected”).

43. . Human Rights Council Res. 10/26 (Mar. 27, 2009) and Res. 15/5 (Sep. 29, 2010) (recognizing the importance of the utilization of forensic genetics to deal with the issue of impunity within the framework of investigations relating to gross human rights violations and serious violations of international humanitarian law).

44. . Juan E. Méndez, *The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling*, in *TELLING THE TRUTHS: TRUTH TELLING AND PEACE BUILDING IN POST-CONFLICT SOCIETIES* 116 (Tristan A. Borer ed., 2006) [hereinafter *Lessons Learned from Latin America*].

45. . *See* Y. Gloria Park, *Truth as Justice: Legal and Extralegal Development of the Right to Truth*, 31 HARV. INT’L REV. 24 (2010) (citing Méndez, *supra* note 19, at 255, who in turn cited *Eighth Annual Report and List of States which, Since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency*, presented by Mr. Leonardo Despouy, Special Rapporteur appointed pursuant to Economic and Social Council Resolution 1985/37, U.N. Doc. E/CN.4/Sub.2/1995/20/Corr.1 (1995)).

46. . *Lessons Learned from Latin America*, *supra* note 44, at 116.

47. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988). *See e.g.*, Inter-Am. Comm’n H.R., ‘OEA/Ser.L/V/II.68, doc. 8 rev. 1, 193 (1986). Before that case, the Inter-American Commission on Human Rights had asserted the existence of an “inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts.”

transferred to the United States Central Intelligence Agency's extraordinary rendition and detention program. It held that an inadequate investigation by the Former Yugoslav Republic of Macedonia into the circumstances of the detention and transfer violated the prohibition on torture in Article 3 of the European Convention of Human Rights and the right to an effective remedy set out in Article 13, and had an "impact" on the right to the truth.⁴⁸ Four concurring judges more forcefully affirmed the existence of the right to truth as "widely recognised by international and European human rights law."⁴⁹ While all aspects of the right to truth are not comprehensively codified in a binding international treaty, the right to the truth for victims of enforced disappearance is articulated in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance.⁵⁰ It also has strong conceptual links to the international humanitarian law norm that families have a right to know the fate of their relatives, as set out in Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949.⁵¹

C. Sources: Treaties and Interrelated Rights

Different aspects of the right to truth are based on a wide array of jurisprudential sources and human rights, including the prohibition of torture, the right to life, the right to an effective remedy, and the State obligation to end impunity and prevent recurrence of mass atrocity. These sources vary depending on the setting and type of human rights violation, the category of truth concerned, and the particular right holder. This subsection considers how each related human right has been used to establish aspects of the right to truth. States

48. *El-Masri v. The Former Yugoslav Republic of Maced.*, Judgment, App. No. 39630/09, Eur. Ct. H.R., ¶¶ 174–91, 255 (Dec. 13, 2012) (acknowledging the right to truth and holding that "[w]here an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure"). *See also* *Süheyla Aydın v. Turkey*, App. No. 25660/94, Eur. Ct. H. R., ¶ 204, 266 (May 24, 2005) (considering the duty to provide reparations set out in art. 41 of the European Convention of Human Rights).

49. *El-Masri*, (Tulkens, Spielmann, Sicilianos and Keller, J., concurring), *supra* note 5, at 83.

50. *International Convention for the Protection of All Persons from Enforced Disappearance* art. 6, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006). The International Convention for the Protection of All Persons from Enforced Disappearance entered into force upon the 20th ratification of the convention in December 2010. As of 1 December 2013, the convention has 40 States parties.

51. *Yasmin Naqvi, The Right to Truth in International Law: Fact or Fiction*, 88 INT'L REV. RED CROSS 245, 248 (2006).

also increasingly acknowledge the existence of the right to truth: this is considered in the following section on customary international law.

International human rights law prohibitions of torture and cruel, inhuman, and degrading treatment form a key basis for certain aspects of the right to truth, including the right of family members to know the specific circumstances of a human rights violation. In the context of disappearances, the right of family members of a disappeared person to know incident-specific truths has been articulated in the prohibition of torture and cruel, inhuman, and degrading treatment embedded in the International Covenant on Civil and Political Rights (ICCPR).⁵² Specifically, in *Del Carmen Almeida de Quinteros v. Uruguay*, the Human Rights Committee concluded that the author of a complaint to the Committee had a “right to know what has happened to her daughter” given the suffering that the continuing uncertainty of a family member’s fate can cause.⁵³ The European Court of Human Rights in *El Masri* linked the right to truth to prohibitions of torture in a slightly different way. The court referred to the procedural limb of the prohibition of torture and inhuman and degrading treatment, requiring the State to conduct an “effective official investigation” whenever an individual raises an arguable claim of being subject to such prohibited treatment.⁵⁴ It went on to hold that a failure to conduct such an investigation (which effectively denies the victim the right to truth) constituted a breach of the procedural limb of the prohibition against torture.⁵⁵

The failure to investigate the disappearance of missing persons in life-threatening circumstances has also been held by the European Court of Human Rights to be a continuing violation of the procedural obligation to protect the right to life.⁵⁶ Although the Human Rights Committee did not make specific mention of the right to truth in its General Comment 6 on the right to life, it did link the importance of investigation procedures to the right to life. Specifically, the Committee set out State obligations to “establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances, which may involve a violation of the right to life.”⁵⁷

52. . *Del Carmen Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, ¶ 14, U.N. Doc. CCPR/C/OP/2 (1990); Méndez and Bariffi, *supra* note 5, ¶ 21; *see also* González Cueva, *supra* note 19, at 1.

53. . *Quinteros*, *supra* note 52, ¶ 14.

54. . *El-Masri v. The Former Yugoslav Republic of Maced.*, Judgment, App. No. 39630/09, Eur. Ct. H.R., ¶ 182 (Dec. 13, 2012).

55. . *Id.* ¶ 194.

56. . *Cyprus v. Turkey*, Judgment, App. No. 25781/94, Eur. Ct. H.R., ¶ 136 (May 10, 2001); *Study on the right to the truth*, *supra* note 29, at 9.

57. . Human Rights Comm., General Comment No. 6 on the Right to Life, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 4 (1982).

The human right to an effective remedy is another basis for certain elements of the right to truth because of the reparative effect that revealing the truth can produce for victims or their families. The Human Rights Committee determined that the right to the truth applies to any serious human rights violation and emanates from the procedural guarantee in Article 2(3) of the ICCPR, requiring a State to provide an effective remedy.⁵⁸ A concurring opinion in *El Masri* also linked State obligations to investigate violations to the right to remedy, concluding that “the right to an effective remedy enshrined in Article 13 [. . .] includes a right of access to relevant information about alleged violations.”⁵⁹

In addition, the Inter-American Court,⁶⁰ the Inter-American Commission on Human Rights,⁶¹ the Human Rights Council,⁶² and the General Assembly⁶³ have all emphasized connections between the right to truth and the duty to provide reparation to victims of serious human rights violations. Of particular note is the General Assembly’s exhortation, in its resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation*,⁶⁴ to States to develop means of informing the general public and victims in particular, regarding gross violations of international human rights law and serious violations of international humanitarian law.

58. . H.R.C. General Comment No. 31, *supra* note 39, ¶ 15.

59. . *El-Masri*, (Tulkens, Spielmann, Sicilianos, and Keller, J., concurring), *supra* note 5, at 82–83 (referring to “the right to an effective remedy enshrined in Article 13, which includes a right of access to relevant information about alleged violations”).

60. . *Moiwana Village v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 204 (June 15, 2005) (holding in the context of a military-perpetrated massacre that “all persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims.”).

61. . *Lenahan (Gonzales) v. United States of America*, Merits, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 193 (July 21, 2011) (holding in the context of the repeated violation of the right to life that “[a] critical component of the right to access information is the right of the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation” (emphasis added) and that the right to truth “is not only a private right for relatives of the victims, affording them a form of reparation, but also a collective right that ensures that society has access to information essential for the workings of democratic systems”; and citing *Ignacio Ellacuria and Others (El Salvador)*, Inter-Am. Comm’n H.R., Report on the Merits No. 136/99, Case 10.488, ¶ 224 (Dec. 12, 1999)).

62. . H.R.C. Res. 9/11, *supra* note 5, at 2.

63. . G.A. Res. 68/165, *supra* note 42, at 1.

64. . *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *supra* note 28.

Finally, it is the State obligations to end impunity⁶⁵ and to prevent recurrence of mass atrocity,⁶⁶ rather than the prohibition of torture or other specific human rights,⁶⁷ that are regarded as forming the basis for the general public's right to truth. Democratic guarantees also contribute to the right to truth of the general public. For instance, the Commission on Human Rights emphasized the right to truth's links with the entitlement of the public to freedom of information and to the public's "access to the fullest extent practicable information regarding the actions and decision-making process of their Government."⁶⁸

D. Sources: State Practice and Customary International Law

Though the right to truth has not been incorporated into a widely ratified treaty, customary international law provides reasonable evidence that the right to truth, in broad terms, has emerged as an international law norm. This includes references to the importance of respecting the right to truth and to setting up judicial mechanisms and truth commissions to investigate human rights violations.⁶⁹ To achieve customary international law status a norm must be evidenced by State practice (including diplomatic and other governmental actions or inaction) and *opinio juris* (a State's understanding of the current status of customary international law, as evidenced by that State's behavior).⁷⁰ Tullio Treves notes that the increase in international forums where States meet to consider international legal norms has created additional opportunities for States to contribute to customary international law,⁷¹ whether expressly or by implication. This is consistent with the International Court of Justice's holding in *Nicaragua* regarding the customary prohibition on the use of force. There the Court held that *opinio juris* was manifest in the States parties' consent to a United Nations General Assembly resolution. The Court noted that endorsing

65. . C.H.R. Res. 2005/66, *supra* note 25, at 2, ¶ 1; H.R.C. Res. 9/11, *supra* note 5, at 2; H.R.C. Res. 21/7, *supra* note 27, at 3 ¶ 1; G.A. Res. 68/165, *supra* note 42 ¶ 1.

66. . *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 77 (Feb. 22, 2002); *Romero y Galdámez v. El Salvador*, Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/100, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 148 (2000); Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, *supra* note 29, Principles 2-3; Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.68, doc. 8 rev. 1, 193 (1986); *Study on the Right to the Truth*, *supra* note 29, ¶ 58.

67. . Méndez & Bariffi, *supra* note 5, ¶ 28.

68. . C.H.R. Res. 2005/66, *supra* note 25, at 2; H.R.C. Res. 21/7, *supra* note 27, at 3.

69. . See, e.g., G.A. Res. 68/165, *supra* note 42, ¶¶ 1, 4.

70. . RESTATEMENT (THIRD) OF THE LAW FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

71. . Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, ¶ 11 (2012).

the General Assembly resolution “cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter,” but rather may actually “be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”⁷²

Repeated consensual consideration of the right to truth by multilateral bodies such as the General Assembly,⁷³ the Human Rights Council,⁷⁴ and the now defunct Commission on Human Rights⁷⁵ has become increasingly pivotal in the crystallization of the right to truth as a legally binding (*lex lata*) norm. Calls by the Human Rights Council and the General Assembly for special rapporteurs and other mechanisms to take into account the right to truth⁷⁶ and the subsequent establishment of the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence⁷⁷ provide further evidence of *opinio juris* regarding the crystallization of the right to truth.⁷⁸

A duty to investigate past acts of violence was also confirmed by the African Commission on Human and People’s Rights in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.⁷⁹ In that case, Zimbabwe readily acknowledged the existence of a duty to investigate incident-specific truths,⁸⁰ though not expressly negating the duty to also investigate structural truths, and the Commission ordered the respondent State to establish a commission of inquiry into acts of violence that had not been investigated.⁸¹ This case complements the duty to investigate articulated by the European Court of Human Rights⁸² and the Human Rights Committee for circumstances where the

72. . Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, ¶ 188 (June 27).

73. . G.A. Res. 68/165, *supra* note 42; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 28.

74. . H.R.C. Res. 9/11, *supra* note 5; Human Rights Council Res. 12/12, U.N. Doc. A/HRC/RES/12/12 (Oct. 12, 2009); H.R.C. Res. 21/7, *supra* note 27.

75. . C.H.R. Res. 2005/66, *supra* note 25.

76. . H.R.C. Res. 9/11, *supra* note 5; G.A. Res. 68/165, *supra* note 42, ¶ 12.

77. . Human Rights Council Res. 18/7: Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, U.N. Doc. A/HRC/RES/18/7 (Oct. 13, 2011).

78. . *See also* G.A. Res. 65/196, U.N. Doc. A/RES/65/196 (Dec. 21, 2010) (proclaiming 24 March as the ‘International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims’).

79. . African Comm’n on Human and People’s Rights, Communication 245/02: Zimbabwe Human Rights NGO Forum v. Zimbabwe (June 25, 2002).

80. . *Id.* ¶ 115.

81. . *Id.*

82. . Cyprus v. Turkey, Judgment, App. No. 25781/94, Eur. Ct. H.R., ¶ 136 (May 10, 2001).

right to life may have been violated, discussed in Subsection C of Part II, above.⁸³

In addition, the General Assembly and Human Rights Council have also both noted that the right to truth⁸⁴ may be alternatively characterized in domestic legal systems as “the right to know, the right to be informed, or freedom of information.”⁸⁵ In its first session, the General Assembly referred to freedom of information as a “fundamental human right.”⁸⁶ The prevalence of freedom of information clauses in constitutions and laws in many countries⁸⁷ could provide further proof of the crystallization of (at least one aspect of) the right to truth: such laws tend to enshrine the right of access to information already in the possession of public authorities.⁸⁸ Whether they provide further evidence of a governmental duty to investigate and disclose the truth related to gross violations of human rights or serious violations of international humanitarian law per se remains to be determined.

Domestic jurisdictions also continue to reaffirm the right to truth of the general public. Argentina, the Bolivarian Republic of Venezuela, Cuba, Peru, and Uruguay all made statements to the Office of the High Commissioner on Human Rights affirming that society is entitled to know the truth regarding serious violations of human rights.⁸⁹ Courts in Colombia, Bosnia and Herzegovina, Peru, and Argentina were some of the first national courts to uphold the right of society as a whole to the truth.⁹⁰ More recently, the Supreme Court of the Philippines invoked the public’s right to truth when releasing its rules on writs on *habeas data* (concerning access to information), a remedy that

(cited in *Study on the right to the truth*, *supra* note 29, at 9).

83. . H.R.C. General Comment No. 6 on the Right to Life, *supra* note 57.

84. . These statements acknowledge that the right to truth applies to incident-specific truths (given the statements’ repeated focus on identifying victims and setting up judicial processes in the preamble and para. 4). Arguably, their reference to “massive or systemic violations of human rights” (preamble) provides some evidence of endorsement of the right to truth also applying to structural truths.

85. . G.A. Res. 68/165, *supra* note 42; H.R.C. Res. 21/7, *supra* note 27.

86. . G.A. Res. 59 (I), U.N. GAOR, 1st Sess., U.N. Doc. A/RES/59(I) (Dec. 14, 1946).

87. . See, e.g., Toby Mendel, *Freedom of Information as an Internationally Protected Human Right*, ARTICLE 19, <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> (referring to freedom of information laws in Fiji, India, Japan, South Africa, Trinidad and Tobago, the United Kingdom, Sweden, the United States, Finland, the Netherlands, Australia, Canada, and a number of other European States).

88. . *Id.*

89. . *Study on the Right to the Truth*, *supra* note 29, ¶ 37.

90. . *Id.* at ¶ 36 (referring to the following holdings: Supreme Court of the Nation (Argentina), Judgment 14/6/2005; Constitutional Tribunal (Peru), Judgment of 18 March 2004; Constitutional Court (Colombia), 2002, Judgment C-580; Human Rights Chamber for Bosnia and Herzegovina, Decision of 7 March 2003, Srebrenica cases, ¶ 212).

can be pursued by “any person [or if that person is dead, any member of that person’s immediate family] whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee.”⁹¹ The court specifically described the rules as “promulgated both as an independent remedy to enforce the right to informational privacy and the complementary ‘right to truth’ as well as an additional remedy to protect the right to life, liberty, or security of a person.”⁹² Writs of *amparo* (concerning protection) in the Philippines, also created by the rules of that country’s Supreme Court, protect an individual’s constitutional right to life, liberty, and security.⁹³ Victims of violations or threats thereof, their family members or “[a]ny concerned citizen, organization, association or institution, if there is no known member of the immediate family or relative of the aggrieved party”⁹⁴ are entitled to file writs of *amparo*. In 2011, South Africa’s Constitutional Court also affirmed the rights of victims, the media, and the general public to speak the truth about crimes committed during apartheid, including crimes for which amnesty had been granted.⁹⁵

E. Conflicts with Other Rights Holders

While the truth can be a source of healing for victims and a means of ensuring greater understanding and accountability for society, tensions can emerge between the right to truth and the privacy rights of different stakeholders.⁹⁶ Insisting on the general public’s right to truth might mean exposing the details of sexual or other degrading offences, which can violate the privacy rights of victims and their families.⁹⁷ Revealing the identity of child perpetrators (who may also be victims⁹⁸) is also problematic, given that they

91. . SUPREME COURT OF THE PHIL., THE RULE ON THE WRIT OF HABEAS DATA §§ 1,-2 (2008).

92. . SUPREME COURT OF THE PHIL., ANNUAL REPORT 63 (2008).

93. . SUPREME COURT OF THE PHIL., THE RULE ON THE WRIT OF AMPARO § 1 (2007).

94. . *Id.* at § 2(c).

95. . *The Citizen 1978 (Pty) Ltd v McBride*, CCT 23/10 [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (8 Apr. 2011).

96. . Publicly “identifying” someone as a perpetrator of a crime prior to them being subject to a lawful crime also raises ethical and human rights concerns. *See* discussion “iii. Identifying Perpetrators” under Part IV(B), *infra*.

97. . ICCPR, *supra* note 2, art. 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

98. . *See* Ismene Zarifis, *Sierra Leone’s Search for Justice and Accountability of Child Soldiers*, 9 HUM. RTS. BRIEF 18 (2002) (referring to child soldiers as “both victims and victimizers”).

have a right to anonymity⁹⁹ and that the best interests of the child must be a primary consideration in all “actions” concerning children.¹⁰⁰ In addition, publically exposing a juvenile offender’s identity can undermine his or her ability to reintegrate into society,¹⁰¹ given the stigma that can attach to such actions.¹⁰² Resolving this tension requires the balancing of these different interests and can be facilitated by the use of pseudonyms, private hearings, and other methods of ensuring that individual accounts cannot be traced back to those who wish, and who have the right, to remain anonymous.

F. Non-State Duty Bearers?

With regard to duty bearers, the host State will be obliged to comply with the right to truth and its correlative duty to investigate and disclose publically held information. Other entities may also be bound by, or voluntarily take on, these obligations. If the violation was committed during an international armed conflict by a combatant belonging to another State, that State will also be bound by international humanitarian law obligations regarding the search for such persons, including transmitting any relevant information upon request.¹⁰³ Such a State would also be obliged to fulfill the right to truth for any violations it committed extraterritorially.¹⁰⁴

Claims that non-State actors such as armed opposition groups ought to be bound by international human rights standards, which would include the right to

99. . UNICEF, *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, at 8 (Apr. 30, 1997) (“A code of conduct for journalists should be developed in order to prevent the media exploitation of child soldiers. This code should take account of, *inter alia*, the manner in which sensitive issues are raised, the child’s right to anonymity and the frequency of contact with the media.”).

100. . Convention on the Rights of the Child, *supra* note 3, art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

101. . *Id.* art. 39 (requiring states to take measures to promote societal reintegration of child victims).

102. . BETH VERHEY, CHILD SOLDIERS: PREVENTING, DEMOBILIZING AND REINTEGRATING 10 (2001).

103. . Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *supra* note 3, arts. 32–33.

104. . Arguments that the right to truth applies extra-territorially have been made in cases concerning the United States’ policy of extraordinary rendition. *See, e.g.*, Steven Macpherson Watt et al., *Petition Alleging Violations of the Human Rights of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah, and Bisher Al-Rawi by the United States of America with a Request for an Investigation and Hearing on the Merits*, Nov. 14, 2011, <https://www.aclu.org/files/assets/111114-iachr-petition-final.pdf>.

truth, remain controversial. Philip Alston, whilst Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, suggested that it may be desirable for the actions of armed opposition groups to be addressed “within some part of the human rights equation,” especially where the group “exercises significant control over territory and population and has an identifiable political structure.”¹⁰⁵ While any such obligations for non-State actors would likely be politically (rather than legally) imposed, it would still open up space for encouraging such groups to effectively fulfill the right to truth. Actions of the Revolutionary Armed Forces of Colombia (FARC) opposition group also contribute to a growing expectation that armed opposition groups will honor the right to truth, regardless of whether or not they are strictly obliged to by international law. These include the FARC’s calls for a truth commission, and its signing of a declaration of principles for the continuation of peace talks in June 2014, which includes a statement that “[c]larifying what happened during the conflict, including its multiple causes, origins and effects, is a key part of the fulfillment of the rights of victims, and society in general.”¹⁰⁶

Finally, business enterprises have a responsibility to respect human rights,¹⁰⁷ meaning that they should avoid violating human rights. Where businesses do breach human rights—for instance, by assisting a previous rights-violating regime—they should remedy the problem.¹⁰⁸ Disclosure of all pertinent information would likely come within such remedy, using a similar logic to that of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which, as discussed above, emphasizes the need to inform victims and the general public

105. . Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, including the Questions of Disappearances and Summary Executions*, ¶ 76, Comm’n on Human Rights, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston); see also Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, , *Civil and Political Rights, including the Questions of Disappearances and Summary Executions, Addendum: Mission to Sri Lanka*, ¶ 71(c), Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (by Philip Alston) (calling on the Liberation Tamil Tigers of Eelam to “take a range of concrete steps to demonstrate that it is serious about human rights”); Andrew Clapham, *Human Rights Obligations of Non-state Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 863 (Sept. 2006).

106. . Joint Communiqué 37—Declaration of Principles for the Discussion of 5th Item of the Agenda: “Victims”, Colom.—FARC-EP, June 2014, <http://bit.ly/1rCL8ab>.

107. . Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, at 13, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) (“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”).

108. . *Id.*

regarding gross violations of international human rights law and serious violations of international humanitarian law.¹⁰⁹

G. “The Truth”

Part of the challenge of defining the exact contours of the right to truth is the difficulty in defining what “the truth” actually is. Martti Koskenniemi conceived of major events impacting on international politics, which for this Article’s purposes would include widespread or systematic violations of international human rights law or international humanitarian law, as having many truths—among them, the legal truth (whether or not the accused committed the crime) and the historical truth (why they did it and how they were influenced by the behavior of others around them and the general context).¹¹⁰ This jars with the notion that a singular, definitive truth can be found by a court or other fact-finding institution.¹¹¹ The issue is further complicated by Koskenniemi’s observation that there will be various stakeholders to the truth in any particular case, including victims and members of the public who seek closure and healing, perpetrators who have the right to a fair trial, and members of general society who crave societal reconciliation.¹¹² The difficulty in arriving at a single incontestable truth was also acknowledged by the South African Truth and Reconciliation Commission. The Commission emphasized “the multilayered experiences of the South African story” that were illustrated by allowing both perpetrators and victims to recount their perspectives.¹¹³

The co-existence of criminal trials and a truth commission can also lead to inconsistent findings by different institutions, which can cause consternation and confusion. For instance, despite the fact that the 2014 report of Brazil’s National Truth Commission¹¹⁴ identified certain surviving perpetrators of human rights violations between 1946 and 1988, there is no guarantee that these perpetrators would be convicted in a criminal trial. Some or all may be acquitted, or the

109. . Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 28, ¶ 24.

110. . Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. OF U.N. LAW 1, 12 (2002) (cited in Georgina Duffin, *Past Truths and Present Justice: The Right to Truth in Transition 13* (Sep. 8, 2010) (unpublished M.A. dissertation, School of Oriental and African Studies, University of London)).

111. . Naqvi, *supra* note 51, at 246.

112. . Koskenniemi, *supra* note 110, at 12–13.

113. . TRUTH AND RECONCILIATION COMM’N OF S. AFR., VOLUME ONE: TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 112 (Oct. 29, 1998).

114. . COMISSÃO NACIONAL DA VERDADE, RELATÓRIO: VOLUME I (Dec. 2014).

crimes alleged might be attributed to other individuals, which could frustrate or confuse victims and members of the public.

However, such inconsistencies are not fatal to the truth-finding project. Different processes and investigative methods will answer different questions. More victim-focused processes, such as truth commissions, may better represent the disputed nature of certain events by allowing the inclusion of conflicting interpretations in the final report. Indeed, prosecutions must present the possibility of coming to findings that are inconsistent with truth commission findings: were it otherwise, the integrity of the prosecution would be significantly undermined. At the very least, truth commissions offer what Michael Ignatieff has described as the ability to limit the amount of unchallenged lies that exist in public discourse: Argentina's CONADEP made it impossible to deny that the military threw victims into the sea from helicopters, and Chile's Commission refuted denials that the Pinochet regime dispatched thousands of innocent individuals.¹¹⁵ South Africa's Commission managed to rely on a diversity of accounts while still discrediting existing "disinformation":

[O]ne can say that the information in the hands of the Commission made it impossible to claim, for example, that: the practice of torture by state security forces was not systematic and widespread; that only a few 'rotten eggs' or 'bad apples' committed gross violations of human rights; that the state was not directly and indirectly involved in 'black-on-black violence' . . . Thus, disinformation about the past that had been accepted as truth by some members of society lost much of its credibility.¹¹⁶

While it may be an imperfect or unsatisfying result to leave open the possibility of different mechanisms coming to different conclusions about certain events, this conflict is necessary to ensure the integrity and independence of each process. Truth commissions will generally have a broader scope of inquiry, which combined with their ability to debunk existing "disinformation," illustrates their value in helping to reveal both incident-specific truths and structural truths.

III.

THE DUTY TO BRING PERPETRATORS TO JUSTICE

Another State obligation that arises in transitional justice contexts and which often interacts with the right to truth is the duty to bring perpetrators of gross human rights violations to justice. Whether or not a State is under a duty to

115. . Michael Ignatieff, *Articles of faith*, 5 INDEX ON CENSORSHIP 110, 113 (1996). Cited in *Volume One: Truth and Reconciliation Commission of South Africa Report*, *supra* note 113, at 111.

116. . *Volume One: Truth and Reconciliation Commission of South Africa Report*, *supra* note 113, at 11112.

prosecute perpetrators of human rights abuses will depend on the circumstances of the violation. For State parties to the relevant treaties, there exists a duty to prosecute instances of genocide,¹¹⁷ torture and cruel, inhuman and degrading treatment,¹¹⁸ apartheid,¹¹⁹ and forced disappearances.¹²⁰ There also exists an obligation to prosecute grave breaches of international humanitarian law,¹²¹ provided the breaches occurred during an international armed conflict.¹²² The United Nations' *Basic Principles and Guidelines on the Right to a Remedy and Reparation* also set out that victims of gross human rights abuses or serious violations of international humanitarian law have a right to a remedy. This right entitles victims access to justice, adequate reparation, and information concerning violations and reparation mechanisms.¹²³

Whether States have a duty to prosecute all international crimes or serious violations of international human rights law is unsettled. The duty to prosecute and its corresponding right to justice are best characterized as soft (*lex ferenda*) norms. Many international courts and mechanisms have sought to articulate such a duty. The Human Rights Committee has built upon the obligation in the ICCPR's Article 2(1) to "respect and ensure" human rights, arguing that there exists an obligation to bring "to justice" violators of the right to life, the prohibition on torture, and the protection of liberty and security, among others.¹²⁴ This is based on the reasoning that impunity for perpetrators of human rights violations weakens respect for human rights.¹²⁵

117. . Convention for the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277.

118. . Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 3, arts. 4, 7.

119. . G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Doc. A/9030, 1015 U.N.T.S. 243 art. IV (Nov. 3, 1973).

120. . International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 50, arts. 4–11.

121. . Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) art. 49, Aug. 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) art. 50, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 129, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 146, Aug. 12, 1949, 6 U.S.T. 3516.

122. . Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 202, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

123. . Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 28, ¶ 11.

124. . ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 13–16

The European Court of Human Rights has developed jurisprudence concerning a duty to prosecute as a means of ensuring general enjoyment of the right to life.¹²⁶ The Inter-American Court of Human Rights' articulation of the duty to "prevent, investigate and punish" in *Velasquez-Rodriguez* and subsequent cases was also based on the obligation to ensure human rights,¹²⁷ including the right to life. Although the court in that case refrained from calling for criminal prosecutions,¹²⁸ by 2006 it had characterized the duty to prosecute (and the victim's corresponding right to judicial protection) as a non-derogable (*jus cogens*) norm.¹²⁹ The obligation to bring perpetrators to justice has often been articulated as including investigation, the bringing of criminal charges, judgment and, if the individual is convicted, punishment.¹³⁰

One complicating factor regarding the duty to bring perpetrators to justice is the repeated use of amnesties in peace negotiations. An amnesty that guarantees that certain persons cannot be convicted for actions associated with past human rights violations undercuts a duty to bring a perpetrator to justice by potentially rendering that duty impossible to wholly fulfill.¹³¹ For this reason, it is becoming increasingly untenable for States to grant a blanket amnesty for serious human rights violations in an attempt to foster the disclosure of information by perpetrators. While such a process may ensure the comprehensive satisfaction of the right to truth, blanket amnesties have been repeatedly held to be invalid. For instance, the Inter-American Court of Human

(2009).

125. . Human Rights Comm., Comments on Argentina, ¶ 10, U.N. Doc. CCPR/C/79/Add.46 (1995) (cited in SEIBERT-FOHR, *supra* note 124, at 16).

126. . Öneriyildiz v. Turkey, Judgment, App. No. 48939/99, Eur. Ct. H.R. ¶ 91 (2004) and Mahmut Kaya v. Turkey, App. No. 22535/93, 2000-III Eur. Ct. H.R. ¶ 85 (2000) (both are cited in SEIBERT-FOHR, *supra* note 124, at 115).

127. . Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988); SEIBERT-FOHR, *supra* note 124, at 58. Although, the Court in that case refrained from calling for criminal prosecutions, despite being asked to by the complainants.

128. . Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990) (cited in van Zyl, *supra* note 21, at 61).

129. . Goiburú v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 84, 131 (Sept. 22, 2006); La Cantuta v. Peru, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157 (Nov. 29, 2006) (cited in SEIBERT-FOHR, *supra* note 124, at 67).

130. . Vicente v. Colombia, H.R.C., Communication No. 612/1995, ¶ 8.8, U.N. Doc. CCPR/C/60/D/612/1995 (1997), ; Bautista de Arellana vs. Colombia, H.R.C., Communication No. 563/1993, ¶ 8.6, U.N. Doc. CCPR/C/55/D/563/1993 (1995), ; Las Palmeras Case, Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 65 (Dec. 6, 2001).

131. . William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145 (2004); William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L. F. 3 (2004).

Rights in the 2001 *Barrios Altos* decision held that “all [self-]amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations.”¹³² In addition, the European Court of Human Rights held in the 2009 *Yeter v. Turkey* decision that amnesties or pardons that apply to criminal proceedings and sentencing “should not be permissible” for government agents who are accused of crimes that violate Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment.¹³³

On the other hand, the fact that States often resort to the granting of amnesties casts doubt on whether the duty to bring perpetrators to justice is a legally binding (*lex lata*) obligation in customary international law.¹³⁴ In this regard, the refusal of the Sierra Leone Truth and Reconciliation Commission to characterize the amnesty set out in the Lomé Peace Accord as illegal is telling. The Commission’s holding that “amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict” undermines arguments that the duty to bring perpetrators to justice is a binding one.¹³⁵ The Special Court for Sierra Leone took a different position, characterizing the Lomé Peace Accord amnesty as “contrary to the direction in which customary international law is developing.” This ruling was vigorously critiqued by William Schabas, a member of the Sierra Leone Truth and Reconciliation Commission.¹³⁶ Schabas criticized the ruling for vaguely referring to the “direction” of customary international law, rather than clearly holding that the amnesty strictly breached customary international law in its present form.¹³⁷ This disagreement between

132. . *Barrios Altos* Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶¶ 41–44 (2001); *see also* *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 195–229 (Feb. 24, 2011) (considering authorities from the American, European, and African regional human rights bodies, as well as United Nations human rights bodies and national jurisdictions invalidating amnesties for serious human rights violations, and holding that “[t]he incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, ‘self-amnesties’”).

133. . *Yeter v. Turkey*, App. No. 33750/03, Eur. Ct. H.R., ¶ 70 (Jan. 13, 2009) (citing *Abdülşamet Yaman v. Turkey*, App. No. 32446/96, Eur. Ct. H.R., ¶ 55 (Nov. 2, 2004) and *Yeşil and Sevim v. Turkey*, App. No. 34738/04, Eur. Ct. H.R., ¶ 38 (2007)).

134. . *See* Part III, *infra*.

135. . SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION VOL. 3B 365 (2004).

136. . Schabas, *supra* note 131, at 161 (“Courts, of course, should apply the law, but should they also apply ‘the direction in which the law is developing’? This is an odd approach, to say the least.”).

137. . *Id.*

leading commentators and jurists is an example of the uncertainty and lack of consensus regarding whether the duty to bring perpetrators to justice is a legally binding (*lex lata*) obligation.

Interpreting the duty to bring perpetrators to justice as a hard norm also clashes conceptually with the discretion of prosecutors, predominantly in common law jurisdictions,¹³⁸ to decide which cases will be pursued. The duty to bring perpetrators to justice, as framed, is one of “means” and not “results”:¹³⁹ governments are bound to pursue prosecutions in good faith but will not breach their duty where prosecutions result in acquittals or where their justice system cannot prosecute every single accused person. Nonetheless, domestic prosecutors may decline to prosecute a case for many reasons other than an inability or a lack of resources, such as having good cause consistent with the public interest.¹⁴⁰ Where this discretion forms an uncontroversial part of State practice in many nations, a characterization of the duty to prosecute as a *lex lata* norm is harder to defend.

Similarly, looking at the duty to bring perpetrators to justice from its correlative right of victims to justice, shortcomings are readily apparent in the operation of the International Criminal Court, where prosecutors are bound only to consider the amorphous concepts of “gravity” and the “interests of justice” when selecting cases for prosecution.¹⁴¹ The court’s limited resources and the vastness of the situations it grapples with means the court can only ever prosecute a tiny sliver of the available cases.¹⁴² Given that the court’s jurisdiction is only enlivened where a nation is unwilling or unable to carry out domestic prosecutions,¹⁴³ the majority of victims affected by situations now before the court will inevitably not see their right to justice fulfilled. This

138. .Cécile Aptiel, *Prosecutorial Discretion at the ICC and Victims’ Right to Remedy: Narrowing the Impunity Gap*, 10 J. INT’L CRIM’L JUST. 1357, 1359 (2012).

139. . See Mendéz, *supra* note 19, at 264.

140. . See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, 3D ED. Standard 3-3.9(b) (AMERICAN BAR ASS’N 1993), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html (“The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”).

141. . Aptiel, *supra* note 138, at 1361 (citing Rome Statute, *supra* note 3, arts. 14, 15: “[T]he ICC Prosecutor has broad discretionary powers, and is only requested to consider ‘gravity’ and the ‘interest of justice’ when selecting cases. The vagueness and ambiguity of these two concepts is such that they do not really restrict the prosecutor, as their understanding is inherently subjective.”).

142. . *Id.* at 1360 (noting that “sifting through the crimes and layers of criminal responsibility to handpick a few cases is a quintessential part of what international prosecutors have been tasked to do since Nuremberg”).

143. . Rome Statute, *supra* note 3, art. 17(1)(a)–(b).

practical impediment, acknowledged and incorporated into the Rome Statute, weakens the plausibility of each State bearing a legally binding (*lex lata*) duty to prosecute.¹⁴⁴ Despite these difficulties, the right of victims to justice and the corresponding State duty still play an important factor in shaping State responses to gross violations of international human rights law and international humanitarian law.

IV.

RELATIONSHIP BETWEEN TRUTH AND JUSTICE

Deciding whether to focus on either the obligation of truth-finding or of achieving justice has been aptly identified as a false dilemma.¹⁴⁵ It will not suffice for a State to satisfy its obligations concerning only one of the two; each obligation stands independently.¹⁴⁶ Therefore, the question is how to design a transitional justice policy that meets both. Indeed, the two obligations often lead to complementary, rather than conflicting, transitional justice mechanisms. Just as prosecutions include truth-finding, so too can facts found by truth commissions assist future prosecutions.¹⁴⁷

On the other hand, there are times when one process ought to prevail over the other. Méndez suggested that truth-finding might be favored over prosecution where the impugned actions were legal at the time they were committed and where moral culpability is shared by large sections of society.¹⁴⁸ Conversely, the Office of the High Commissioner for Human Rights' Working Group on Enforced or Involuntary Disappearances argued that justice may be privileged over truth-finding if proportionate and necessary to avoid jeopardizing an ongoing criminal investigation.¹⁴⁹ The above discussion of amnesties, which impact whether or not the duty to bring perpetrators to justice is a binding one, further demonstrates that navigating the interaction of that duty and the right to truth will often be complex and difficult to resolve.

144. . *Id.*

145. . *Lessons Learned from Latin America*, *supra* note 44, at 119; González Cueva, *supra* note 19, at 3; TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, (Naomi Roht-Arriaza and Javier Mariezcurrena eds., 2006); Mark Drumbl, *Book Review: Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, Naomi Roht-Arriaza and Javier Mariezcurrena, 1 INT'L J. TRANSITIONAL JUSTICE 311 (2007).

146. . Méndez, *supra* note 19, at 255.

147. . González Cueva, *supra* note 19, at 2. *See also* Méndez, *supra* note 19, at 256; Paul van Zyl, *Unfinished Business: the Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, in POST CONFLICT JUSTICE 751 (M. Cherif Bassiouni ed., 2002).

148. . Méndez, *supra* note 19, at 280.

149. . OHCHR, *Special Procedures Advisory, General Comment on the Right to Truth: Working Group on Enforced or Involuntary Disappearances* (July 22, 2010).

While the right to the truth and duty to bring perpetrators to justice impose obligations on States, in some situations there may be good reason to allow for some flexibility with regard to compliance. The duties to punish and to investigate are duties of means, not results.¹⁵⁰ The obligations attached to a State therefore vary depending on the State's capacity to act and are not intended to lead to unrealistic requirements. A State may be entitled to derogate from these obligations where to pursue them would pose a grave threat to the life of the nation or where the obligations would be impossible to perform.¹⁵¹ Between discussions of strict compliance and derogation lies the question of how best to holistically satisfy these obligations, given the particular circumstances facing a State in any given case. The next Part considers the transitional justice mechanisms available to States seeking to fulfill their obligations.

V.

MECHANISMS AVAILABLE TO FULFILL TRUTH AND JUSTICE OBLIGATIONS

States have various mechanisms to choose from when seeking to meet their obligations with regard to the right to truth. The options available to bring perpetrators to justice are fewer, but there remains some scope for differing approaches to the legitimate pursuit of justice, depending on the type and number of prosecutions or other processes leading to some form of sanction. Freedom of information procedures can help to satisfy the right to truth by making accessible information in the government's possession.¹⁵² Reparations provide a remedy to victims in the form of compensation and acknowledgement of past wrongs. Memorials provide very public acknowledgments of past events, which can impact a government's obligations with regard to truth, justice, and remedy. Searches for missing or disappeared persons, while often taking many years,¹⁵³ help fulfill the right to truth by identifying the remains of victims and providing key insights into the past, while also allowing families some sense of closure. Searches can also provide information to investigators that can be used in future prosecutions, thus assisting governments to bring perpetrators to justice. Where governments are completely lacking in capacity, the international

150. . See *supra* note 34.

151. . Paul van Zyl, *supra* note 6, at 64-66 (citing Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2596 (1990/1991) and *Lawless v. Ireland*, No. 3 E. H.R. Rep. (ser. A) 1/15, 31-32 (1961) (discussing the proposition that prohibitions of detention without trial could be derogated in a time of war or other public emergency threatening the life of a nation)).

152. . González Cueva, *supra* note 19, at 2-3.

153. . *Id.* at 3.

community may be motivated to offer resources and technical assistance to truth commissions, such as international criminal trials or the United Nations' provision of three non-citizen commissioners to assist the four Sierra Leonean commissioners of Sierra Leone's Truth and Reconciliation Commission.¹⁵⁴ Community groups may also contribute to truth-finding through non-governmental truth projects.¹⁵⁵

This Article focuses on truth commissions, but that is not to deny the useful role that the other mechanisms have to play. Rather, truth commissions are considered because of their potential to supplement many aspects of the right to truth—particularly those that even the most exemplary set of prosecutions may not be able to satisfy. The following section considers the ability of prosecutions to fulfill the right to truth and the duty to bring perpetrators to justice. A discussion of the value of truth commissions with regard to truth and justice follows.

A. Prosecutions

Prosecutions of human rights violations stand as an obvious choice for seeking to bring perpetrators to justice. The dominant mode of thought in regional human rights courts, other human rights bodies, and extra-curial writing is that State-operated prosecutions also remain the most appropriate means of satisfying the right to truth, provided they are supported by an effective police force, comply with fair trial standards, and target a sufficient amount of past perpetrators.¹⁵⁶ The rigorous evidentiary and due process standards afforded to the accused lead to detailed findings that are harder to contest.¹⁵⁷ However, prosecutions still require close scrutiny in this context, given that they tend to be selectively carried out, can pose threats to the fair trial rights of accused persons, reveal a fairly narrow scope of truth, and tend to focus more on the guilt or innocence of the accused, rather than on the perspective of those who suffered the human rights violations. This subsection scrutinizes different factors that impact on the ability of prosecutions to satisfy these two obligations. Subsection B then considers how truth commissions can be used by States to complement such efforts.

154. . Truth and Reconciliation Commission Act 2000 (Sierra Leone), art. 3(1).

155. . Louis Bickford, *Unofficial Truth Projects*, 29 HUM. RTS. Q. 994 (2007).

156. . *See supra* note 5.

157. . Méndez, *supra* note 19, at 278.

1. *Selective Prosecutions*

Prosecutions require an immense amount of resources, technical expertise, and other institutional capacities, including accountable police forces to make arrests and prisons to house the accused. Transitioning States are often unable to carry out a sustained campaign of criminal prosecutions in a manner that sufficiently fulfills the right to the truth. For instance, a government seeking to pursue a strategy that focuses on justice may find that it can only carry out a handful of prosecutions that satisfy these requirements. Such prosecutions will likely establish incident-specific truths for the crimes prosecuted, but many other violations will remain unacknowledged. Further, where the only truth-seeking process embarked upon by the State is prosecution, the experiences of victims of perpetrators who have fled the jurisdiction or who have died will not be made part of the historical record.

Carrying out prosecutions selectively is not inconsistent with the soft (*lex ferenda*) obligation to bring perpetrators to justice, provided that the selection of those prosecuted is made pursuant to a clear public rule that does not discriminate based on a proscribed category¹⁵⁸ and that reflects the full extent of the State's capacity to bring prosecutions. However, achieving only a limited number of prosecutions may fail to meet a government's obligations to uncover the truth.

Governments facing resource and capacity shortages may seek to carry out large numbers of prosecutions that do not comply with accepted fair trial standards. Rwanda's Gacaca courts (or *Inkiko Gacaca*) were the archetypal example of streamlined prosecutions, with over one million accused persons being tried, but the courts drew significant criticisms from international civil society organizations like Amnesty International for their lack of fair trial and due process protections.¹⁵⁹ Defendants were tried without legal counsel, which likely infringed on their right to "equality of arms" as set out in the ICCPR and African Charter on Human and Peoples' Rights.¹⁶⁰ Amnesty International also decried the swiftness and brevity of the training given to Gacaca judges and expressed concern regarding the impartiality of judges, given the vagueness of the organic law establishing the Gacaca courts and the "considerable political, social, economic and psychological pressures emanating from within polarized communities" with which the judges would have to contend.¹⁶¹ Others critiqued

158. . Méndez, *supra* note 19, at 274.

159. . Ariel Meyerstein, *Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality*, 32 L. & SOC. INQUIRY 479 (SPRING, 2007).

160. . AMNESTY INTERNATIONAL, RWANDA: GACACA: A QUESTION OF JUSTICE 35 (Dec 17, 2002), <http://www.amnesty.org/en/library/info/AFR47/007/2002..>

161. . *Id.*, at 38.

Amnesty's response as being too focused on western or common law forms of justice, instead of assessing whether the Gacaca might satisfy international human rights standards through a singular and innovative process.¹⁶² Overall, prosecutions that fail to comply with fair trial standards will usually not satisfy the duty to bring perpetrators to justice, and any unreliable procedures employed may undermine the quality of any truth found.

2. *The Narrow Truth*

Prosecutions may also fail to adequately reveal structural truths. This is because a court is primarily concerned with determining the criminal responsibility of the accused, rather than with the broader system that allowed the abuse to occur.¹⁶³ The truth about an accused's guilt or innocence is often very narrow, focused on the elements of crime and drawn from a strictly regulated pool of evidence.¹⁶⁴ Rules of evidence, while strengthening the reliability of the truth found by a court, may exclude information that is not strictly relevant to the trial of the accused but which is nonetheless important to understanding the broader context in which human rights violations occurred.¹⁶⁵ Prosecutors may also be reasonably motivated reduce the number of charges against the accused to ensure a less complicated trial and a possible conviction, further limiting the scope of incident-specific truth that will be uncovered.¹⁶⁶ Evidence relating to incidents no longer the subject of prosecutions could also be regarded as irrelevant and inadmissible.¹⁶⁷

In addition, plea bargaining—regularly employed by prosecutors in common law and international criminal law jurisdictions¹⁶⁸—can lead to processes of justice that are swift but which obscure the truth in exchange for a

162. . See, e.g., William Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 886—87 (2005); Meyerstein, *supra* note 159, at 478.

163. . González Cueva, *supra* note 19, at 3.

164. . INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, ICTJ BRIEFING: CONFRONTING THE PAST: TRUTH TELLING AND RECONCILIATION IN UGANDA, 3 (Sept. 2012).

165. . Priscilla Hayner, *UNSPEAKABLE TRUTHS* 107 (2d ed., 2010).

166. . See, e.g., Gideon Boas, *Trying Tyrants for Mass Atrocity*, 34 ALTERNATIVE L. J. 108 (2009), (arguing that “[o]ne of the clear messages from the trial [of Slobodan Milošević at the International Criminal Tribunal for the former Yugoslavia] was that international prosecutors must resist the temptation to ‘throw the book’ at a senior accused who may be linked at differing levels of responsibility to a massive scope of criminality. Milošević was charged with over 7000 criminal allegations across three wars, spanning eight years. Commitment to represent all victims of the conflicts led to an understandable, but weak, refusal to take responsibility for that which a prosecution must: the scope, nature and viability of the case it will plead.”).

167. . INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *supra* note 164, at 3.

168. . Naqvi, *supra* note 51, at 271 (referring to rule 62 of the ICTY Rules of Procedure and Evidence, adopted in 2001, which sets out a process for accepting a plea arrangement).

guilty plea for other crimes.¹⁶⁹ For instance, Biljana Plavšić, a senior official of the Serbian Democratic Party, was originally indicted by the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia for a host of international crimes, including genocide, complicity in genocide, crimes against humanity of persecutions, extermination and killing, deportation, and inhumane acts.¹⁷⁰ Plavšić pleaded guilty to a single count of the crime against humanity of persecution, relating to the persecution of Bosnian Muslim, Bosnian Croat, and other non-Serb populations in Bosnia Herzegovina.¹⁷¹ Pursuant to a plea bargaining agreement, the Prosecution moved to dismiss the remaining counts of the indictment.¹⁷² Allegations that Plavšić was involved in the partial destruction, extermination, and killing of those populations, and the deportation and forced transfer of members of those populations, were never determined. While this is an instance of an international, rather than domestic, criminal prosecution, it nonetheless highlights that plea bargains can reduce the capacity of prosecutions to uncover both incident-specific truths (here, regarding the partial destruction, extermination, and killing of populations, as well as deportations and forced transfers) and structural truths (Plavšić's original indictment alleged a series of joint criminal enterprises with other high-ranking officials that would likely have revealed certain systemic causes for the atrocities in Bosnia Herzegovina).

This is not to suggest that prosecutions should not focus on such a limited range of information: this narrow focus is essential to their fair and efficient operation. If criminal trials were used for judgments of history about systemic causes of atrocity, there would be a risk of breaching a defendant's right to a fair trial and descending into show trials.¹⁷³ Nonetheless, such a narrow scope can ignore or inadvertently exonerate the systems or structures that led to the individual actions that are the subject of prosecutions.¹⁷⁴ This indicates that

169. . *Id.* at 271 (referring to the *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, where the defendant's charge bargain entailed admission to facts relevant to the charge of persecution in exchange for the withdrawal of previous charges related to genocide, thereby obscuring what involvement if any she had had in the planning of activities which constituted genocide). See also Méndez, *supra* note 19, at 268.

170. . *Prosecutor v. Krajišnik & Plavšić*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 7, 2002).

171. . *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

172. . *Id.*

173. . Méndez, *supra* note 19, at 279 (quoting IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* 142 (1994)).

174. . Koskeniemi, *supra* note 110, at 15.

prosecutions cannot usually be solely relied upon to fulfill the right to the truth and that governments may need to employ additional truth-finding mechanisms.

3. *Victims' Voices*

Prosecutions will also struggle to create an environment conducive to the restoration of victims' dignity through the hearing of victims' voices. This is particularly problematic when the past human rights violations occurred in a context where victims were silenced by state-sanctioned intimidation tactics.¹⁷⁵ Courts must treat victims neutrally, which requires some form of contestation of the victims' evidence by judges or defense counsel at trial.¹⁷⁶ Many victims will not desire to be cross-examined and have their credibility and the veracity of their accounts challenged. This in turn may limit the truth found in a particular trial.

The above discussion of the potential shortcomings of prosecutions with regard to the right to truth and, to a lesser extent, the duty to bring perpetrators to justice, indicates that transitional programs relying solely on prosecutions are likely to fall short of satisfying international human rights law. While ably conducted and properly resourced prosecutions offer the best available option for bringing a perpetrator to justice, the narrowness of the truth revealed by prosecutions and the potentially limited amount of prosecutions that can be so pursued means that they are unlikely to ever sufficiently reveal structural truths or an adequately wide scope of incident-specific truths. Therefore, prosecutions typically cannot be the only transitional justice mechanism employed by States. This Article now turns to consider the role truth commissions can play to more comprehensively fulfill the right to truth. The obligation to bring perpetrators to justice is less relevant to this discussion, although the role truth commissions can play in assisting prosecutions is considered.

B. *Truth Commissions*

While the composition and mandate of a truth commission will vary depending on the context in which it is created, most truth commissions share some common characteristics. Truth commissions generally take the form of government-sanctioned bodies of inquiry, set up on a temporary basis to investigate a set of abuses (rather than a single incident) that took place during a

175. . Méndez, *supra* note 19, at 278.

176. . See, e.g., Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protections*, 55 B.C. L. REV 775 (2014) (discussing defendant rights of confrontation and cross-examination).

specific period in that nation's history.¹⁷⁷ Their intended duration is often no longer than two years,¹⁷⁸ and their findings are often compiled in a written report.¹⁷⁹

Truth commissions use the truth-finding process to achieve many goals.¹⁸⁰ Not all commissions have been explicitly set up to fulfill the right to truth,¹⁸¹ although even those that do not refer to the right to truth generally have the objective of investigating and revealing the truth regarding past events. Commissions that do have express references to the right to truth in their mandates include those of Guatemala ("a right to know the whole truth concerning these events"¹⁸²), Peru ("the right of society to the truth"¹⁸³), Brazil ("the right to memory and historical truth"¹⁸⁴), and Tunisia ("[u]nveiling the truth about violations" and "[p]reserving the national memory" are rights guaranteed by law¹⁸⁵). The right to truth does not necessarily mandate the establishment of a truth commission,¹⁸⁶ and the Inter-American Court of Human Rights has even held that the "historical truth" obtained by a truth commission

177. . Priscilla Hayner, *UNSPEAKABLE TRUTHS* 14 (1st ed., 2001).

178. . *Cf.* BRAZIL'S SPECIAL COMMISSION ON POLITICAL DEATHS AND DISAPPEARANCES (CEMDP), BRASIL: *DIREITO À MEMÓRIA E À VERDADE* (Brasília: Secretaria de Direitos Humanos, 2007) (cited in Juan Pablo Bohoslavsky and Marcelo D. Torelly, *Financial Complicity: The Brazilian Dictatorship Under the "Macroscopic" in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION* 245 (Dustin Scharp ed., 2014)) (established in 1995 pursuant to Law No. 9.410 and did not publish its final report until 2007).

179. . *See, e.g.*, TRUTH, JUSTICE AND RECONCILIATION COMM'N, KENYA, REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION (2013); REPUBLIC OF LIBERIA, TRUTH & RECONCILIATION COMM'N, CONSOLIDATED FINAL REPORT (2009); COMISSÃO DE ACOPLHIMENTO, VERDADE E RECONCILIAÇÃO DE TIMOR-LESTE, CHEGA! (Nov. 2005); SIERRA LEONE TRUTH & RECONCILIATION COMM'N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION (2004); TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Oct. 29, 1998).

180. . *See supra* note 7.

181. . The right to truth is not mentioned in, for instance, the founding documents or final reports of the South Africa Truth and Reconciliation Commission. *See* South Africa Promotion of National Unity and Reconciliation Act 34 § 3 1995; TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Oct. 29, 1998); Commission for Reception, Truth and Reconciliation in East Timor. *See* COMISSÃO DE ACOPLHIMENTO, VERDADE E RECONCILIAÇÃO DE TIMOR-LESTE, CHEGA! [Commission for Reception, Truth and Reconciliation in East Timor], pt.Part 2, 2 (Nov. 2005).

182. . U.N. Mission for the Verification of Human Rights in Guatemala, Comm. for Historical Clarification: Charter, at 1 (Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer).

183. . Supreme Decree No. 065-2001-PCM, June 4, 2001 (Peru).

184. . Law N° 12.528 of 18 November 2011, art. 1 (Braz.).

185. . Draft Organic Law on the Foundations and Organization of Transitional Justice of Tunisia's Instance Verite et Dignite, arts. 2, 5.

186. . *Lessons Learned in Latin America*, *supra* note 44, at 119.

does not completely fulfill the right to truth in and of itself.¹⁸⁷ Commissions can nevertheless be effective tools for at least partially fulfilling this right. They will be most effective when established by a government seeking to comply in good faith with its international human rights law and international humanitarian law obligations,¹⁸⁸ and when provided with a clear and achievable mandate and the financial and other means needed to realize that mandate. Commissions should also be established as soon as is practicable: while the exact amount of time needed will vary depending on the circumstances facing the government, a commission would ideally be created within months, not years, of a political transition, where possible.

The scope of inquiry for different truth commissions varies, as does their fulfillment of the right to truth's two categories of truth. Truth commissions seeking to establish incident-specific truths can seek to hear from victims, witnesses, and alleged perpetrators.¹⁸⁹ Most commissions also seek to reveal the broader causes and patterns in a series of violations, thus fulfilling the right to truth with regard to structural truths. Generally, the scope of truth commission mandates is broad. Kenya's recent Truth, Justice and Reconciliation Commission had one of the most expansive mandates to date,¹⁹⁰ including the creation of a complete historical record of individual violations (including breaches of economic rights)¹⁹¹ and a more systemic-focused inquiry into the causes, nature, and extent of the violations,¹⁹² among a raft of other broad-reaching, truth-seeking, and recommendation-making functions.¹⁹³

187. . *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 150 (Sep. 26, 2006) (holding that "the 'historical truth' included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death, attribute responsibilities, and punish all those who turn out to be participants"). See also *Unfinished Business: the Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, *supra* note 147, at 745–60.

188. . Méndez, *supra* note 19, at 278.

189. . See, e.g., Mark Freeman and Priscilla B. Hayner, *The Truth Commissions of South Africa and Guatemala*, RECONCILIATION AFTER VIOLENT CONFLICT (David Bloomfield and Lucien Huyse, eds, 2003) 140–141 (describing how South Africa's Truth and Reconciliation Commission sought to reveal both incident-specific and structural truths by hearing testimony from 23,000 victims and witnesses, as well as granting amnesty to perpetrators "who fully confessed to their involvement in past crimes and showed them to be politically motivated").

190. . INT'L CTR FOR TRANSITIONAL JUSTICE, *ICTJ Forum Series on Truth Commissions and Peace Mediation: Betty Murungi*, (Mar. 12, 2013), <http://ictj.org/es/node/18020>.

191. . Truth, Justice, and Reconciliation Commission Bill, (2008), arts. 5(a), 6(a) (Kenya).

192. . *Id.* arts. 5(b), 6(b).

193. . See *id.* arts. 5, 6.

Some of the aspects that distinguish truth commissions from prosecutions—less formal evidentiary and procedural rules, a usually broader scope of investigation—have also been a source of criticism. While truth commissions benefit from a wider scope, they are less suited to determining a comprehensive and incontestable account of the truth.¹⁹⁴ One commentator has wryly suggested that truth commissions should be called “some-of-the-truth commissions.”¹⁹⁵ Truth commissions also face various legal and practical pitfalls that sit in tension with uncovering the full and complete truth. These include legal difficulties associated with naming perpetrators and referring individuals for prosecution, as well as the shortage of resources that truth commissions usually face. Truth commissions that do not allow for public participation and oversight also risk undermining the right to truth and opportunities for public healing. This section considers these issues by exploring in turn: (i) the importance of truth-finding processes being open to the public, (ii) challenges concerning the practice of identifying perpetrators by name, (iii) how truth commissions can contribute information to criminal prosecutions, and (iv) the ways in which time and resource limitations can impact on truth-finding efforts and be affected by the scope of a truth commission’s mandate.

1. Public Processes

Because the right to truth is held by both victims and society as a whole, a process of truth-finding must be substantially open to the public. This was the case for Argentina’s “truth trials,” Morocco’s Equity and Reconciliation Commission, and the Truth and Reconciliation Commissions of South Africa, Peru, and Sierra Leone, all of which conducted at least some proceedings that were open for the public to attend.¹⁹⁶ Broadcasting proceedings via radio or television, as was done by South Africa’s Commission,¹⁹⁷ is another effective way to increase the general public’s access, especially those in remote locations.¹⁹⁸

A commission’s final report must be promptly made available to the public to ensure that the public can access the commission’s findings and more

194. . Hayner, *supra* note 177, at 22.

195. . *Id.* (quoting an anonymous commentator).

196. . *Lessons Learned from Latin America*, *supra* note 44, at 129. The holding of some proceedings *in camera* may also be appropriate in certain circumstances.

197. . Gunnar Theissen, *Common Past Divided Truth*, in *LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES* 101, 105 (Susanne Karstedt ed., 2009).

198. . Ari S. Bassin and Paul van Zyl, *The Story of Samuel Hinga Norman in Sierra Leone: Can Truth Commissions and Criminal Prosecutions Coexist After Conflict?*, in *HUMAN RIGHTS ADVOCACY STORIES* 260 (Deena Hurwitz and Margaret Satterthwaite eds., 2009).

effectively hold the government accountable regarding any recommendations made by a truth commission.¹⁹⁹ Haiti's National Commission on Truth and Justice fell drastically short of this standard. President Aristide failed to release the report for six months after receiving it from the Commission, and when it was released, only a small number of copies were ever printed and distributed.²⁰⁰ This obstructed the access of many to the truth that had been found.²⁰¹ The government generally ignored the recommendations set out in the report,²⁰² although some efforts have been made to arrest and prosecute those included on the report's list of accused perpetrators,²⁰³ illustrating how truth commissions can assist governments to fulfill their duty to bring perpetrators to justice.

2. *Identifying Perpetrators*

A truth commission that refuses to identify perpetrators by name will limit the "full truth" that the right to truth requires.²⁰⁴ Yet, seeking to publish the names of perpetrators must be done in compliance with those individuals' due process protections.²⁰⁵ Such protections include the right to the presumption of innocence²⁰⁶ and to "a fair and public hearing by a competent, independent and impartial tribunal established by law."²⁰⁷ Those accused also must be afforded the right to challenge the authenticity of evidence relied upon and to cross-examine witnesses testifying against the alleged perpetrator.²⁰⁸ These protections would create strong pressures on a commission to follow stricter, more court-like procedures, which in turn would reduce the commission's agility and ability to efficiently reveal the truth.

The South African Truth and Reconciliation Commission was determined to name thousands of individuals for whom there existed strong evidence of involvement in past abuses but ultimately named less than ten percent of that

199. . *Id.* at 80.

200. . *Lessons Learned in Latin America*, *supra* note 44, at 129.

201. . Similar delays occurred in Ghana and Sierra Leone. Bosire, *supra* note 11, at 80.

202. . Hayner, *supra* note 177, at 55.

203. . Brian Concannon, *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View From Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2000).

204. . Méndez, *supra* note 19, at 265.

205. . Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 88 (Naomi Roht-Arriaza and Javier Mariezcurrena eds., 2006).

206. . ICCPR, *supra* note 2, art. 14(2).

207. . ICCPR, *supra* note 2, art. 14(1).

208. . *See e.g.*, *Mulosmani v. Albania*, Judgment, App. No. 29864/03, Eur. Ct. H.R., ¶ 125-126 (2013) (discussed *infra*).

figure.²⁰⁹ The Commission determined that due process standards required that the accused individuals were entitled to an opportunity to examine the evidence, upon which the Commission planned to base an allegation, and to respond to the allegations.²¹⁰ This process took considerable time, as lawyers for the individuals accused sought a sufficient opportunity to properly analyze the documentary and in person evidence on which the tribunal sought to base its conclusions.²¹¹ This resulted in significant delays for the Commission, which, compounded by the fact that the decision to name perpetrators was taken towards the end of its mandate, restricted the number of individuals the Commission could name after the individuals were accorded due process.²¹² This example reveals how truth commissions, as usually *ad hoc* institutions with modest funding sources and limited control over the duration of their mandates, can struggle to manage more cumbersome, court-like processes. Other commissions have allowed perpetrators to cross-examine victims.²¹³ Such disputation of a victim's account, while in furtherance of reaching an objective truth and in compliance with the alleged perpetrator's right to a fair trial, may further strip, rather than restore, the victim's dignity and can lead to further traumatization.²¹⁴ While restoring a victim's inherent dignity might not be the central focus of the truth or justice obligations considered in depth by this Article, it is an important factor underpinning the field of transitional justice generally,²¹⁵ as well as forming one of the key bases for international human rights law.²¹⁶

More fundamentally, there may be circumstances in which naming a perpetrator will breach that individual's right to a fair trial. European Court of

209. .*Unfinished Business: the Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, *supra* note 147, at 751.

210. .*Id.* at 750–51.

211. .*Id.* at 751.

212. .*Id.* at 751.

213. .*See, e.g.*, Bosire, *supra* note 11, at 80 (discussing Ghana's National Reconciliation Commission and the Oputa Panel of Nigeria).

214. .*Id.* Bosire goes on to note, however, that other victims felt empowered by the Commission's court-like process and felt gratified by the 'victory' of summoning the perpetrators to the commission to defend themselves.

215. .Elizabeth A. Cole, *Transitional Justice and the Reform of History Education*, 1 INT'L J. TRANS. JUST. 115 (2007) ("Transitional justice goals now extend to truth telling, restoring the dignity and preserving the memory of victims, building peace, creating respect for human rights and democracy, and to reconciliation.").

216. .*See, e.g.*, UDHR, *supra* note 3, preamble ("Whereas recognition 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") and art. 1 ("All human beings are born free and equal in dignity and rights.").

Human Rights jurisprudence sets out that any statement by a public official reflecting a belief that an individual charged with a crime is guilty violates the presumption of innocence.²¹⁷ There may be doubts regarding whether truth commission members, especially those appointed by international processes rather than by the State, are considered public officials. Many truth commissions will also seek to name perpetrators before they are formally indicted with an offence. Nonetheless, a truth commission's ability to identify perpetrators could be significantly challenged or limited if a court were to interpret or expand this fair trial protection in a way that included members of truth commissions as public officials.

Peru's Truth and Reconciliation Commission resolved this dilemma by naming individuals and providing all relevant information of their acts while avoiding language that sounded like an indictment for a particular crime,²¹⁸ as that was a task for the prosecutors to whom it would refer potentially prosecutable cases. A senior staff member of the Commission viewed the distinction between naming an individual as a "doer" rather than as a "perpetrator" moot: it did not result in the protection of the individual's reputation in the "court of public opinion,"²¹⁹ where such due process rights do not exist. Nonetheless, using language that avoids accusing individuals of breaches of domestic law or of international human rights or international humanitarian law may well comply with the human right to a fair trial. The appropriateness of such an approach will depend on the circumstances in which a commission operates, including time and resource constraints, as well as the specific language used.

A central consideration for future commissions seeking to follow the Peruvian Commission's approach will be to ensure compliance with the human rights of the alleged perpetrators, including their rights to due process. A failure to ensure this would risk undermining the normative system of human rights protections that transitional justice seeks to restore. Méndez resolves this dilemma by stating that a commission should name names where prosecutions are unlikely to follow (after informing the accused of the allegation and allowing them the opportunity to adequately prepare to defend the allegation) but should refrain from identifying individuals if a trial is due to take place.²²⁰ Where a

217. . *Mulosmani v. Albania*, Judgment, App. No. 29864/03, Eur. Ct. H.R., ¶ 137 (2013) (holding that "the presumption of innocence . . . will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law") (citing *Shuvalov v. Estonia*, App. No. 14942/09, Eur. Ct. H.R., ¶ 75 (2002); *Allenet de Ribemont v. France*, App. No. 15175/89, Eur. Ct. H.R., ¶ 35 (1995)).

218. . *González Cueva*, *supra* note 205, at 88.

219. . *Id.* at 88–89.

220. . Méndez, *supra* note 19, at 265; Méndez and Bariffi, *supra* note 5, ¶ 13.

commission does plan to name individuals as perpetrators, the manner in which it does so must be carefully considered and, preferably, be the subject of an independent legal opinion to ensure it is done through a process that complies with each alleged perpetrator's human rights.

3. *Contributing to Prosecutions*

Truth commissions can also contribute to prosecutions, thereby supplementing the process that has been most consistently endorsed as the key to satisfying the State's obligation to investigate and to punish. Various commissions have referred cases to prosecutors, whether according to an official mandate or of their own initiative. Argentina's CONADEP is regarded as a vital precursor to prosecutions.²²¹ Peru's Truth and Reconciliation Commission referred some forty-seven individuals for prosecution, although institutional tensions between the Commission and the Office of the Prosecutor General failed to lead to the timely indictment of those individuals.²²² It was only after the establishment of a National Criminal Court to hear human rights cases that many of these individuals were indicted, albeit with most trials leading to acquittals.²²³

Other commissions have been explicitly prohibited from naming names or referring persons for prosecution.²²⁴ Indeed, a commission that plans to refer cases to prosecutors is likely to encounter greater reluctance from accused persons to give evidence, thus losing a vital source of information.²²⁵ This means efforts to strengthen justice may come into tension with a commission's ability to uncover the truth. Whether a commission ought to have a cooperative relationship with prosecutors will thus depend on the particular circumstances of each case and the priorities of the government's transitional justice program, which will vary from government to government, depending on, amongst other factors: the country's political stability, the extent of funding and institutional

221. . Hayner, *supra* note 177, at 94 (quoting Luis Moreno-Ocampo, the then deputy prosecutor of Argentina, as stating that would have been "impossible" without the information gathered by CONADEP).

222. . González Cueva, *supra* note 205, at 88–89.

223. . Hayner, *supra* note 177, at 96.

224. . *Id.* at 93. Such commissions include those of Morocco and the Solomon Islands, as well as Chile's second commission.

225. . Basin and van Zyl, *supra* note 198, at 258 (stating that "the TRC [truth and reconciliation commission] will not want to provide prosecutors with free access to all information it gathers, as this will dissuade perpetrators from cooperating with the TRC. It might cause the TRC to be perceived as an investigative branch of the court, and thus create powerful disincentives for people to testify before the TRC. Valuable information would be lost, and the TRC may not be able to function effectively as a venue for truth- seeking or reconciliation.").

capacity available, and the perspectives and articulated priorities of victims and other stakeholders. In that regard, a government seeking societal reconciliation and a period of nation-wide reflection through truth-finding may be less inclined to encourage truth commissions to refer cases for prosecution than a government seeking to differentiate itself from the former regime through a policy of robust and sustained prosecutions of human rights violators. Both approaches can be pursued while still fulfilling a State's truth and justice obligations, provided due care is taken in the design of mechanisms employed and in how those mechanisms interact.

4. *Time and Resource Limitations*

Finally, time and resource limitations can make it difficult for truth commissions to adequately satisfy the right to truth with regard to incident-specific truths and structural truths. This is further complicated by the growing tendency of truth commission mandates to include the making of recommendations on systemic reforms to prevent recurrence. For instance, Argentina's 1983 commission produced recommendations to ensure non-recurrence which spanned less than a page,²²⁶ in comparison to the seventeen or so pages of recommendations included in the 2013 findings of Kenya's Truth, Justice and Reconciliation Commission.²²⁷ Pablo de Greiff, the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, has argued that a truth commission's ability to comprehensively carry out truth-finding can be eroded by more global or recommendatory mandates, which pull a commission's efforts and resources in a different direction.²²⁸ In other words, there is a risk that empowering a truth commission to make recommendations for reform can deprive the commission of valuable time, resources, and energy needed for comprehensive truth-finding. On the other hand, determining appropriate structural reforms is vital to a nation's attempts to prevent recurrence of violence, and a commission intimately familiar with the nature of abuses on an individual and systemic level will often be well placed to efficiently make recommendations for reform. While the right to truth would pull in the direction of restricting truth commission mandates to truth-finding, prudent governance (and State obligations under international human rights law to prevent recurrence of human rights violations and to end

226. .NATIONAL COMM'N ON THE DISAPPEARANCE OF PERSONS, *supra* note 36, pt. VI.

227. . TRUTH, JUSTICE, AND RECONCILIATION COMM'N, *supra* note 35, at 1–62.

228. . Pablo de Greiff, *Truth Without Facts: On the Erosion of the Fact-Finding Function of Truth Commissions*, in *THE FUTURE OF HUMAN RIGHTS FACT-FINDING* (Philip Alston and Sarah Knuckey eds.) (forthcoming 2015).

impunity²²⁹) also requires consideration of reforms to ensure non-recurrence of human rights violations and the maintenance of peace. How this tension is resolved in each case will depend on the circumstances, and the likely competencies and resources of the truth commission.

This discussion reveals that prosecutions alone cannot entirely protect the right to the truth. Truth commissions will often play a complementary role, albeit one that must be carefully navigated. Truth commissions can help bring perpetrators to justice, provided that pitfalls of including justice considerations, such as referring accused perpetrators to prosecutors, are closely monitored within truth commissions' mandates. The next Part considers contextual variables that impact the ability of different transitional justice mechanisms to protect the right to truth and satisfy the duty to bring perpetrators to justice. The following Part looks at the various ways to combine different procedures to form an integrated response that best meets these obligations, depending on the specific facts in any case.

VI.

VARIABLES TO THE FULFILLMENT OF THE RIGHT TO TRUTH AND DUTY TO BRING PERPETRATORS TO JUSTICE

It is trite to say that transitional justice does not have a 'one size fits all' solution to every scenario. Each country in transition may require a different combination of transitional justice mechanisms depending on the circumstances that country faces. This Article seeks to explain the value and shortcomings of truth commissions in transitional settings, especially with regard to a government's international legal obligations to ensure the right to truth and to bring perpetrators to justice. However, the evaluation of truth commissions cannot be done in a vacuum: various practical considerations must be factored into decision-making regarding transitional justice policies. This Part considers five contextual variables that determine the most effective transitional justice measures to fulfill a State's international human rights law obligations.

A. Institutional Capacity

Implementing transitional justice mechanisms requires functioning State institutions.²³⁰ For example, criminal trials require an effective police or security service to investigate and detain accused individuals, an able and sufficiently resourced prosecutor, competent and accessible defense counsel, and

229. . See discussion in Part II(C): "Sources: Treaties and Interrelated Rights," *supra*.

230. . Bosire, *supra* note 11, at 76.

an independent and well-trained judiciary. States will have greatly reduced capacity to carry out criminal trials where its judges and prosecutors lack independence,²³¹ were decimated²³² or left the country following the withdrawal of an occupying power.²³³ In such circumstances, a truth commission might provide a more realistic means of fulfilling the right to the truth due to its *ad hoc* nature and its less technical procedures; carrying out a very limited number of prosecutions or seeking international funding and assistance to build domestic prosecution capability may then be the only plausible means of satisfying the duty to bring perpetrators to justice. As a party to the Rome Statute, if a State cannot fulfill its duty to prosecute, it may be obliged to submit a self-referral to the International Criminal Court.²³⁴ Even where a relatively substantial number of prosecutions do take place, the scale of such efforts will likely be dwarfed by a properly financed, victim-focused truth commission. For example, Argentina succeeded in convicting over 250 offenders since 2003,²³⁵ which is a substantial number compared to many other transitional attempts at prosecution. This number was nonetheless eclipsed by the list of 8,960 disappeared persons compiled by Argentina's CONADEP.²³⁶ In other cases, truth commissions might also seek to complement and facilitate future prosecutions. For instance, CONADEP referred around 700 individual cases for prosecution.²³⁷ Alternatively, a truth commission might help clear the

231. . See *id.* at 77 (noting that “[i]n the DRC, the history of the judiciary in the entire post-colonial phase has been marked by a lack of independence, integrity, and infrastructure.”).

232. . See, e.g., William Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM L. F. 533 (1996) (cited in van Zyl, *supra* note 21, at 55 (referring to reliable estimates that only 20% of Rwanda's judiciary survived the events of 1994)).

233. . Justice Shane Marshall, *The East Timorese Judiciary: At the Threshold of Self-sufficiency?*, Conference of Supreme and Federal Court Judges, Darwin, Australia, (Dec. 20, 2004) (discussing East Timor's appointment of its first eight judges and two prosecutors in 2000); Justice Shane Marshall, *The East Timorese Judiciary: At the Threshold of Self-sufficiency? Update*, Co-operating with Timor-Leste Conference, Victoria University, Melbourne, Australia, (Jun. 17, 2005) (noting that in 2005 all 22 of East Timor's judges, as well as all prosecutors and public defenders that were assessed, failed their examinations and evaluations and were suspended from duty).

234. . Rome Statute, *supra* note 3, art. 14(1). This will be limited to crimes committed after that state became a party to the Rome Statute, art. 11(2).

235. . HUMAN RIGHTS WATCH, WORLD REPORT 2013, ARGENTINA, <http://www.hrw.org/world-report/2013/country-chapters/argentina>.

236. . NATIONAL COMM'N ON THE DISAPPEARANCE OF PERSONS, *supra* note 36, at pt. II. An additional 1,300 had been seen in secret detention centers but were still missing.

237. . Leonardo Filippini, ICTJ BRIEFING: CRIMINAL PROSECUTIONS FOR HUMAN RIGHTS VIOLATIONS IN ARGENTINA 2 (Nov. 2009). Prosecutors tried three military juntas before the “Full Stop Law,” *Ley de Punto Final*, was passed by the National Congress of Argentina in 1986, halting prosecutions until the law was held to be unconstitutional in 2005. Rebecca Lichtenfield, ICTJ CASE STUDY SERIES: ACCOUNTABILITY IN ARGENTINA: 20 YEARS LATER, TRANSITIONAL JUSTICE

docket itself in countries with low institutional capacity. The UNTAET Commission for Reception, Truth and Reconciliation in East Timor used plea bargaining to swiftly mete out Community Reconciliation Agreements, in which individuals who confessed to crimes could accept some form of community service as punishment.²³⁸ Additionally, truth commissions may fill a potential gap in the current prosecution process by identifying perpetrators.²³⁹ As discussed in Part V.B.2, identifying perpetrators is a resource-intensive process because of due process rights afforded to each named individual. However, the process of identification by a truth commission may cost less than prosecuting each named individual and, in a country lacking institutional capacity, should be easier to achieve.²⁴⁰

B. Financial Resources

Transitional governments often lack the financial resources required to carry out prosecutions that promote fair trial standards for defendants.²⁴¹ Additionally, limited State funding reduces the number of possible prosecutions. When a government faces such financial constraints, truth commissions, which are generally less expensive,²⁴² can complement a State's endeavors to comply with its international obligations. However, limited funding will also affect a truth commission's ability to pursue incident-specific truths and to identify perpetrators while affording them due process.

Rather than simply establishing a truth commission, financial limitations demand nuanced transitional justice policies. A State may be unable to allocate the funds needed to sustain a specialized prosecutorial office (or a court) that serves to prosecute grave human rights violations, and this type of office usually produces a very low yield of convictions to money spent.²⁴³ Thus, setting up

MAINTAINS MOMENTUM (Aug. 2005).

238. . U.N. Transitional Administration in East Timor (UNTAET), Regulation No. 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, U.N. Doc. UNTAET/REG/2001/10, pt. IV (July 13, 2001). The Office of the General Prosecutor maintained the power to nullify such Community Reconciliation Plans and have the case reheard: *ibid.*, § 24.6.

239. . As was done by, e.g., the South African Truth Commission: see van Zyl, *supra* note 147, at 751.

240. . See, e.g., Marshall, *supra* note 233 (discussing the suspension from duty of all judges in East Timor). In such circumstances, the absence of a functioning judiciary renders an *ad hoc* truth commission more likely than the courts to efficiently and appropriately reveal the identity of perpetrators of violations of international human rights and international humanitarian law.

241. . van Zyl, *supra* note 6, at 57.

242. . CHARLES VILLA-VICENCIO & ERIK DOXTADER, PIECES OF THE PUZZLE: KEYWORDS ON RECONCILIATION AND TRANSITIONAL JUSTICE, 89–90 (2004).

243. . One key example, albeit at the international level, as opposed to the domestic level, is the

courts specifically to try human rights violations, such as Peru's National Criminal Court, will likely not be possible. However, such prosecutorial efforts can be blended with other, potentially pre-existing, investments in the legal infrastructure. It may be cost effective to assign human rights violations to the corruption, criminal syndicate, or other complex crime prosecution units. These units will be more accustomed to carrying out prosecutions that, like crimes associated with grave human rights violations, involve individuals who plan the offense and 'foot soldiers' who carry it out and that pose the challenge of disproving plausible deniability. This approach, while not necessarily being cheaper than implementing a truth commission,²⁴⁴ offers the opportunity to reduce operational costs compared with those that would be required to establish a new human rights and international humanitarian law focused prosecutorial office. This approach could also leave sufficient funds for a truth commission to exist alongside such efforts to prosecute violations of human rights, thus expanding the State's ability to fulfill its duties with regards to both truth-finding and bringing perpetrators to justice.

C. *Extent of the Atrocity*

When human rights violations occur on a massive scale, it may be impossible to investigate and prosecute every perpetrator.²⁴⁵ However, this impossibility does not render the prosecution attempts that do take place to be futile: the duty to prosecute obliges states to use all available means to bring perpetrators to justice, rather than demanding that states succeed in bringing every perpetrator to justice.²⁴⁶ In such circumstances, criminal prosecutions may also be positioned to make findings regarding historical or structural truths. In its early cases, the International Criminal Tribunal for the former Yugoslavia used historians as expert witnesses to explain the background of certain conflicts.²⁴⁷ Historians also explained the circumstances in which the charged

International Criminal Court, which has secured only two convictions in its first twelve years of operation. While international courts operate in different contexts to national courts, the International Criminal Court also possesses a significant depth of expertise in determining questions of international human rights and international humanitarian law; this renders its relatively meager output of convictions per year particularly illustrative of the low yields of convictions to be expected by an institution for breaches of international human rights or international humanitarian law.

244. . VILLA-VICENCIO & DOXTADER, *supra* note 242 (noting that truth commissions "demand fewer resources than courts").

245. . van Zyl, *supra* note 6, at 59.

246. . *See supra* note 139.

247. . Robert J. Donia, *Encountering the Past: History at the Yugoslav War Crimes Tribunal* 11 J. INT'L INST. (2004), <http://hdl.handle.net/2027/spo.4750978.0011.201> ("I was called as the prosecution's historical expert in June 1997 in the case against Croatian General Tihomir Blaškić. False My presentation was more an extended lecture on regional history than court testimony as it

crimes were allegedly committed.²⁴⁸ Such a role will not always be possible. Systemic crimes remain very costly to prosecute and can be difficult to prove beyond a reasonable doubt in circumstances where government officials may be “trained in the art of concealing their crimes and destroying evidence”.²⁴⁹ These characteristics limit the ability of criminal prosecutions to make expansive historical findings. On the other hand, due to their broader scope of investigations and less rigorous evidence standards, truth commissions utilize a greater pool of potential information sources.²⁵⁰ These will often make truth commissions better placed to make findings regarding structural truths.²⁵¹

D. Whether Perpetrators Still Inhabit State Institutions

When those who organized, assisted, or directly perpetrated human rights violations continue to occupy influential positions in State machinery, this could impede State efforts to carry out effective prosecutions, at least in the short term. If judges were implicated in past abuses or exhibit continuing prejudice against a previously victimized group, it will be difficult to obtain fair prosecutions.²⁵²

might take place in an American court, where a judge would neither need nor welcome such an extensive background portrayal.”).

248. . *Id.* (referring to Dr. Audrey Budding’s account in *Prosecutor v. Milošević*, Case No. IT-02-54-T, of Slobodan Milošević as a pragmatist who evoked latent nationalist sentiment for his own political gain).

249. . Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, J. INT’L. AFF. (Spring 1999), 652-653 (explaining that the South African government could not afford the costs associated with prosecuting all of the accused, many of whom were former state employees with the right to state-funded legal defense and describing the “hidden costs to the state” such as large teams of state lawyers and large costs associated with witness support and protection) and 652 (stating that “political crimes committed by highly skilled operatives trained in the art of concealing their crimes and destroying evidence are difficult to prosecute”).

250. . Eduardo González and Howard Varney, *Truth Seeking: Elements of Creating an Effective Truth Commission* (2013), <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>, 11 (stating that “[b]ecause of their broad focus, both in terms of violations and time period, commissions may gather massive information from direct witnesses, archives, and other sources. . . . Such large amounts of data allow commissions to incorporate different methodological approaches, like statistical analysis, in their work.”).

251. . *Id.*, 11 (stating that “[u]nlike parliamentary commissions of inquiry, common in many countries, which tend to focus on single issues or the circumstances of a specific event, truth commissions typically cover longer periods of abuse, sometimes decades. This allows truth commissions an opportunity to identify historical patterns of violence and systemic violations.”).

252. . Paloma Aguilar *Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective*, 7 INT’L J. TRANS. JUST., 246 (arguing that “[w]hen liability for repression not only falls on military and police forces but also implicates the judicial system, judges and prosecutors tend to be reluctant to approve punitive measures against repressors”); see also Paola Cesarini, *Transitional Justice*, THE SAGE HANDBOOK OF COMPARATIVE POLITICS 507 (Todd Landman & Neil Robinson, eds., 2009) (stating that “local

One alternative for a new government which seeks to achieve justice and carry out truth-finding, but whose courts are staffed by such judges, is to set up new judicial institutions, such as Peru's National Criminal Court. This may not be an easy task, but if those loyal to the former regime are only concentrated in the judicial arm of government, the State's legislature or executive may be in a position to proceed to establish such an additional court. As previously discussed, ensuring fair criminal trials is a resource-intensive endeavor; setting up an alternative court would also require considerable financial investment and time to become operational.²⁵³ Additionally, there must be judges available who possess the training and expertise, and who exhibit a requisite degree of integrity and lack of bias. Deferring prosecution until the judiciary has been re-trained or gradually vetted and re-staffed, may be another option, provided the absence of immediate efforts to prosecute is replaced with other truth-finding mechanisms.²⁵⁴ Truth commissions, freedom of information processes, and missions dedicated to locating disappeared persons can be used for this purpose. To guarantee the right to truth, staff members of such mechanisms must be appointed using public processes that apply strict criteria regarding independence and ability.²⁵⁵ In many circumstances, staffing a truth commission may be easier than finding judges for a new judicial institution, as truth commissions can recruit from a broader field of potential candidates than courts. This will be especially relevant in contexts where a State finds itself with very few candidates possessing the sufficient training to become judges.

Another challenge exists where current members of the police force or military are implicated in past human rights violations²⁵⁶ and pose the risk of leading the nation back into conflict by mobilizing their armed forces against a government that seeks to prosecute them. If the threat is sufficiently serious, a government may be able to derogate from its duty to bring perpetrators to

employees from the previous undemocratic regime will be – at best – less than enthusiastic supporters of democratic reform and – at worse – active saboteurs of the new regime”).

253. . Christina T. Prusak, *The Trial of Alberto Fujimori: Navigating the Show Trial Dilemma in Pursuit of Transitional Justice*, 873 NYU L. Rev. (2010), (arguing that “given the financial expenditures associated with fair trials, societies with scarce resources are wise to invest in more viable transitional justice mechanisms, such as truth commissions or victim reparations schemes”).

254. . Bosire, *supra* note 11, at 77 (citing *Rep. of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, xiv ¶50 U.N. Doc. S/2004/616 (2004)).

255. . *Id.* at 79 (citing Alex Boraine, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION*, 71–72 (2000)).

256. . Such was the case in South Africa and, initially, in Argentina and Chile. Christian Tomuschat, *Clarification Commission in Guatemala*, 23 HUM. RTS. Q. 233, 235 (2001); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations* 43 HASTINGS L. J. 1425, 1432 (1992).

justice.²⁵⁷ However, governments should still endeavor to find alternative means to comply with international human rights law, rather than seeking to avoid their international law obligations. By focusing on incremental or sequenced responses,²⁵⁸ a government may be able to fulfill its obligations through a multi-pronged response that seeks to prosecute after utilizing other truth-finding and vetting processes.²⁵⁹ This approach allows the truth commission to gather evidence and information immediately, instead of waiting for an appropriate time to prosecute,²⁶⁰ by which time material evidence or witnesses may have disappeared.²⁶¹ Even a truth commission would not, however, guard against witnesses' memories fading.

E. Precariousness of Peace

Some civil wars end in negotiated peace agreements rather than the defeat of one side of the conflict. In these circumstances, peace and security can be fragile. Either party could be in a position to revive conflict if they are dissatisfied with, or threatened by, transitional justice mechanisms.²⁶² Parties may view truth commissions as less of a challenge, potentially indicating that truth commissions may be less likely to reignite conflict.²⁶³ In El Salvador and

257. . van Zyl, *supra* note 6, at 65–66.

258. . The notion of sequencing transitional justice mechanisms is discussed in Part VII, Sequencing, *infra*.

259. . U. N. PEACEBUILDING SUPPORT OFFICE, WHAT IS TRANSITIONAL JUSTICE? A BACKGROUNDER 4 (Feb. 20 2008), http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf.

260. . Elin Skaar, Camila Gianella Malca, & Trine Eide, AFTER VIOLENCE: TRANSITIONAL JUSTICE, PEACE, AND DEMOCRACY, 49 (2015) (noting that transitional justice mechanisms, such as truth commissions, “typically” occur “immediately after the transition”).

261. . See, e.g., HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH, BRIEFING PAPER: SEDUCTIONS OF ‘SEQUENCING’: THE RISKS OF PUTTING JUSTICE ASIDE FOR PEACE, (Dec. 2010), http://www.hrw.org/sites/default/files/related_material/Sequencing%20Paper%2012.7.10.pdf, at 3–4 (stating that in transitional justice contexts: “[i]f delays [in pursuing justice] persist, other practical problems may arise that could render justice even more difficult to achieve. Memories fade over time, witnesses move or pass away, documentary or physical evidence can be lost, and suspects may no longer be available for prosecution.”).

262. . See, e.g., Rachel Kerr & Eirin Mobekk PEACE AND JUSTICE 8 (2007) (noting that “[s]et against all the purported benefits of transitional justice are a number of risks and dangers that also need to be taken into account. Foremost is the potential for destabilization of a fragile peace process and the risk that pursuing justice might heighten tensions and reignite conflict between warring factions.”).

263. . See, e.g., Pierre Hazan, *The Nature of Sanctions: the Case of Morocco's Equity and Reconciliation Commission*, 90 INT'L. REV. OF THE RED CROSS 405 (describing the King of Morocco's need in 2004 to “cope with countervailing pressure from, on the one hand, human rights activists [some of whom demanded complete accountability for past wrongs, others of whom demanded at least some form of transitional justice mechanism] and, on the other, the armed forces,

Guatemala, truth commissions were required by peace agreements between each government and its opposing guerilla movement.²⁶⁴ Christian Tomuschat, former coordinator of Guatemala's Commission for Historical Clarification, views prosecutions as unlikely to be an effective means of sanctioning past atrocities in these circumstances.²⁶⁵ However, the perceived precariousness of peace should not be used to justify inaction or a disproportionately cautious (or stubborn) approach. Doing so risks squandering the opportunities for systemic change and investigation that democratic restoration can create.²⁶⁶ It may also cause extensive public outcry and opposition, such as when the Uruguayan government chose to grant amnesty to military and government personnel²⁶⁷ and to not pursue prosecutions *or* truth-finding after over a decade of civic military dictatorship.²⁶⁸

All potential transitional justice options should be considered. The possibility of future prosecutions should not be definitively ruled out merely because their immediate pursuit might endanger peace.²⁶⁹ Indeed, efforts by civil society in numerous countries have been effective in ensuring that initial commitments to limited transitional justice mechanisms eventually lead to more comprehensive responses to past violations of international human rights and international humanitarian law. Argentina progressed from truth-finding in 1984 and two laws which impeded prosecutions²⁷⁰ to recommencing prosecutions in

the police and the security services that helped him keep his grip on power [and who insisted on the absence of any form of prosecution of past perpetrators].”

264. . Tomuschat, *supra* note 256, at 235.

265. . *Id.* at 235.

266. . Rolando Ames Cobián & Félix Reátegui, *Toward Systemic Social Transformation: Truth Commissions and Development*, in TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 154 (Pablo de Greiff & Roger Duthis eds., 2009) (stating that in transitional periods “acute awareness of the crisis to be overcome and the enthusiasm of the democratic restoration generate a climate in which certain executive or legislative decisions become possible, along with certain agreements among various sectors of society that would not be possible in routine situations”).

267. . L. 15.848, Ley de Caducidad de la Pretensión Punitiva del Estado [Law on the Expiration of the Punitive Claims of the State] (Uruguay) (Dec. 22, 1986).

268. . Zalaquett, *supra* note 256, at 1432; *Lessons Learned from Latin America*, *supra* note 44, at 138.

269. . Graeme Simpson, *Transitional Justice and Peace Negotiations*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 18. See, e.g., Sarah Khatib, *Transitional Justice in the Shadow of the Arab Spring*, MUFTAH (Aug. 3 2012), <http://muftah.org/transitional-justice-in-the-shadow-of-the-arab-spring> (considering the prosecution of former President Hosni Mubarak in the immediate aftermath of his fall from power as contributing to the destabilization of Egyptian society, and noting that “success of criminal prosecutions may be dependent on timing”).

270. . Law No. 23492, Dec. 24, 1986, [1986-B] A.L.J.A. 1100 (Arg.), <http://www.nuncamas.org/document/nacional/ley23492.htm> (known as “*Punto Final*” or the “Full Stop Law”) and Law No. 23521, June 8, 1987, [1987-A] A.L.J.A. 260 (Arg.), <http://www.nuncamas.org/document/nacional/ley23521.htm>

2005, after the Supreme Court overturned those laws.²⁷¹ Morocco gradually advanced from its initial reparations recommendations to more substantial, if not geographically comprehensive, truth-finding.²⁷² These examples illustrate how a country can incrementally adopt various transitional justice mechanisms as power dynamics shift within the country.

This Part has considered various practical challenges to implementing transitional justice programs that are consistent with a nation's international human law obligations. To adopt a realistic, effective transitional program the government must consider factors, including the country's institutional capacity and whether perpetrators remain in control of certain State institutions. Additionally, the State should closely consider its available financial resources and the extent of the atrocity in designing mechanisms to satisfy the right to truth and the duty to bring perpetrators to justice to the fullest extent possible. The precariousness of peace will also be a key factor in designing a policy that does not lead to further human rights violations. Most importantly, these variables should function as countervailing pressures, rather than inflexible roadblocks to the fulfillment of truth or justice. As discussed in the following Part, the incremental or sequential implementation of different mechanisms in response to changing political environments can assist a government to ensure these obligations are achieved holistically despite various practical challenges.

VII. SEQUENCING

The above contextual variables indicate that there is no hard and fast formula to satisfy a government's human rights obligations during transitional periods. However, these factors are directly applicable to a government's short-term goals, which can change along with the political context. Therefore, they should not rule out the possibility of future prosecutions, which may become possible as political dynamics shift. Rather than justifying non-compliance with international human rights law obligations, a government should aspire towards an integrated, long-term transitional justice strategy. This may involve

www.derechos.org/ddhh/arg/ley/ley23521.txt (known as "*Obedencia Debida*" or the "Due Obedience Law").

271. . See, e.g., Margarita K. O'Donnell, *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations*, 84 NYU L. REV. 333 (2009).

272. . See, e.g., Veerle Opgenhaffen and Mark Freeman, *Transitional Justice in Morocco: Lifting the Veil on a Hidden Face*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POST CONFLICT SOCIETIES (Joanna Quinn ed., 2009).

sequencing different mechanisms to start at various times, depending on the political context.

The examples of Sierra Leone,²⁷³ where a court and a truth commission took conflicting positions on the legality of amnesty clauses (discussed in Part III, above), and Peru,²⁷⁴ where institutional tensions undermined a truth commission's prosecution referrals (discussed in Part V.B.3, above), illustrate the difficulties that can result from the concurrent operation of prosecutions and truth commissions without sufficiently clear modes of operation and communication. Similar complications can result where multiple truth-finding commissions are established with overlapping mandates, as was proposed in Nepal.²⁷⁵ Even if a government has the resources and opportunity to immediately employ various judicial mechanisms at once, sequencing different mechanisms may be more effective in certain cases. Whether trials and truth-finding occur in parallel or consecutively, the government must also articulate clear rules and criteria to prioritize resources between these processes and govern their interactions, while also defining long-term strategies and goals. A transitional judicial program that promises too much to victims, such as "completely restor[ing] their dignity,"²⁷⁶ can further alienate victims when those commitments are not delivered. Similarly, a program that pledges too little, by, for instance, ruling out the possibility of any prosecutions of human rights violations,²⁷⁷ will also undermine the key transitional justice objectives of acknowledging and upholding the dignity of each victim and preventing atrocities from recurring.²⁷⁸ Furthermore, transitional justice programs must be designed and implemented in close consultation with victims groups and other relevant stakeholders. A program that is designed without such consultation

273. . Bassin and van Zyl *supra* note 198, at 229–65.

274. . González Cueva, *supra* note 205.

275. . *See, e.g.*, González Cueva, *supra* note 19 (discussing the overlapping mandates of the proposed Truth and Reconciliation Commission and a Commission of Inquiry on the Disappearance of Persons, which were merged pursuant to a Nepali Cabinet ordinance in August 2012).

276. . The Democratic Republic of Congo's Truth and Reconciliation Commission was mandated to, amongst other things, decide the "fate of the victims of the said crimes . . . and completely restore their dignity." Inter-Congolese Dialogue Resolution, DIC/CPR/04 (quoted in Bosire, *supra* note 11, at 80).

277. . For instance, Sri Lanka's government ruled out the possibility of future prosecutions for crimes committed during and following its civil war. Niran Anketell, *Hijacked Justice? Truth and Reconciliation in Sri Lanka*, OPEN SECURITY (December 3, 2013), <https://www.opendemocracy.net/opensecurity/niran-anketell/hijacked-justice-truth-and-reconciliation-in-sri-lanka>.

278. . *See also* HUMAN RIGHTS WATCH, *supra* note 261, 19 (arguing that "failing to signal the intent to implement accountability measures in a serious way and failure to follow through sends a dangerous message").

risks being ill-adapted to the circumstances on the ground²⁷⁹ and also may fail to sufficiently acknowledge and protect the inherent dignity of those who have suffered human rights violations.

Commentators note that sequencing processes of peace building (and impliedly truth-finding) before prosecutions can undermine future prosecutions, as vital evidence may be lost, perpetrators may no longer be available for prosecution and witnesses' memories may fade.²⁸⁰ However, the practical necessity of avoiding the realistic risk of descending back into conflict, where present, can outweigh these dangers. Additionally, the effective information collection and organization carried out by truth commissions can be used for future prosecutions. Nonetheless, sequencing should not be used as a means to completely avoid justice. The delay of prosecutions for several decades, as occurred in Argentina,²⁸¹ Chile,²⁸² and Cambodia,²⁸³ should also be avoided where possible. Delays in prosecutions increase the chances of witnesses' recollections diminishing and documentary evidence being misplaced or destroyed, which can impede the government's ability to bring perpetrators to justice.²⁸⁴ For instance, in the case of Cambodia, one report noted that "[m]uch mass grave evidence from the Khmer Rouge era has been lost or destroyed as crime scenes have been altered and witnesses' memories may have faded."²⁸⁵ Given these risks, sequencing different transitional justice mechanisms must aim to maximize the complementarity of those mechanisms.²⁸⁶

279. . Such allegations were recently leveled against Mali's recent suite of transitional justice mechanisms. INT'L CTR FOR TRANSITIONAL JUSTICE, BRIEFING PAPER: POSSIBILITIES AND CHALLENGES FOR TRANSITIONAL JUSTICE IN MALI (Sept. 2014), <http://www.ictj.org/publication/possibilities-and-challenges-transitional-justice-mali>, at 8–9.

280. . See, e.g., HUMAN RIGHTS WATCH, *supra* note 261, at 3–4; see also Mark Kersten, *The Fallacy of Sequencing Peace and Justice*, OPINIO JURIS (Sep. 29, 2011), <http://opiniojuris.org/2011/09/29/the-fallacy-of-sequencing-peace-and-justice/> (discussing the practical difficulties of using amnesties to secure peace and then later invalidating them to enable prosecution of past perpetrators).

281. . See O'Donnell, *supra* note 271.

282. . Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79 (2012).

283. . See, e.g., Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 84 INT'L REV. RED CROSS 93 (2002).

284. . HUMAN RIGHTS WATCH, *supra* note 261, 3–4.

285. . Melanie Klinkner, *Forensic Science for Cambodian Justice*, 2 INT'L J. TRANSITIONAL JUST. 239 (2008).

286. . U. N. PEACEBUILDING SUPPORT OFFICE, *supra* note 259.

CONCLUSION

International human rights law is gaining influence over governmental responses to gross and systematic human rights violations. Regional and international human rights institutions and experts regularly apply the rights to truth and reparations and the duty to bring perpetrators to justice when considering State transitional justice policies, and States and international organizations are also increasingly acknowledging the existence of such norms. This ensures that governments adopt policies that are best suited to maintaining peace and restoring the inherent dignity of victims rather than merely adopting measures that suit the government's political program. As a general rule, prosecutions stand as the principal means of complying with a State's truth and justice obligations. However, even the most well resourced prosecution campaigns may fail to uncover the systemic causes of violence and the incident-specific truth for each victim and perpetrator. Governments may also more effectively fulfill the duty to bring perpetrators to justice by supplementing prosecutions with additional transitional justice mechanisms, such as truth commissions. States should therefore consider implementing a range of transitional justice mechanisms to comprehensively fulfill their international obligations. When practical limitations restrict a State's ability to carry out comprehensive prosecutions, additional transitional justice mechanisms become even more important.

This Article has set out the advantages and shortcomings of using truth commissions to complement prosecutorial efforts. Truth commissions are governed by less technical rules of procedure, enabling them to determine incident-specific and structural truths on a broader scale than prosecutions. Problems can arise, however, where commissions seek to identify perpetrators by name: due process rights for the accused are enlivened, which can stymie a commission's efficiency as it requires more formal, court-like processes. Similarly, while truth commissions might be able to contribute to prosecutions and supplement government efforts to fulfill the duty to bring perpetrators to justice, such an approach requires the careful navigation of practical and legal challenges that can arise when a truth commission and a court have overlapping mandates.

This Article has also considered contextual variables that, if taken into account early enough, can promote integrated policies to maximize the number of perpetrators brought to justice and the amount of truth uncovered. To determine realistic goals, one must consider a State's institutional capacities and whether perpetrators or those loyal to the former regime still inhabit State institutions. Additionally, the State's available financial resources and the extent of past human rights violations are factors that may affect how a government

should set out to meet its truth and justice obligations. Governments must also comply with fair trial rights and ensure public access to truth-finding procedures. The precariousness of peace is another important consideration given the need of governments to prevent future human rights violations.

Most importantly, these variables should only be used to fine tune policies; they should not be regarded as inflexible barriers to the fulfillment of State obligations regarding truth or justice. Truth commissions, for instance, must not be used to justify impunity by avoiding prosecutions. In this regard, mechanisms can be sequenced—only when absolutely necessary—so that a State is fulfilling both its truth and justice obligations to the greatest extent practically possible under the circumstances. While sequencing may often lead to truth commissions commencing before prosecutions, there is no hard and fast rule. The strategic implementation of necessary transitional justice mechanisms to fulfill the right to the truth and the duty to bring perpetrators to justice will depend on each State's specific context. States who devise strategies to meet both short- and long-term obligations will maximize their compliance with international human rights norms, which are designed to prevent future gross, systematic human rights violations, and to restore the inherent dignity of those whose human rights were violated.